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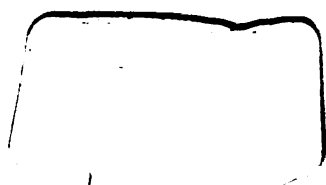
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A
LAW DICTIONARY,

ADAPTED TO THE

CONSTITUTION AND LAWS

OF THE

UNITED STATES OF AMERICA

AND OF THE

Seberal States of the American Union;

WITH

**REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF
FOREIGN LAW.**

BY JOHN BOUVIER.

Ignoratis terminis ignoratur et ars.—Co. Litt. 2 a.

Je sais que chaque science et chaque art a ses termes propres, inconnu au commun des hommes.—FLEURY.

SIXTH EDITION, REVISED, IMPROVED, AND GREATLY ENLARGED.

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LAW DICTIONARY.

LABEL. A narrow slip of paper or parchment, affixed to a deed or writing hanging at or out of the same. This name is also given to an appending seal.

LABOR. Continued operation; work.

2. The labor and skill of one man is frequently used in a partnership, and valued as equal to the capital of another.

3. When business has been done for another, and suit is brought to recover a just reward, there is generally contained in the declaration, a count for work and labor.

4. Where penitentiaries exist, persons who have committed crimes are condemned to be imprisoned therein at labor.

LACHES. This word, derived from the French *lacher*, is nearly synonymous with negligence.

2. In general, when a party has been guilty of laches in enforcing his right by great delay and lapse of time, this circumstance will at common law prejudice, and sometimes operate in bar of a remedy which it is discretionary and not compulsory in the court to afford. In courts of equity, also, delay will generally prejudice. 1 Chit. Pr. 786, and the cases there cited; 8 Com. Dig. 684; 6 Johns. Ch. R. 360.

3. But laches may be excused from ignorance of the party's rights; 2 Mer. R. 362; 2 Ball & Beat. 104; from the obscurity of the transaction; 2 Sch. & Lef. 487; by the pendency of a suit; 1 Sch. & Lef. 413; and where the party labors under a legal disability, as insanity, coverture, infancy, and the like. And no laches can be imputed to the public. 4 Mass. Rep. 522; 3 Serg. & Rawle, 291; 4 Henn. & Munf. 57; 1 Penna. R. 476. Vide 1 Supp. to Ves. Jr. 436; 2 Id. 170; Dane's Ab. Index, h. t.; 4 Bouv. Inst. n. 3911.

LADY'S FRIEND. The name of a

functionary in the British house of commons. When the husband sues for a divorce, or asks the passage of an act to divorce him from his wife, he is required to make a provision for her before the passage of the act; it is the duty of the lady's friend to see that such a provision is made. Macq. on H. & W. 213.

LAGA. The law; Magna Carta; hence Saxon-lage, Mercen-lage, Dane-lage, &c.

LAGAN. Goods tied to a buoy and cast into the sea are so called. The same as *Ligan*. (q. v.)

LAIRESITE. The name of a fine imposed upon those who committed adultery or fornication. Tech. Dict. h. t.

LAITY. Those persons who do not make a part of the clergy. In the United States the division of the people into clergy and laity is not authorized by law, but is merely conventional.

LAMB. A ram, sheep or ewe, under the age of one year. 4 Car. & P. 216; S. C. 19 Eng. Com. Law Rep. 351.

LAND. This term comprehends any ground, soil or earth whatsoever, as meadows, pastures, woods, waters, marshes, furze and heath. It has an indefinite extent upwards as well as downwards; therefore land, legally includes all houses and other buildings standing or built on it; and whatever is in a direct line between the surface and the centre of the earth, such as mines of metals and fossils. 1 Inst. 4 a; Wood's Inst. 120; 2 Bl. Com. 18; 1 Cruise on Real Prop. 58. In a more confined sense, the word *land* is said to denote "frank tenement at the least." Shepp. Touch. 92. In this sense, then, leaseholds cannot be said to be included under the word lands. 3 Madd. Rep. 535. The technical sense of the word land is further

explained by Sheppard, in his Touch. p. 88, thus: "if one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple or for life; by this grant shall pass no more but the lands he hath in fee simple." It is also said that land in its legal acception means arable land. 11 Co. 55 a. See also Cro. Car. 293; 2 P. Wms. 458, n.; 5 Ves. 476; 20 Vin. Ab. 203.

2. Land, as above observed, includes in general all the buildings erected upon it; 9 Day, R. 374; but to this general rule, there are some exceptions. It is true, that if a stranger voluntarily erect buildings on another's land, they will belong to the owner of the land, and will become a part of it; 16 Mass. R. 449; yet cases are not wanting where it has been decided that such an erection, under peculiar circumstances, would be considered as personal property. 4 Mass. R. 514; 8 Pick. R. 283, 402; 5 Pick. R. 487; 6 N. H. Rep. 555; 2 Fairf. R. 371; 1 Dana, R. 591; 1 Burr. 144.

LAND MARK. A monument set up in order to ascertain the boundaries between two contiguous estates. For removing a land mark an action lies. 1 Tho. Co. Litt. 787. Vide *Monuments*.

LAND TENANT. He who actually possesses the land. He is technically called the *terre-tenant*. (q. v.)

LANDLORD. He who rents or leases real estate to another.

2. He is bound to perform certain duties and is entitled to certain rights, which will here be briefly considered. 1st. His *obligations* are, 1. To perform all the express covenants into which he has entered in making the lease. 2. To secure to the tenant the quiet enjoyment of the premises leased; but a tenant for years has no remedy against his landlord, if he be ousted by one who has no title, in that case the law leaves him to his remedy against the wrong doer. Y. B. 22 H. VI. 52 b, and 32 H. VI. 32 b; Cro. Eliz. 214; 2 Leon. 104; and see Bac. Ab. Covenant, B. But the implied covenant for quiet enjoyment may be qualified, and enlarged or narrowed according to the particular agreement of the parties; and a general covenant for quiet enjoyment does not extend to wrongful evictions or disturbances by a stranger. Y. B. 26 H. VIII. 3 b. 3. The landlord is bound by his express covenant to repair the premises, but

unless he bind himself by express covenant the tenant cannot compel him to repair. 1 Saund. 320; 1 Vent. 26, 44; 1 Sed. 429; 2 Keb. 505; 1 T. R. 312; 1 Sim. R. 146.

3. His *rights* are, 1. To receive the rent agreed upon, and to enforce all the express covenants into which the tenant may have entered. 2. To require the lessee to treat the premises demised in such manner that no injury be done to the inheritance, and prevent waste. 3. To have the possession of the premises after the expiration of the lease. Vide, generally, Com. L. & T., B. 3, c. 1; Woodf. L. & T. ch. 10; 2 Bl. Com. by Chitty, 275, note; Bouv. Inst. Index, h. t.; 1 Supp. to Ves. Jr. 212, 246, 249; 2 Id. 282, 403; Com. Dig. Estate by Grant, G 1; 5 Com. Dig. tit. Nisi Prius Dig. page 553; 8 Com. Dig. 694; Whart. Dig. Landlord & Tenant. As to frauds between landlord and tenant, see Hov. Fr. c. 6, p. 199 to 225.

LANGUAGE. The faculty which men possess of communicating their perceptions and ideas to one another by means of articulate sounds. This is the definition of *spoken* language; but ideas and perceptions may be communicated without sound by writing, and this is called *written* language. By conventional usage certain sounds have a definite meaning in one country or in certain countries, and this is called the language of such country or countries, as the Greek, the Latin, the French or the English language. The law, too, has a peculiar language. Vide Eunom. Dial. 2; *Technical*.

2. On the subjugation of England by William the Conqueror, the French Norman language was substituted in all law proceedings for the ancient Saxon. This, according to Blackstone, vol. iii. p. 317, was the language of the records, writs and pleadings, until the time of Edward III. Mr. Stephen thinks Blackstone has fallen into an error, and says the record was, from the earliest period to which that document can be traced, in the Latin language. Plead. Appx. note 14. By the statute 36 Ed. III. st. 1, c. 15, it was enacted that for the future all pleas should be pleaded, shown, defended, answered, debated and judged in the English tongue; but be entered and enrolled in Latin. The Norman or law French, however, being more familiar as applied to the law, than any other language, the lawyers continued to employ it in making their notes of the trial of cases, which they afterwards published in that barbarous

dialect, under the name of Reports. After the enactment of this statute, on the introduction of paper pleadings, they followed in the language, as well as in other respects, the style of the records, which were drawn up in Latin. This technical language continued in use till the time of Cromwell, when by a statute the records were directed to be in English; but this act was repealed at the restoration, by Charles II., the lawyers finding it difficult to express themselves as well and as concisely in the vernacular as in the Latin tongue; and the language of the law continued as before till about the year 1730, when the statute of 4 Geo. II. c. 26, was passed. It provided that both the pleadings and the records should thenceforward be framed in English. The ancient terms and expressions which had been so long known in French and Latin were now literally translated into English. The translation of such terms and phrases were found to be exceedingly ridiculous. Such terms as *nisi prius*, *habeas corpus*, *feri facias*, *mandamus*, and the like, are not capable of an English dress with any degree of seriousness. They are equally absurd in the manner they are employed in Latin, but use and the fact that they are in a foreign language has made the absurdity less apparent.

3. By statute of 6 Geo. II., c. 14, passed two years after the last mentioned statute, the use of technical words was allowed to continue in the usual language, which defeated almost every beneficial purpose of the former statute. In changing from one language to another, many words and technical expressions were retained in the new, which belonged to the more ancient language, and not seldom they partook of both; this, to the unlearned student, has given an air of confusion, and disfigured the language of the law. It has rendered essential also the study of the Latin and French languages. This perhaps is not to be regretted, as they are the keys which open to the ardent student vast stores of knowledge. In the United States, the records, pleadings, and all law proceedings are in the English language, except certain technical terms which retain their ancient French and Latin dress.

4. Agreements, contracts, wills and other instruments, may be made in any language, and will be enforced. Bac. Ab. Wills, D 1. And a slander spoken in a foreign language, if understood by those present, or a libel

published in such language, will be punished as if spoken or written in the English language. Bac. Ab. Slander, D 3; 1 Roll. Ab. 74; 6 T. R. 163. For the construction of language, see articles *Construction*; *Interpretation*; and Jacob's Intr. to the Com. Law Max. 46.

5. Among diplomatists, the French language is the one commonly used. At an early period the Latin was the diplomatic language in use in Europe. Towards the end of the fifteenth century that of Spain gained the ascendancy, in consequence of the great influence which that country then exercised in Europe. The French, since the age of Louis XIV. has become the almost universal diplomatic idiom of the civilized world, though some states use their national language in treaties and diplomatic correspondence. It is usual in these cases to annex to the papers transmitted, a translation in the language of the opposite party; wherever it is understood this comity will be reciprocated. This is the usage of the Germanic confederation, of Spain, and of the Italian courts. When nations using a common language, as the United States and Great Britain, treat with each other, such language is used in their diplomatic intercourse.

Vide, generally, 3 Bl. Com. 323; 1 Chit. Cr. Law, *415; 2 Rey, Institutions Judiciaires de l'Angleterre, 211, 212.

LANGUIDUS, *practice*. The name of a return made by the sheriff, when a defendant whom he has taken by virtue of process is so dangerously sick that to remove him would endanger his life or health. In that case the officer may and ought unquestionably to abstain from removing him, and may permit him to remain even in his own house, in the custody of a follower, though not named in the warrant, he keeping the key of the house in his possession; the officer ought to remove him as soon as sufficiently recovered. If there be a doubt as to the state of health of the defendant, the officer should require the attendance and advice of some respectable medical man, and require him, at the peril of the consequences of misrepresentation, to certify in writing whether it be fit to remove the party, or take him to prison within the county. 3 Chit. Pr. 358. For a form of the return of *languidus*, see 3 Chit. P. 249; T. Chit. Forms, 53.

LAPSE, *eccles. law*. The transfer, by forfeiture, of a right or power to present or

collate to a vacant benefice, from, a person vested with such right, to another, in consequence of some act of negligence of the former. Ayl. Parerg. 331.

LAPSED LEGACY. One which is extinguished. The extinguishment may take place for various reasons. See *Legacy, Lapsed*.

2. A distinction has been made between a lapsed devise of real estate and a lapsed legacy of personal estate. The real estate which is lapsed does not fall into the residue, unless so provided by the will, but descends to the heir at law; on the contrary, personal property passes by the residuary clause where it is not otherwise disposed of. 2 Bouv. Inst. 2154-6.

LARCENY, crim. law. The wrongful and fraudulent taking and carrying away, by one person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his, the taker's use, and make them his property, without the consent of the owner. 4 Wash. C. C. R. 700.

2. To constitute larceny, several ingredients are necessary. 1. The intent of the party must be felonious; he must intend to appropriate the property of another to his own use; if, therefore, the accused have taken the goods under a claim of right, however unfounded, he has not committed a larceny.

3.—2. There must be a taking from the possession, actual or implied, of the owner; hence if a man should find goods, and appropriate them to his own use, he is not a thief on this account. Mart. and Yerg. 226; 14 John. 294; Breese, 227.

4.—3. There must be a taking against the will of the owner, and this may be in some cases, where he appears to consent; for example, if a man suspects another of an intent to steal his property, and in order to try him leaves it in his way, and he takes it, he is guilty of larceny. The taking must be in the county where the criminal is to be tried. 9 C. & P. 29; S. C. 38 E. C. L. R. 23; Ry. & Mod. 349. But when the taking has been in the county or state, and the thief is caught with the stolen property in another county than that where the theft was committed, he may be tried in the county where arrested with the goods, as by construction of law, there is a fresh taking in every county in which the thief carries the stolen property.

5.—4. There must be an actual carrying

away, but the slightest removal, if the goods are completely in the power of the thief, is sufficient. To snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair, is a sufficient asportation or carrying away.

6.—5. The property taken must be personal property; a man cannot commit larceny of real estate, or of what is so considered in law. A familiar example will illustrate this; an apple, while hanging on the tree where it grew, is real estate, having never been separated from the freehold; it is not larceny, therefore, at common law, to pluck an apple from the tree, and appropriate it to one's own use, but a mere trespass; if that same apple, however, had been separated from the tree by the owner or otherwise, even by accident, as if shaken by the wind, and while lying on the ground it should be taken with a felonious intent, the taker would commit a larceny, because then it was personal property. In some states there are statutory provisions to punish the felonious taking of emblements or fruits of plants, while the same are hanging by the roots, and there the felony is complete, although the thing stolen is not, at common law, strictly personal property. Animals *feræ naturæ*, while in the enjoyment of their natural liberty, are not the subjects of larceny; as, doves; 9 Pick. 15; bees. 3 Binn. 546. See *Bee*; 5 N. H. Rep. 203. At common law, choses in action are not subjects of larceny. 1 Port. 83.

7. Larceny is divided in some states, into grand and petit larceny; this depends upon the value of the property stolen. Vide 1 Hawk. 141 to 250, ch. 19; 4 Bl. Com. 229 to 250; Com. Dig. Justices, O 4, 5, 6, 7, 8; 2 East's P. C. 524 to 791; Burn's Justice, Larceny; Williams' Justice, Felony; 3 Chitty's Cr. Law, 917 to 992; and articles *Carrying Away*; *Invito Domino*; *Robbery*; *Taking*; *Breach*, 6.

LARGE. Broad; extensive; unconfin'd. The opposite of strict, narrow, or confined. At large, at liberty.

LAS PARTIDAS. The name of a code of Spanish law; sometimes called *las siete partidas*, or the seven parts, from the number of its principal divisions. It is a compilation from the civil law, the customary law of Spain, and the canon law. Such of its provisions as are applicable are in force in Louisiana, Florida, and Texas.

LASCIVIOUS CARRIAGE, law of Connecticut. An offence, ill defined, cre-

ated by statute, which enacts that every person who shall be guilty of lascivious carriage and behaviour, and shall be thereof duly convicted, shall be punished by fine, not exceeding ten dollars, or by imprisonment in a common gaol, not exceeding two months, or by fine and imprisonment, or both, at the discretion of the court. This law was passed at a very early period. Though indefinite in its terms, it has received a construction so limiting it, that it may be said to punish those wanton acts between persons of different sexes, who are not married to each other, that flow from the exercise of lustful passions, and which are not otherwise punished as crimes against chastity and public decency. 2 Swift's Dig. 343; 2 Swift's Syst. 331.

2. Lascivious carriage may consist not only in mutual acts of wanton and indecent familiarity between persons of different sexes, but in wanton and indecent actions against the will, and without the consent of one of them, as if a man should forcibly attempt to pull up the clothes of a woman. 5 Day, 81.

LAST RESORT. A court of last resort, is one which decides, definitely, without appeal or writ of error, or any other examination whatever, a suit or action, or some other matter, which has been submitted to its judgment, and over which it has jurisdiction.

2. The supreme court is a court of last resort in all matters which legally come before it; and whenever a court possesses the power to decide without appeal or other examination whatever, a subject matter submitted to it, it is a court of last resort; but this is not to be understood as preventing an examination into its jurisdiction, or excess of authority, for then the judgment of a superior does not try and decide so much whether the point decided has been so done according to law, as to try the authority of the inferior court.

LAST SICKNESS. That of which a person died.

2. The expenses of this sickness are generally entitled to a preference, in payment of debts of an insolvent estate. Civ. Code of Lo. art. 3166; Purd. Ab. 393.

3. To prevent impositions, the statute of frauds requires that nuncupative wills shall be made during the testator's last sickness. Rob. on Frauds, 556; 20 John. R. 502.

LATENT, construction. That which is concealed; or which does not appear; for

example, if a testator bequeaths to his cousin Peter his white horse; and at the time of making his will and at his death he had two cousins named Peter, and he owned two white horses, the ambiguity in this case would be latent, both as respects the legatee, and the thing bequeathed. Vide Bac. Max. Reg. 23, and article *Ambiguity*. A latent ambiguity can only be made to appear by parol evidence, and may be explained by the same kind of proof. 5 Co. 69.

LATITAT, Eng. law. He lies hid. The name of a writ calling a defendant to answer to a personal action in the king's bench; it derives its name from a supposition that the defendant lurks and lies hid, and cannot be found in the county of Middlesex, (in which the said court is holden,) to be taken there, but is gone into some other county, and therefore requiring the sheriff to apprehend him in such other county. Fitz. N. B. 78.

LAUNCHES. Small vessels employed to carry the cargo of a large one to and from the shore; lighters. (q. v.)

2. The goods on board of a launch are at the risk of the insurers till landed. 5 N. S. 387. The duties and rights of the master of a launch are the same as those of the master of a lighter.

LAW. In its most general and comprehensive sense, law signifies a rule of action; and this term is applied indiscriminately to all kinds of action; whether animate or inanimate, rational or irrational. 1 Bl. Com. 38. In its more confined sense, law denotes the rule, not of actions in general, but of human action or conduct. In the civil code of Louisiana, art. 1, it is defined to be "a solemn expression of the legislative will." Vide Toull. Dr. Civ. Fr. tit. prel. s. 1, n. 4; 1 Bouv. Inst. n. 1-3.

2. Law is generally divided into four principal classes, namely: *Natural law, the law of nations, public law, and private or civil law.* When considered in relation to its origin, it is *statute law or common law.* When examined as to its different systems it is divided into *civil law, common law, canon law.* When applied to objects, it is *civil, criminal, or penal.* It is also divided into *natural law and positive law.* Into *written law, lex scripta; and unwritten law, lex non scripta.* Into *law merchant, martial law, municipal law, and foreign law.* When considered as to their duration, laws are *immutable and arbitrary or positive; when as to their effect, they are prospective and retro-*

spective. These will be separately considered.

LAW, ARBITRARY. An arbitrary law is one made by the legislator simply because he wills it, and is not founded in the nature of things; such law, for example, as the tariff law, which may be high or low. This term is used in opposition to *immutable*.

LAW, CANON. The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has or pretends to have the proper jurisdiction over.

2. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see. All which lay in the same confusion and disorder as the Roman civil law, till about the year 1151, when one Gratian, an Italian monk, animated by the discovery of Justinian's *Pandects*, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia discordantium canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of Pope Alexander III. The subsequent papal decrees to the pontificate of Gregory IX., were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii noni*. A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus decretalium*. The Clementine constitution or decrees of Clement V., were in like manner authenticated in 1317, by his successor, John XXII., who also published twenty constitutions of his own, called the *Extravagantes Joannis*, all of which in some manner answer to the novels of the civil law. To these have since been added some decrees of the later popes, in five books, called *Extravagantes communes*. And all these together, Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors, form the *Corpus juris canonici*, or body of the Roman canon law. 1 Bl. Com. 82; Encyclopédie, Droit Canonique, Droit Public Ecclesiastique; Diet. de Jurispr. Droit Canonique; Ersk. Pr. L. Scotl. B. 1, t. 1, s. 10. See, in general, Ayl. Par. Jur. Can. Ang.; Shelf. on M. & D. 19; Preface to Burn's Ecol. Law, by Thyrwhitt, 22; Hale's Hist. C. L. 26-29; Bell's Case of a Putative Marriage, 203; Diet. du Droit Canonique; Stair's Inst. b. 1, t. 1, 7.

LAW, CIVIL. The term civil law is gene-

rally applied by way of eminence to the civil or municipal law of the Roman empire, without distinction as to the time when the principles of such law were established or modified. In another sense, the civil law is that collection of laws comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Ersk. Pr. L. Scotl. B. 1, t. 1, s. 9; 5 L. R. 494.

2. The *Institutes* contain the elements or first principles of the Roman law, in four books. The *Digests* or *Pandects* are in fifty books, and contain the opinions and writings of eminent lawyers digested in a systematical method, whose works comprised more than two thousand volumes. The *new code*, or collection of imperial constitutions, in twelve books; which was a substitute for the code of Theodosius. The *novels* or new constitutions, posterior in time to the other books, and amounting to a supplement to the code, containing new decrees of successive emperors as new questions happened to arise. These form the body of the Roman law, or *corpus juris civilis*, as published about the time of Justinian.

3. Although successful in the west, these laws were not, even in the lifetime of the emperor universally received; and after the Lombard invasion they became so totally neglected, that both the Code and Pandects were lost till the twelfth century, A. D. 1130; when it is said the Pandects were accidentally discovered at Amalphi, and the Code at Ravenna. But, as if fortune would make an atonement for her former severity, they have since been the study of the wisest men, and revered as law, by the politest nations.

4. By the term civil law is also understood the particular law of each people, opposed to natural law, or the law of nations, which are common to all. Just. Inst. l. 1, t. 1, § 1, 2; Ersk. Pr. L. Scot. B. 1, t. 1, s. 4. In this sense it is used by Judge Swift. See below.

5. Civil law is also sometimes understood as that which has emanated from the secular power opposed to the ecclesiastical or military.

6. Sometimes by the term civil law is meant those laws which relate to civil matters only; and in this sense it is opposed to criminal law, or to those laws which concern criminal matters. Vide *Civil*.

7. Judge Swift, in his System of the Laws of Connecticut, prefers the term civil

law, to that of municipal law. He considers the term municipal to be too limited in its signification. He defines civil law to be a rule of human action, adopted by mankind in a state of society, or prescribed by the supreme power of the government, requiring a course of conduct not repugnant to morality or religion, productive of the greatest political happiness, and prohibiting actions contrary thereto, and which is enforced by the sanctions of pains and penalties. 1 Sw. Syst. 37. See Ayl. Pand. B. 1, t. 2, p. 6.

See, in general, as to civil law, Cooper's Justinian; the Pandects; 1 Bl. Com. 80, 81; Encyclopédie, art. Droit Civil, Droit Romain; Domat, Les Loix Civiles; Ferrière's Dict.; Brown's Civ. Law; Halifax's Analys. Civ. Law; Wood's Civ. Law; Ayliffe's Pandects; Heinec. Elem. Jur.; Erskine's Institutes; Pothier; Eunomus, Dial. 1; Corpus Juris Civilis; Taylor's Elem. Civ. Law.

LAW, COMMON. The common law is that which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature, by an express act, which is the criterion by which it is distinguished from the statute law. It has never been reduced to writing; by this expression, however, it is not meant that all those laws are at present merely oral, or communicated from former ages to the present solely by word of mouth, but that the evidence of our common law is contained in our books of Reports, and depends on the general practice and judicial adjudications of our courts.

2. The common law is derived from two sources, the common law of England, and the practice and decision of our own courts. In some states the English common law has been adopted by statute. There is no general rule to ascertain what part of the English common law is valid and binding. To run the line of distinction, is a subject of embarrassment to courts, and the want of it a great perplexity to the student. Kirb. Rep. Pref. It may however be observed generally, that it is binding where it has not been superseded by the constitution of the United States, or of the several states, or by their legislative enactments, or varied by custom, and where it is founded in reason and consonant to the genius and manners of the people.

3. The phrase "common law" occurs

in the seventh article of the amendments of the constitution of the United States. "In suits at common law, where the value in controversy shall not exceed twenty dollars," says that article, "the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state. 1 Gallis. 20; 1 Bald. 558; 3 Wheat. 223; 3 Pet. R. 446; 1 Bald. R. 554. The term is used in contradistinction to equity, admiralty, and maritime law. 3 Pet. 446; 1 Bald. 554.

4. The common law of England is not in all respects to be taken as that of the United States, or of the several states; its general principles are adopted only so far as they are applicable to our situation. 2 Pet. 144; 8 Pet. 659; 9 Cranch, 333; 9 S. & R. 380; 1 Blackf. 66, 82, 206; Kirby, 117; 5 Har. & John. 356; 2 Aik. 187; Charl. 172; 1 Ham. 243. See 5 Cow. 628; 5 Pet. 241; 1 Dall. 67; 1 Mass. 61; 9 Pick. 532; 3 Greenl. 162; 6 Greenl. 55; 3 Gill & John. 62; Sampson's Discourse before the Historical Society of New York; 1 Gallis. R. 489; 3 Conn. R. 114; 2 Dall. 2, 297, 384; 7 Cranch, R. 32; 1 Wheat. R. 415; 3 Wheat. 223; 1 Blackf. R. 205; 8 Pet. R. 658; 5 Cowen, R. 628; 2 Stew. R. 362.

LAW, CRIMINAL. By criminal law is understood that system of laws which provides for the mode of trial of persons charged with criminal offences, defines crimes, and provides for their punishments.

LAW, FOREIGN. By foreign laws are understood the laws of a foreign country. The states of the American Union are for some purposes foreign to each other, and the laws of each are foreign in the others. See *Foreign laws*.

LAW, INTERNATIONAL. The law of nature applied to the affairs of nations, commonly called the law of nations, *jus gentium*; is also called by some modern authors international law. Toullier, Droit Français, tit. prel. § 12. Mann. Comm. 1; Bentham on Morals, &c., 260, 262; Wheat. on Int. Law; Fœlix, Du Droit Intern. Privé, n. 1.

LAW, MARTIAL. Martial law is a code established for the government of the army and navy of the United States.

2. Its principal rules are to be found in the articles of war. (q. v.) The object of this code or body of regulations is to maintain that order and discipline, the fundamental principles of which are a due obedience of

the several ranks to their proper officers, a subordination of each rank to their superiors, and the subjection of the whole to certain rules of discipline, essential to their acting with the union and energy of an organized body. The violations of this law are to be tried by a court martial. (q. v.)

3. A military commander has not the power, by declaring a district to be under martial law, to subject all the citizens to that code, and to suspend the operation of the writ of *habeas corpus*. 3 Mart. (Lo.) 531. Vide Hale's Hist. C. L. 38; 1 Bl. Com. 413; Tytler on Military Law; Ho. on C. M.; M'Arth. on C. M.; Rules and Articles of War, art. 64, et seq; 2 Story, L. U. S. 1000.

LAW, MERCHANT. A system of customs acknowledged and taken notice of by all commercial nations; and those customs constitute a part of the general law of the land; and being a part of that law their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio*. See Beawes' *Lex Mercatoria Rediviva*; Caines' *Lex Mercatoria Americana*; Com. Dig. Merchant, D; Chit. Comm. Law; Pardess. *Droit Commercial*; Collection des *Lois Maritimes antérieures au dix huitième siècle*, par Dupin; Capmany, *Costumbres Maritimas*; Π *Consolato del Mare*; Us et Coutumes de la Mer; Piantandia, *Della Giurisprudenza Maritima Commerciale, Antica e Moderna*; Valin, *Commentaire sur l'Ordonnance de la Marine, du Mois d'Août, 1681*; Boulay-Paty, Dr. Comm.; Boucher, *Institutions au Droit Maritime*.

LAW, MUNICIPAL. Municipal law is defined by Mr. Justice Blackstone to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." This definition has been criticised, and has been perhaps, justly considered imperfect. The latter part has been thought superabundant to the first; see Mr. Christian's note; and the first too general and indefinite, and too limited in its signification to convey a just idea of the subject. See *Law, civil*. Mr. Chitty defines municipal law to be "a rule of civil conduct, prescribed by the supreme power in a state, commanding what shall be done or what shall not be done." 1 Bl. Com. 44, note 6, Chitty's edit.

2. Municipal law, among the Romans, was a law made to govern a particular city or province; this term is derived from the

Latin *municipium*, which among them signified a city which was governed by its own laws, and which had its own magistrates.

LAW OF NATIONS. The science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights. Vattel's *Law of Nat. Prelim.* § 3. Some complaints, perhaps not unfounded, have been made as to the want of exactness in the definition of this term. Mann. Comm. 1. The phrase "international law," has been proposed in its stead. 1 Benth. on Morals and Legislation, 260, 262. It is a system of rules deducible by natural reason from the immutable principles of natural justice, and established by universal consent among the civilized inhabitants of the world; Inst. lib. 1, t. 2, § 1; Dig. lib. 1, t. 1, l. 9; in order to decide all disputes, and to insure the observance of good faith and justice in that intercourse which must frequently occur between them and the individuals belonging to each; or it depends upon mutual compacts, treaties, leagues and agreements between the separate, free, and independent communities.

2. International law is generally divided into two branches; 1. The natural law of nations, consisting of the rules of justice applicable to the conduct of states. 2. The positive law of nations, which consist of, 1. The voluntary law of nations, derived from the presumed consent of nations, arising out of their general usage. 2. The conventional law of nations, derived from the express consent of nations, as evidenced in treaties and other international compacts. 3. The customary law of nations, derived from the express consent of nations, as evidenced in treaties and other international compacts between themselves. Vattel, *Law of Nat. Prel.*

3. The various sources and evidence of the law of nations, are the following: 1. The rules of conduct, deducible by reason from the nature of society existing among independent states, which ought to be observed among nations. 2. The adjudication of international tribunals, such as prize courts and boards of arbitration. 3. Text writers of authority. 4. Ordinances or laws of particular states, prescribing rules for the conduct of their commissioned cruisers and prize tribunals. 5. The history of the wars, negotiations, treaties of peace, and other matters relating to the public intercourse of nations. 6. Treaties of peace, alliance and commerce, declaring, modifying, or defining

the preëxisting international law. Wheat. Intern. Law, pt. 1, c. 1, § 14.

4. The law of nations has been divided by writers into *necessary* and *voluntary*; or into *absolute* and *arbitrary*; by others into *primary* and *secondary*, which latter has been divided into *customary* and *conventional*. Another division, which is the one more usually employed, is that of the *natural* and *positive* law of nations. The natural law of nations consists of those rules, which, being universal, apply to all men and to all nations, and which may be deduced by the assistance of revelation or reason, as being of utility to nations, and inseparable from their existence. The positive law of nations consists of rules and obligations, which owe their origin, not to the divine or natural law, but to human compacts or agreements, either express or implied; that is, they are dependent on custom or convention.

5. Among the Romans, there were two sorts of laws of nations, namely, the primitive, called *primarium*, and the other known by the name of *secundarium*. The *primarium*, that is to say, primitive or more ancient, is properly the only law of nations which human reason suggests to men; as the worship of God, the respect and submission which children have for their parents, the attachment which citizens have for their country, the good faith which ought to be the soul of every agreement, and the like. The law of nations called *secundarium*, are certain usages which have been established among men, from time to time, as they have been felt to be necessary. Ayl. Pand. B. 1, t. 2, p. 6.

As to the law of nations generally, see Vattel's Law of Nations; Wheat. on Intern. Law; Marten's Law of Nations; Chitty's Law of Nations; Puffend. Law of Nature and of Nations, book 8; Burlamaqui's Natural Law, part 2, c. 6; Principles of Penal Law, ch. 13; Mann. Comm. on the Law of Nations; Leibnitz, Codex Juris Gentium Diplomaticus; Binkershoeck, Quæstionis Juris Publici, a translation of the first book of which, made by Mr. Duponceau, is published in the third volume of Hall's Law Journal; Klüber, Droit des Gens Moderne de l'Europe; Dumont, Corps Diplomatique; Mably, Droit Public de l'Europe; Kent's Comm. Lecture 1.

LAW OF NATURE. The law of nature is that which God, the sovereign of the universe, has prescribed to all men, not by any formal promulgation, but by the internal

dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties which we owe either to the Supreme Being, to ourselves, or to our neighbors; as reverence to God, self-defence, temperance, honor to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like. Erskine's Pr. of L. of Scot. B. 1, t. 1, s. 1. See Ayl. Pand. tit. 2, p. 5; Cicero de Leg. lib. 1.

2. The primitive laws of nature may be reduced to six, namely: 1. Comparative sagacity, or reason. 2. Self-love. 3. The attraction of the sexes to each other. 4. The tenderness of parents towards their children. 5. The religious sentiment. 6. Sociability.

3.—1. When man is properly organized, he is able to discover moral good from moral evil; and the study of man proves that man is not only an intelligent, but a free being, and he is therefore responsible for his actions. The judgment we form of our good actions, produces happiness; on the contrary the judgment we form of our bad actions produces unhappiness.

4.—2. Every animated being is impelled by nature to his own preservation, to defend his life and body from injuries, to shun what may be hurtful, and to provide all things requisite to his existence. Hence the duty to watch over his own preservation. Suicide and duelling are therefore contrary to this law; and a man cannot mutilate himself, nor renounce his liberty.

5.—3. The attraction of the sexes has been provided for the preservation of the human race, and this law condemns celibacy. The end of marriage proves that polygamy, (q. v.) and polyandry, (q. v.) are contrary to the law of nature. Hence it follows that the husband and wife have a mutual and exclusive right over each other.

6.—4. Man from his birth is wholly unable to provide for the least of his necessities; but the love of his parents supplies for this weakness. This is one of the most powerful laws of nature. The principal duties it imposes on the parents, are to bestow on the child all the care its weakness requires, to provide for its necessary food and clothing, to instruct it, to provide for its wants, and to use coercive means for its good, when requisite.

7.—5. The religious sentiment which leads us naturally towards the Supreme Be-

ing, is one of the attributes which belong to humanity alone; and its importance gives it the rank of the moral law of nature. From this sentiment arise all the sects and different forms of worship among men.

8.—6. The need which man feels to live in society, is one of the primitive laws of nature, whence flow our duties and rights; and the existence of society depends upon the condition that the rights of all shall be respected. On this law are based the assistance, succors and good offices which men owe to each other, they being unable to provide each every thing for himself.

LAW, PENAL. One which inflicts a penalty for a violation of its enactment.

LAW, POSITIVE. Positive law, as used in opposition to natural law, may be considered in a threefold point of view. 1. The *universal voluntary law*, or those rules which are presumed to be law, by the uniform practice of nations in general, and by the manifest utility of the rules themselves. 2. The *customary law*, or that which, from motives of convenience, has, by tacit, but implied agreement, prevailed, not generally indeed among all nations, nor with so permanent an utility as to become a portion of the *universal voluntary law*, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it. 1 Taunt. 241. 3. The *conventional law*, or that which is agreed between particular states by *express treaty*, a law binding on the parties among whom such treaties are in force. 1 Chit. Comm. Law, 28.

LAW, PRIVATE. An act of the legislature which relates to some private matters, which do not concern the public at large.

LAW, PROSPECTIVE. One which provides for, and regulates the future acts of men, and does not interfere in any way with what has past.

LAW, PUBLIC. A public law is one in which all persons have an interest.

LAW, RETROSPECTIVE. A retrospective law is one that is to take effect, in point of time, before it was passed.

2. Whenever a law of this kind impairs the obligation of contracts, it is void. 3 Dall. 391. But laws which only vary the remedies, divest no right, but merely cure a defect in proceedings otherwise fair, are valid. 10 Serg. & Rawle, 102, 3; 15 Serg. & Rawle, 72. See *Ex post facto*.

LAW, STATUTE. The written will of the legislature, solemnly expressed according to

the forms prescribed by the constitution; an act of the legislature. See *Statute*.

LAW, UNWRITTEN, or lex non scripta. All the laws which do not come under the definition of written law; it is composed, principally, of the law of nature, the law of nations, the common law, and customs.

LAW, WRITTEN, or lex scripta. This consists of the constitution of the United States; the constitutions of the several states; the acts of the different legislatures, as the acts of congress, and of the legislatures of the several states, and of treaties. See *Statute*.

LAWFUL. That which is not forbidden by law. *Id omne licitum est, quod non est legibus prohibitum, quamobrem, quod, lege permittente, fit, poenam non meretur.* To be valid a contract must be lawful.

LAWLESS. Without law; without lawful control.

LAWS EX POST FACTO. Those which are made to punish actions committed before the existence of such laws, and which had not been declared crimes by preceding laws. Declar. of Rights, Mass. part 1, s. 24; Declar. of Rights, Maryl. art. 15. By the constitution of the United States and those of the several states, the legislatures are forbidden to pass *ex post facto* laws. Const. U. S. art. 1, s. 10, subd. 1.

2. There is a distinction between *ex post facto* laws, and *retrospective* laws; every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited.

3. Laws under the following circumstances are to be considered *ex post facto* laws, within the words and intents of the prohibition; 1st. Every law that makes an act done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. 3 Dall. 390.

4. The policy, the reason and humanity of the prohibition against passing *ex post facto* laws, do not extend to civil cases, to cases that merely affect the private property

of citizens. Some of the most necessary acts of legislation are, on the contrary, founded upon the principles that private rights must yield to public exigencies. 3 Dall. 400; 8 Wheat. 89; see 1 Cranch, 109; 1 Gall. Rep. 105; 9 Cranch, 874; 2 Pet. S. C. R. 627; Id. 380; Id. 523.

LAW OF THE TWELVE TABLES. Laws of ancient Rome composed in part from those of Solon, and other Greek legislators, and in part from the unwritten laws or customs of the Romans. These laws first appeared in the year of Rome 303, inscribed on ten plates of brass. The following year two others were added, and the entire code bore the name of the Laws of the Twelve Tables. The principles they contained became the source of all the Roman law, and serve to this day as the foundation of the jurisprudence of the greatest part of Europe.

See a fragment of the Law of the Twelve Tables in Coop. Justinian, 656; Gibbon's Rome, c. 44.

LAW OF THE HANSE TOWNS. A code of maritime laws known as the laws of the Hanse towns, or the ordinances of the Hanseatic towns, was first published in German, at Lubec, in 1597. In an assembly of deputies from the several towns held at Lubec, these laws were afterwards, May 23, 1614, revised and enlarged. The text of this digest, and a Latin translation, are published with a commentary by Kuricke; and a French translation has been given by Cleirac.

LAW OF OLERON, maritime law. A code of sea laws of deserved celebrity. It was originally promulgated by Eleonor, duchess of Guienne, the mother of Richard the First, of England. Returning from the Holy Land, and familiar with the maritime regulations of the Archipelago, she enacted these laws at Oleron in Guienne, and they derive their title from the place of their publication. The language in which they were originally written is the Gascon, and their first object appears to have been the commercial operations of that part of France only. Richard I., of England, who inherited the dukedom of Guienne from his mother, improved this code, and introduced it into England. Some additions were made to it by King John; it was promulgated anew in the 50th year of Henry III., and received its ultimate confirmation in the 12th year of Edward III. Brown's Civ. and Adm. Law, vol. ii. p. 40.

2. These laws are inserted in the begin-

ning of the book entitled "Us et Coutumes de la Mer," with a very excellent commentary on each section by Clairac, the learned editor. A translation is to be found in the Appendix to 1 Pet. Adm. Dec.; Marsh. Ins. B. 1, c. 1, p. 16. See *Laws of Wisbuy; Laws of the Hanse Towns; Code.*

LAW OF WISBUY, maritime law. A code of sea laws established by "the merchants and masters of the magnificent city of Wisbuy." This city was the ancient capital of Gothland, an island in the Baltic sea, anciently much celebrated for its commerce and wealth, now an obscure and inconsiderable place. Malyne, in his collection of sea laws, p. 44, says that the laws of Oleron were translated into Dutch by the people of Wisbuy for the use of the Dutch coast. By Dutch, he probably means German, and it cannot be denied that many of the provisions contained in the Laws of Wisbuy, are precisely the same as those which are found in the Laws of Oleron. The northern writers pretend however that they are more ancient than the Laws of Oleron, or than even the Consolato del Mare. Clairac treats this notion with contempt, and declares that at the time of the promulgation of the laws of Oleron, in 1266, which was many years after they were compiled, the magnificent city of Wisbuy had not yet acquired the denomination of a town. Be this as it may, these laws were for some ages, and indeed still remain, in great authority in the northern part of Europe. "Lex Rhodia navalis," says Grotius, "pro jure gentium, in illo mare Mediterraneo vigeat; sicut apud Gallium leges Oleronis, et apud omnes transrhenanos, leges Wisbuenses." Grotius de Jure bel. lib. 2, c. 3.

A translation of these laws is to be found in 1 Peter's Adm. Dec. Appendix. See *Code; Laws of Oleron.*

LAW OF RHODIAN, maritime law. A code of laws adopted by the people of Rhodes, who had, by their commerce and naval victories, obtained the sovereignty of the sea, about nine hundred years before the Christian era. There is reason to suppose this code has not been transmitted to posterity, at least not in a perfect state. A collection of marine constitutions, under the denomination of Rhodian Laws, may be seen in Vinnius, but they bear evident marks of a spurious origin. See Marsh. Ins. B. 1, c. 4, p. 15; this Dict. *Code; Laws of Oleron; Laws of Wisbuy; Laws of the Hanse Towns.*

LAWYER. A counsellor; one learned in the law. Vide *Attorney*.

LAY, English law. That which relates to persons or things not ecclesiastical. In the United States, the people are not, by law, divided, as in England, into ecclesiastical and lay. The law makes no distinction between them.

TO LAY, pleading. To state or to allege. The place from whence a jury are to be summoned, is called the venue, and the allegation in the declaration, of the place where the jury is to be summoned, is in technical language, said to *lay the venue*. 3 Steph. Com. 574; 3 Bouv. Inst. n. 2826.

TO LAY DAMAGES. The statement at the conclusion of the declaration; the amount of damages which the plaintiff claims.

LAY CORPORATION. One which affects or relates to other than ecclesiastical persons.

LAY DAYS, mar. law. The time allowed to the master of a vessel for loading and unloading the same. In the absence of any custom to the contrary, Sundays are to be computed in the calculation of lay days at the port of discharge. 10 Mees. & Wels. 331. See 3 Esp. 121. They differ from *demurrage*. (q. v.)

LAY PEOPLE. By this expression was formerly understood jurymen. Finch's Law, B. 4, p. 381; Eunom. Dial. 2, § 51, p. 151.

LAYMAN, eccl. law. One who is not an ecclesiastic nor a clergyman.

LAZARET or LAZARETTO. A place selected by public authority, where vessels coming from infected or unhealthy countries are required to perform quarantine. Vide *Health*.

LÆSÆ MAJESTATIS CRIMEN. The crime of high treason. Glanv. lib. 1, c. 2; Clef des Lois Rom. h. t.; Inst. 4, 18, 3; Dig. 48, 4; Code, 9, 8.

LE ROI S'AVISERA. The king will consider of it. This phrase is used by the English monarch when he gives his dissent to an act passed by the lords and commons. The same formula was used by the late king of the French, for the same purpose. 1 Toull. n. 52. Vide *Veto*.

LE ROI LE VEUT. The king assents. This is the formula used in England, and formerly in France, when the king approved of a bill passed by the legislature. 1 Toull. n. 52.

LE ROI VEUT EN DELIBERER. The king will deliberate on it. This is the formula which the late French king used, when he

intended to veto an act of the legislative assembly. 1 Toull. n. 42.

TO LEAD TO USES. In England, when deeds are executed prior to fines and recoveries, they are called *deeds to lead to uses*; when subsequent, *deeds to declare the uses*.

LEADING. That which is to be followed; as, a leading case; leading question; leading counsel.

LEADING CASE. A case decided by a court in the last resort, which settles a particular point or question; the principles upon which it is decided are to be followed in future cases, which are similar to it. Collections of such cases have been made, with commentaries upon them by White, by Wallace and Hare, and others.

LEADING COUNSEL, English law. When there are two or more counsel employed on the same side in a cause, he who has the principal management of the cause, is called the leading counsel, as distinguished from the other, who is called the *junior counsel*.

LEADING QUESTION, evidence, practice. A question which puts into the witness' mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. 7 Serg. & Rawle, 171; 4 Wend. Rep. 247. In that case the examiner is said to *lead* him to the answer. It is not always easy to determine what is or is not a leading question.

2. These questions cannot, in general, be put to a witness in his examination in chief. 6 Binn. R. 483, 3 Binn. R. 130; 1 Phill. Ev. 221; 1 Stark. Ev. 123. But in an examination in chief, questions may be put to lead the mind of the witness to the subject of inquiry; and they are allowed when it appears the witness wishes to conceal the truth, or to favor the opposite party, or where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry, without a particular specification of such subject. 1 Camp. R. 43; 1 Stark. C. 100.

3. In cross-examinations, the examiner has generally the right to put leading questions. 1 Stark. Ev. 132; 3 Chit. Pr. 892; Rosc. Civ. Ev. 94; 3 Bouv. Inst. n. 3203-4.

LEAGUE, measure. A league is a measure of length, which consists of three geographical miles. The jurisdiction of the United States extends into the sea a marine league. See Acts of Congress of June 5, 1794, 1 Story's L. U. S. 352; and April

20, 1818, 3 Story's L. U. S. 1694; 1 Wait's State Papers, 195. Vide *Cannon Shot*.

LEAGUE, crim. law, contracts. In criminal law, a league is a conspiracy to do an unlawful act. The term is but little used.

2. In contracts it is applied to agreements between states. Leagues between states are of several kinds. 1st. Leagues offensive and defensive, by which two or more nations agree not only to defend each other, but to carry on war against their common enemies. 2d. Defensive, but not offensive, obliging each to defend the other against any foreign invasion. 3d. Leagues of simple amity, by which one contracts not to invade, injure, or offend the other; this usually includes the liberty of mutual commerce and trade, and the safeguard of merchants and traders in each other's dominion. Bac. Ab. Prerogative, D 4. Vide *Confederacy; Conspiracy; Peace; Truce; War*.

LEAKAGE. The waste which has taken place in liquids, by their escaping out of the casks or vessels in which they were kept.

2. By the act of March 2, 1799, s. 59, 1 Story's L. U. S. 625, it is provided that there be an allowance of two per cent. for leakage, on the quantity which shall appear by the gauge to be contained in any cask of liquors, subject to duty by the gallon; and ten per cent. on all beer, ale, and porter, in bottles; and five per cent. on all other liquors in bottles; to be deducted from the invoice quantity, in lieu of breakage; or it shall be lawful to compute the duties on the actual quantity, to be ascertained by tale, at the option of the importer, to be made at the time of entry.

LEAL. Loyal; that which belongs to the law.

LEAP YEAR. Vide *Bissextile*.

LEASE, contracts. A lease is a contract for the possession and profits of lands and tenements on one side, and a recompense of rent or other income on the other; Bac. Ab. *Lease, in pr.*; or else it is a conveyance of lands and tenements to a person for life, or years, or at will, in consideration of a return of rent, or other recompense. Cruise's Dig. tit. Leases. The instrument in writing is also known by the name of lease; and this word sometimes signifies the term, or time for which it was to run; for example, the owner of land, containing a quarry, leases the quarry for ten years, and then conveys the land, "reserving the quarry until the end of the lease;" in this case the reserva-

tion remained in force till the ten years expired, although the lease was cancelled by mutual consent within the ten years. 8 Pick. R. 339.

2. To make such contract, there must be a lessor able to grant the land; a lessee, capable of accepting the grant, and a subject-matter capable of being granted. See *Lessor; Lessee*.

3. This contract resembles several others, namely: a sale, to constitute which there must be a thing sold, a price for which it is sold, and the consent of the parties as to both. So, in a lease there must be a thing leased, the price or rent, and the consent of the parties as to both. Again, a lease resembles the contract of hiring of a thing, *locatio conductio rei*, where there must be a thing to be hired, a price or compensation, called the hire, and the agreement and consent of the parties respecting both. Poth. Bail à rente, n. 2.

4. Before proceeding to the examination of the several parts of a lease, it will be proper here to say a few words, pointing out the difference between an agreement or covenant to make a lease, and the lease itself. When an agreement for a lease contains words of present demise, and there are circumstances from which it may be collected that it was meant that the tenant should have an immediate legal interest in the term, such an agreement will amount to an actual lease; but although words of present demise are used, if it appears on the whole, that no legal interest was intended to pass, and that the agreement was only preparatory to a future lease, to be made, the construction will be governed by the intention of the parties, and the contract will be held to amount to no more than an agreement for a lease. 2 T. R. 739. See Co. Litt. 45 b; Bac. Abr. Leases, K; 15 Vin. Abr. 94, pl. 2; 1 Leon. 129; 1 Burr. 2209; Cro. Eliz. 156; Id. 173; 12 East, 168; 2 Campb. 286; 10 John. R. 336; 15 East, 244; 3 Johns. R. 44, 383; 4 Johns. R. 74, 424; 5 T. R. 163; 12 East, 274; Id. 170; 6 East, 530; 13 East, 18; 16 Esp. R. 106; 3 Taunt. 65; 5 B. & A. 322.

5. Having made these few preliminary observations, it is proposed to consider, 1. By what words a lease may be made. 2. Its several parts. 3. The formalities the law requires.

6.—1. The words "demise, grant, and to farm let," are technical words well understood, and are the most proper that can

be used in making a lease; but whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for such a determinate time, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose. 4 Burr. 2209; 1 Mod. 14; 11 Mod. 42; 2 Mod. 89; 3 Burr. 1446; Bac. Abr. Leases; 6 Watts, 362; 3 M'Cord, 211; 3 Fairf. 478; 5 Rand. 571; 1 Root, 318.

7.—2. A lease in writing by deed indented consists of the following parts, namely, 1. The *premises*. 2. The *habendum*. 3. The *tenendum*. 4. The *reddendum*. 5. The *covenants*. 6. The *conditions*. 7. The *warranty*. See *Deed*.

8.—3. As to the form, leases may be in writing or not in writing. See *Parol Leases*. Leases in writing are either by deed or without deed; a deed is a writing sealed and delivered by the parties, so that a lease under seal is a lease by deed. The respective parties, the lessor and lessee, whose deed the lease is, should *seal*, and now in every case, *sign* it also. The lease must be *delivered* either by the parties themselves or their attorneys, which delivery is expressed in the attestation "sealed and delivered in the presence of us." Almost any manifestation, however, of a party's intention to deliver, if accompanied by an act importing such intention, will constitute a delivery. 1 Ves. jr. 206.

9. A lease may be avoided, 1. Because it is not sufficiently formal; and, 2. Because of some matter which has arisen since its delivery.

10.—1. It may be avoided for want of either, 1st. Proper parties and a proper subject-matter. 2d. Writing or printing on parchment or paper, in those cases where the statute of frauds requires they should be in writing. 3d. Sufficient and legal words properly disposed. 4th. Reading, if desired, before the execution. 5th. Sealing, and in most cases, signing also; or, 6th. Delivery. Without these essentials it is void from the beginning.

11.—2. It may be avoided by matter arising after its delivery; as, 1st. By erasure, interlineation, or other alteration in any material part; an immaterial alteration made by a stranger does not vitiate it, but

such alteration made by the party himself, renders it void. 2d. By breaking or effacing the seal, unless it be done by accident. 3d. By delivering it up to be cancelled. 4th. By the disagreement of such whose concurrence is necessary; as, the husband, where a married woman is concerned. 5th. By the judgment or decree of a court of judicature.

LEASE AND RELEASE. A species of conveyance, invented by Serjeant Moore, soon after the enactment of the statute of uses. It is thus contrived; a lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. This, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the *possession*. Being thus in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession; and, accordingly, the next day a release is granted to him.

2. The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance. 2 Bl. Com. 339; 4 Kent, Com. 482; Co. Litt. 207; Cruise, Dig. tit. 32, c. 11.

LEASEHOLD. The right to an estate held by lease.

LEAVE OF COURT. The grant by the court of something, which, without such grant it would have been unlawful to do.

2. Asking leave of court to do any act, is an implied admission of jurisdiction of the court, and, in those cases in which the objection to the jurisdiction must be taken, if at all, by plea to the jurisdiction, and it can be taken in no other way, the court by such asking leave becomes fully vested with the jurisdiction. Bac. Ab. Abatement, A; Bac. Ab. Pleas, &c., E 2; Lawes, Pl. 91; 6 Pick. 391. But such admission cannot aid the jurisdiction except in such cases.

3. The statute of 4 Ann. c. 16, s. 4, provides that it shall be lawful for any defendant, or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with *leave of the court*, to plead as many several matters thereto, as he shall think necessary for his defence. The principles of this statute have been adopted by most of the states of the Union.

4. When the defendant, in pursuance of this statute, pleads more than one plea in bar, to one and the same demand, or

thing, all of the pleas, except the first, should purport to be pleaded with *leave of the court*. But the omission is not error nor cause of demurrer. Lawes, Pl. 132; 2 Chit. Pl. 421; Story, Pl. 72, 76; Gould on Pl. c. 8, § 21; Andr. 109; 3 N. H. Rep. 523.

LEDGER, commerce, accounts, evidence. A book in which are inscribed the names of all persons dealing with the person who keeps it, and in which there is a separate account, composed generally of one or more pages for each. There are two parallel columns, on one of which the party named is the debtor, and on the other, the creditor, and presents a ready means of ascertaining the state of the account. As this book is a transcript from the day book or journal, it is not evidence per se.

LEDGER-BOOK, eccl: law. The name of a book kept in the prerogative courts in England. It is considered as a roll of the court, but, it seems, it cannot be read in evidence. Bac. Ab. h. t.

LEGACY. A bequest or gift of goods or chattels by testament. 2 Bl. Com. 512; Bac. Abr. Legacies, A. See Merlin, Répertoire, mot Legs, s. 1; Swinb. 17; Domat, liv. 4, t. 2, § 1, n. 1. This word, though properly applicable to bequests of personal estate only, has nevertheless been extended to property not technically within its import, in order to effectuate the intention of the testator, so as to include real property and annuities. 5 T. R. 716; 1 Burr. 268; 7 Ves. 522; Id. 391; 2 Cain. R. 345. Devise is the term more properly applied to gifts of real estate. Godolph. 271.

2. As the testator is presumed at the time of making his will to be *inops concilii*, his intention is to be sought for, and any words which manifest the intention to give or create a legacy, are sufficient. Godolph. 281, pt. 3, c. 22, s. 21; Com. Dig. Chancery, 3 Y 4; Bac. Abr. Legacies, B 1.

3. Legacies are of different kinds; they may be considered as general, specific, and residuary. 1. A legacy is general, when it is so given as not to amount to a bequest of a specific part of a testator's personal estate; as of a sum of money generally, or out of the testator's personal estate, or the like. 1 Rep. Leg. 256; Lownd. Leg. 10. A general legacy is relative to the testator's death; it is a bequest of such a sum or such a thing at that time, or a direction to the executors, if such a thing be not in the

testator's possession at that time, to procure it for the legatee. Cas. Temp. Talb. 227; Ambl. 57; 4 Ves. jr. 675; 7 Ves. jr. 399.

4.—2. A specific legacy is a bequest of a particular thing, or money specified and distinguished from all other things of the same kind; as of a particular horse, a particular piece of plate, a particular term of years, and the like, which would vest immediately, with the assent of the executor. 1 Rep. Leg. 149; Lownd. Leg. 10, 11; 1 Atk. 415. A specific legacy has relation to the time of making the will; it is a bequest of some particular thing in the testator's possession at that time, if such a thing should be in the testator's possession at the time of his death. If it should not be in the testator's possession, the legatee has no claim. There are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for their payment. Touchst. 433; Amb. 310; 4 Ves. 565; 3 Ves. & Bea. 5.

5. This kind of legacy is so far general, and differs so much in effect from a specific one, that if the funds be called in or fail, the legatees will not be deprived of their legacies, but be permitted to receive them out of the general assets; yet the legacies are so far specific, that they will not be liable to abate with general legacies upon a deficiency of assets. 2 Ves. jr. 640; 5 Ves. jr. 206; 1 Meriv. 178.

6.—3. A residuary legacy is a bequest of all the testator's personal estate, not otherwise effectually disposed of by his will. Lownd. Leg. 10; Bac. Abr. Legacies, I.

7. As to the interest given, legacies may be considered as absolute, for life, or in remainder. 1. A legacy is absolute, when it is given without condition, and is to vest immediately. See 2 Vern. 181; Ambl. 750; 19 Ves. 86; Lownd. 151; 2 Vern. 430; 1 Vern. 254; 5 Ves. 461; Com. Dig. Appendix, Chancery, IX.

8.—2. A legacy for life is sometimes given, with an executory limitation after the death of the tenant for life to another person; in this case, the tenant for life is entitled to the possession of the legacy, but when it is of specific articles, the first legatee must sign and deliver to the second, an inventory of the chattels, expressing that they are in his custody for life only, and that afterwards they are to be delivered and remain to the use and benefit of the second legatee. 3 P. Wms. 336; 1 Atk. 471; 2 Atk. 82; 1 Bro. C. C. 279; 2 Vern. 249..

See 1 *Rop. Leg.* 404, 5, 580. It seems that a bequest for life, if specific of things *quæ ipso usu consumuntur*, is a gift of the property, and that there cannot be a limitation over, after a life interest in such articles. 3 *Meriv.* 194.

9.—3. In personal property there cannot be a remainder in the strict sense of the word, and therefore every future bequest of personal property, whether it be preceded or not by any particular bequest, or limited on a certain or uncertain event, is an executory bequest, and falls under the rules by which that mode of limitation is regulated. *Fearne, Cont. R.* 401, n. An executory bequest cannot be prevented or destroyed by any alteration whatsoever, in the estate, out of which, or after which it is limited. *Id.* 421; 8 *Co.* 96, a; 10 *Co.* 476. And this privilege of executory bequests, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the event on which an interest of this sort is permitted to take effect, is such as must happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the period of gestation afterwards. *Fearne, Cont. R.* 431.

10. As to the right acquired by the legatee, legacies may be considered as vested and contingent. 1. A vested legacy is one by which a certain interest, either present or future in possession, passes to the legatee. 2. A contingent legacy is one which is so given to a person, that it is uncertain whether any interest will ever vest in him.

11. A legacy may be lost by abatement, ademption, and lapse. 1. Abatement, see *Abatement of Legacies*. 2. Ademption, see *Ademption*. 3. When the legatee dies before the testator, or before the condition upon which the legacy is given be performed, or before the time at which it is directed to vest in interest have arrived, the legacy is lapsed or extinguished. See *Bac. Abr. Legacies*, E; *Com. Dig. Chancery*, 3 Y 13; 1 *P. Wms.* 83; *Lownd. Leg. ch.* 12, p. 408 to 415; 1 *Rop. Leg. ch.* 8, p. 319 to 341.

12. In Pennsylvania, by legislative enactment, no legacy in favor of a child or other lineal descendant of any testator, shall be deemed or held to lapse or become void, by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator, but such devise or legacy shall be good and available, in favor of such

surviving issue, with like effect, as if such devisee or legatee had survived the testator. The testator may, however, intentionally exclude such surviving issue, or any of them *Act of March 19, 1810, 5 Smith's L. of Pa.* 112.

13. As to the payment of legacies, it is proper to consider out of what fund they are to be paid; at what time; and to whom. 1. It is a general rule, that the personal estate is the primary fund for the payment of legacies. When the real estate is merely charged with those demands, the personal assets are to be applied in the first place towards their liquidation. 1 *Serg. & Rawle*, 453; 1 *Rop. Leg.* 463.

14.—2. When legacies are given generally to persons under no disability to receive them, the payments ought to be made at the end of a year next after the testator's decease. 5 *Binn.* 475. The executor is not obliged to pay them sooner, although the testator may have directed them to be discharged within six months after his death, because the law allows the executor one year from the demise of the testator, to ascertain and settle his testator's affairs; and it presumes that at the expiration of that period, and not before, all debts due by the estate have been satisfied, and the executor to be then able, properly to apply the residue among the legatees according to their several rights and interests.

15. When a legacy is given generally, and is subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of the year after the testator's death, and he is under no obligation to give security for re-payment of the money, in case the event shall happen. The principle seems to be, that as the testator has entrusted him without requiring security, no person has authority to require it. 1 *Ves. Jr.* 97; 18 *Ves.* 181; *Lownd. on Legacies*, 403.

16. As to the persons to whom payment is to be made, see, where the legacy is given to an infant, 1 *Rop. Leg.* 589; 1 *P. Wms.* 285; 1 *Eq. Cas. Abr.* 300; 3 *Bro. C. C.* 97, edit. by *Belt*; 2 *Atk.* 80; 2 *Johns. C. R.* 614; where the legacy is given to a married woman; 1 *Rop. Leg.* 595; *Lownd. Leg.* 399; where the legacy is given to a lunatic; 1 *Rop. Leg.* 599; where it is given to a bankrupt; *Id.* 600; 2 *Burr.* 717; where it is given to a person abroad, who has not been heard of for a long time. *Id.* 601;

Finch, R. 419; 3 Bro. C. C. 510; 5 Ves. 458; Lownd. Leg. 398.

See, generally, as to legacies, Roper on Legacies; Lowndes on Legacies; Bac. Abr. Legacy; Com. Dig. Administration, C 3, 5; Id. Chancery, 3 A; 3 G; 3 Y 1; Id. Prohibition, G 17; Vin. Abr. Devise; Id. Executor; Swinb. 17 to 44; 2 Salk. 414 to 416j.

17. By the Civil Code of Louisiana, legacies are divided into universal legacies, legacies under an universal title, and particular legacies. 1. An universal legacy, is a testamentary disposition, by which the testator gives to one or several persons the whole of the property which he leaves at his decease. Civ. Code of Lo. art. 1599.

18.—2. The legacy under an universal title, is that by which a testator bequeaths a certain proportion of the effects of which the law permits him to dispose, as a half, a third, or all his immovables, or all his movables, or a fixed proportion of all his immovables, or of all his movables. Id. 1604.

19.—3. Every legacy not included in the definition given of universal legacies, and legacies under an universal title, is a legacy under a particular title. Id. 1618. Copied from Code Civ. art. 1003 and 1010. See Toullier, Droit Civil Français, tome 5, p. 482, et seq.

LEGACY, ACCUMULATIVE. An accumulative legacy is a second bequest given by the same testator to the same legatee, whether it be of the same kind of thing, as money, or whether it be of different things, as, one hundred dollars, in one legacy, and a thousand dollars in another, or whether the sums are equal; or whether the legacies are of a different nature. 2 Rop. Leg. 19.

LEGACY, ADDITIONAL. An additional legacy is one which is given by a codicil, besides one before given by the will; or it is an increase by a codicil of a legacy before given by the will. An additional legacy is generally subject to the same qualities and conditions as the original legacy. 6 Mod. 31; 2 Ves. jr. 449; 3 Mer. 154; Ward on Leg. 142.

LEGACY, ALTERNATIVE. One where the testator gives one of two things to the legatee without designating which of them; as, one of my two horses. Vide *Election*.

LEGACY, CONDITIONAL. A bequest which is to take effect upon the happening or not happening of a certain event. Lownd. Leg. 166; Rop. Leg. Index, tit. Condition.

LEGACY, DEMONSTRATIVE. A demon-

strative legacy is a bequest of a certain sum of money, intended for the legatee at all events, with a fund particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail but be payable out of his general assets. 1 Rop. Leg. 153; Lownd. Leg. 85; Swinb. 485; Ward on Leg. 370.

LEGACY, INDEFINITE. A bequest of things which are not enumerated or ascertained as to numbers or quantities; as, a bequest by a testator of all his goods, all his stocks in the funds. Lownd. on Leg. 84; Swinb. 485; Amb. 641; 1 P. Wms. 697.

LEGACY, LAPSED. A legacy is said to be lapsed or extinguished, when the legatee dies before the testator, or before the condition upon which the legacy is given has been performed, or before the time at which it is directed to vest in interest has arrived. Bac. Ab. Legacy, E; Com. Dig. Chancery, 3 Y 13; 1 P. Wms. 83; Lownd. Leg. 408 to 415; 1 Rop. Leg. 319 to 341. See, as to the law of Pennsylvania in favor of lineal descendants, 5 Smith's Laws of Pa. 112. Vide, generally, 8 Com. Dig. 502-3; 5 Toull. n. 671.

LEGACY, MODAL. A modal legacy is a bequest accompanied with directions as to the mode in which it should be applied for the legatee's benefit; for example, a legacy to Titius to put him an apprentice. 2 Vern. 431; Lownd. Leg. 151.

LEGACY, PECUNIARY. A pecuniary legacy is one of money; pecuniary legacies are most usually general legacies, but there may be a specific pecuniary legacy; for example, of the money in a certain bag. 1 Rop. Leg. 150, n.

LEGACY, RESIDUARY. That which is of the remainder of an estate after the payment of all the debts and other legacies. 1 Madd. Ch. P. 284.

LEGAL. That which is according to law. It is used in opposition to equitable, as the legal estate is in the trustee, the equitable estate in the cestui que trust. Vide Powell on Mortg. Index, h. t.

2. The party who has the legal title, has alone the right to seek a remedy for a wrong to his estate, in a court of law, though he may have no beneficial interest in it. The equitable owner, is he who has not the legal estate, but is entitled to the beneficial interest.

3. The person who holds the legal estate for the benefit of another, is called a

trustee; he who has the beneficiary interest and does not hold the legal title, is called the beneficiary, or more technically, the *cestui que trust*.

4. When the trustee has a claim, he must enforce his right in a court of equity, for he cannot sue any one at law, in his own name; 1 East, 497; 8 T. R. 332; 1 Saund. 158, n. 1; 2 Bing. 20; still less can he in such court, sue his own trustee. 1 East, 497.

LEGAL ESTATE. One, the right to which may be enforced in a court of law. It is distinguished from an equitable estate, the rights to which can be established only in a court of equity. 2 Bouv. Inst. n. 1688.

LEGALIZATION. The act of making lawful.

2. By legalization, is also understood the act by which a judge or competent officer authenticates a record, or other matter, in order that the same may be lawfully read in evidence. Vide *Authentication*.

LEGATES. Legates are extraordinary ambassadors sent by the pope to catholic countries to represent him, and to exercise his jurisdiction. They are distinguished from the ambassadors of the pope who are sent to other powers.

2. The canonists divide them into three kinds, namely: 1. Legates *à latere*. 2. Legati *missi*. 3. Legati *nati*.

3.—1. Legates *à latere* hold the first rank among those who are honored by a legation; they are always chosen from the college of cardinals, and are called *à latere*, in imitation of the magistrates of ancient Rome, who were taken from the court, or *side* of the emperor.

4.—2. The *legati missi* are simple envoys.

5.—3. The *legati nati*, are those who are entitled to be legates by birth.

LEGATEE. A legatee is a person to whom a legacy is given by a last will and testament.

2. It is proposed to consider, 1. Who may be a legatee. 2. Under what description legatees may take.

3.—I. *Who may be a legatee.* In general, every person may be a legatee. 2 Bl. Com. 512. But a person civilly dead cannot take a legacy.

II. *Under what description legatees may take.*

4.—§ 1. *Of legacies to legitimate children.*

1. When it appears from express declaration, or a clear inference arising upon the

face of the will, that a testator in giving a legacy to a class of individuals generally, intended to apply the terms used by him to such persons only as answered the description at the date of the instrument, those individuals alone will be entitled, although if no such intention had been expressed, or appeared in the will, every person falling within that class at the testator's death, would have been included in the terms of the bequest. 1 Meriv. 320; and see 3 Ves. 611; Id. 609; 15 Ves. 363; Amb. 397; 2 Cox, 291; 4 Bro. C. C. 55; 3 Bro. C. C. 148; 2 Cox, 384.

5.—2. Where a legacy is given to a class of individuals, as to children, in general terms, and no period is appointed for the distribution of it, the legacy is due at the death of the testator; the payment of it being merely postponed to the end of a year after that event, for the convenience of the executor or administrator in administering the assets. The rights of the legatees are finally settled, and determined at the testator's decease. 1 Ball & B. 459; 2 Murph. 178. Upon this principle is founded the well established rule that children in existence at that period, or legally considered so to be, are alone entitled to participate in the bequest. 1 Bro. C. C. 532, n.; 2 Bro. C. C. 658; 2 Cox, 190; 1 Dick. 344; 14 Ves. 576; 1 Ves. jr. 405; 1 Cox, 68; 3 Bro. C. C. 391; Amb. 448; 1 Ves. sen. 485; 5 Binn. 607.

6.—3. A child in *ventre sa mere* takes a share in a fund bequeathed to children, under the general description of "children," or of "children living at the testator's death." 1 Ves. sen. 85; and see 1 P. Wms. 244, 341; 2 Bro. C. C. 63; 1 Salk. 229; 2 Cox, 425; 5 Serg. & Rawle, 38. See tit. *In ventre sa mere*.

7.—4. When legacies are given to a class of individuals, generally, payable at a future period, as to the children of B, when the youngest shall attain the age of twenty-one; or to be divided among them upon the death of C; any child who can entitle itself under the description, at the time when the fund is to be divided, may claim a share, viz: as well children living at the period of distribution, although not born till after the testator's death, as those born before, and living at the happening of that event. 1 Supp. to Ves. jr. 115, note 3, to Hill v. Chapman; 2 Supp. to Ves. jr. 157, note 1, to Lincoln v. Pelham. This general rule may be divided into two branches. First,

when the division of the fund is postponed until a child or children attain a particular age; as, when a legacy is given to the children of A, at the age of twenty-one; in that case, so soon as the eldest arrives at that period, the fund is distributable among so many as are in existence at that time; and no child born afterwards can be admitted to a share, because the period of division fixes the number of legatees. Distribution is then made, and nothing remains for future partition. 1 Ball & Beat. 459; 3 Bro. C. C. 402; 5 Binn. 607; 2 Ves. jr. 690; 3 Ves. 730; 3 Bro. C. C. 352, ed. by Belt; 14 Ves. 256; 6 Ves. 345; 10 Ves. 152; 11 Ves. 238. Second, when the distribution of the fund is deferred during the life of a person *in esse*. In these cases, when the enjoyment of the thing given, is by the testator's express declaration not to be immediate by those, among whom it is to be finally divided, but is postponed to a particular period, as the death of A, then the children or individuals who answer the general description at that time, when distribution is to be made, are entitled to take, in exclusion of those afterwards coming *in esse*. 1 Ves. sen. 111; 1 Bro. C. C. 386; Id. 530; Id. 582; Id. 537; 1 Atk. 509; 2 Atk. 329; 5 Ves. 136; 3 Bro. C. C. 417; 1 Cox, 327; 8 Ves. 375; 15 Ves. 122; 1 Madd. R. 290; 1 Ball & Beat. 449.

8.—5. The word "children" does not, ordinarily and properly speaking, comprehend grandchildren or issue generally; these are included in that term only in two cases, namely, 1. From necessity, which occurs where the will would remain inoperative unless the sense of the word "children" were extended beyond its natural import; and, 2. Where the testator has shown by other words, that he did not intend to use the term children in its proper and actual meaning, but in a more extended sense. 1 Supp. to Ves. jr. 202, note 2, to Bristow v. Ward. In the following cases, the word children was extended beyond its natural import from necessity: 6 Rep. 16; 10 Ves. 201; 2 Desauss. 123, in note. The following are instances where by using the words children and issue, indiscriminately, the testator showed his intention to use the former term in the sense of issue so as to entitle grandchildren, &c. to take. 1 Ves. sen. 196; S. C. Amb. 555; 3 Ves. 258; 3 Ves. & Bea. 68; 4 Ves. 437; 2 Supp. to Ves. jr. 158. There is another class of cases wherein it was determined that grandchildren, &c. were

not included in the word children. 2 Vern. 107; 4 Ves. 692; 10 Ves. 195; 3 Ves. & Bea. 59; see 2 Desauss. 308.

9.—§ 2. *Of legacies to natural children.*

1. Natural children unborn at the date of the will, cannot take under a bequest to the children generally, or to the illegitimate children of A B by Mary C; because a natural child cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth. Co. Litt. 3, b.

10.—2. Natural children, unborn at the date of the will and described as children of the testator or another man, to be born of a particular woman, cannot take under such a description. 1 Peere Wms. 529; 18 Ves. 288.

11.—3. A legacy to an illegitimate child *in ventre sa mere*, described as the child of the testator or of another man, will fail, since whether the testator or such person were or were not in truth the father, is a fact which can only be ascertained by evidence, that public policy forbids to be admitted. 1 Meriv. 141 to 152.

12.—4. A child *in ventre sa mere* described merely as a child with which the mother is *enceinte*, without mentioning its putative father; or if the testator express a belief that the child is his own, and provide for it under that impression, regardless of the chance of being mistaken; then the child will in the first place be capable of taking; and in the second, as presumed, be also entitled in consequence of the testator's intent to provide for it, whether he be the father or not. 1 Meriv. 148, 152.

13.—5. Natural children *in existence*, having acquired by reputation the name and character of children of a particular person, prior to the date of the will, are capable of taking under the name of children. 1 P. Wms. 529; 1 Ves. & Bea. 467. But the term child, son, issue, and every other word of that species, is to be considered as *prima facie* to mean legitimate child, son, or issue. Id.

14.—6. Whether such children take or not depends upon the evidence of the testator's intention, manifested by the will, to include them in the term children; these cases are instances where the evidence of such intention was deemed insufficient. 5 Ves. 530; 1 Ves. & Bea. 454; 6 Ves. 48, 48; 1 Ves. & Bea. 469; and see 1 Ves. & Bea. 456; 2 East, 530, 542. In the fol-

lowing, the evidence of intention was held to be sufficient. 1 Ves. & Bea. 469; *Blundell v. Dunn*, cited in 1 Madd. 433; *Beachcroft v. Beachcroft*, cited in 1 Madd. 430; 2 Meriv. 419.

15.—§ 3. *Of legacies of personal estate to a man and his heirs.* 1. A legacy to A and his heirs, is an absolute legacy to A, and the whole interest of the money vests in him for his use. 4 Mad. 361. But when no property in the bequest is given to A, and the money is bequeathed to his heirs, or to him with a limitation to his heirs, if he die before the testator, and the contingency happens, then if there be nothing in the will showing the sense in which the testator made use of the word heirs, the next of kin of A, are entitled to claim under the description, as the only persons appointed by law to succeed to personal estate. 5 Ves. 403; 4 Ves. 649; 1 Jac. & Walk. 388.

16.—2. A bequest to the heirs of an individual, without addition or explanation, will belong to the next of kin; the rule, however, is subject to alteration by the intention of the testator. If then the contents of the will show, that by the word heirs the testator meant other persons than the next of kin, those persons will be entitled. *Ambl.* 273; 1 P. Wms. 432; *Forrest*, 56; 2 Atk. 89. See, also, 1 Ves. jr. 145; 4 Madd. 361; 14 Ves. 488; 1 Car. Law R. 484.

17.—§ 4. *Legacies to issue.* 1. The term *issue*, is of very extensive import, and when used as a word of purchase, and unconfined by any indication of intention, will comprise all persons who can claim as descendants from or through the person to whose issue the bequest is made; and in order to restrain the legal sense of the term, a clear intention must appear upon the will. 3 Ves. 257; *Id.* 421; 1 Meriv. 434; 13 Ves. 344.

18.—2. Where it appears clearly to be a testator's meaning to provide for a class of individuals living at the date of his will, and he provides against a lapse by the death of any of them in his lifetime, by the substitution of their issue; in such case, although the word will include all the descendants of the designated legatees, yet if any person who would have answered the description of an original legatee, when the will was made, be then dead, leaving issue, that issue will be excluded, because the issue of those individuals only who

were capable of taking original shares, at the date of the will, were intended to take by substitution; so that as the person who was dead when the will was made, could never have taken an original share, there is nothing for his issue to take in his place. 1 Meriv. 320.

19.—3. When it can be collected from the will that a testator in using the word *issue*, did not intend it should be understood in its common acceptation, the import of it will be confined to the persons whom it was intended to comprehend. 7 Ves. 531; 3 Ves. 383; 7 Ves. 522; 1 Ves. jr. 143.

20.—§ 5. *Of legacies to relations.* 1. Under a bequest to relations, none are entitled but those, who in the case of intestacy, could have claimed under the statute of distribution. *Forrest.* 251.; 4 Bro. C. C. 207; 1 Bro. C. C. 31; 3 Bro. C. C. 234; 5 Ves. 529; *Ambl.* 507; *Dick.* 380; 1 P. Wms. 327; 2 Ves. sen. 527; 19 Ves. 403; 1 Taunt. 263; 1 T. R. 435, n. See the following cases where the bequests were to "poor relations;" 1 P. Wms. 327; 8 Serg. & Rawle, 45; 1 Scho. & Lef. 111; "most necessitous relations;" *Ambl.* 636.

21.—2. To this general rule there are several exceptions, namely, first, when the testator has delegated a power to an individual to distribute the fund among the testator's relations according to his discretion; in such an instance whether the bequest be made to "relations" generally, or to "poor," or "poorest," or "most necessitous" relations, the person may exercise his discretion in distributing the property among the testator's kindred although they be not within the statute of distributions. 1 Scho. & Lef. 111, and 16 Ves. 43; 1 T. R. 435, n.; *Ambl.* 708; 16 Ves. 27, 43. Secondly. Another exception occurs where a testator has fixed a certain test, by which the number of relatives intended by him to participate in his property, can be ascertained; as if a legacy be given to such of the testator's relations as should not be worth a certain sum, in such case, it seems, all the testator's relatives answering the description would take, although not within the degrees of the statute of distributions. *Ambl.* 798. Thirdly. Another exception to the general rule is, where a testator has shown an intention in his will, to comprehend relations more remote than those entitled under the statute; in that case his

intention will prevail. 1 Bro. C. C. 82, n., and see 1 Cox, 235.

22.—3. The word "relation" or "relations," may be so qualified as to exclude some of the next of kin from participating in the bequest; and this will also happen when the terms of the bequest are to my "nearest relations;" 19 Ves. 400; Coop. 275; 1 Bro. C. C. 293; and see 1 Ves. sen. 337; Ambl. 70; to testator's relations of his name 1 Ves. sen. 336; or stock, or blood; 15 Ves. 107.

23.—4. The word relations being governed by the statute of distributions, no person can regularly answer the description but those who are of kin to the testator by blood, consequently relatives by marriage are not included in a bequest to relations generally. 1 Ves. sen. 84; 3 Atk. 761; 1 Bro. C. C. 71, 294.

24.—§ 6. *Legacies to next of kin.* 1. When a bequest is made to testator's next of kin, it is understood the testator means such as are related to him by blood. But it is not necessary that the next of kin should be of the whole blood, the half blood answering the description of next of kin, are equally entitled with the whole, and if nearer in degree, will exclude the whole blood. 1 Ventr. 425; Alleyn, 36; Styl. 74.

25.—2. Relations by marriage are in general excluded from participating in a legacy given to the next of kin. 18 Ves. 53; 14 Ves. 376, 381, 386; and see 3 Ves. 244; 18 Ves. 49. But this is only a *primâ facie* construction, which may be repelled by the contrary intention of a testator. 14 Ves. 382.

26.—3. A testator is to be understood to mean by the expression "next of kin," when he does not refer to the statute, or to a distribution of the property as if he had died intestate, those persons only who should be nearest of kin to him, to the exclusion of others who might happen to be within the degree limited by the statute. 3 Bro. C. C. 69; 19 Ves. 404; 14 Ves. 385. See 3 Bro. C. C. 64.

27.—4. *Nearest* of kin will alone be entitled under a bequest to the next of kin in equal degree. 12 Ves. 433; 1 Madd. 36.

28.—§ 7. *Legacies to legal personal representatives or to personal representatives.* 1. Where there is nothing on the face of the will to manifest a different intention, the legal construction of the words "personal representatives," or "legal personal repre-

sentatives," is executors or administrators of the person described. 6 Ves. 402; 6 Madd. 159. A legacy limited to the personal or legal personal representatives of A, unexplained by anything in the will, will entitle A's executors or administrators to it, not as representing A, or as part of his estate, or liable to his debts, but in their own right as persons designated by the law. 2 Mad. 155.

29.—2. In the following cases the executors or administrators were held to be entitled under the designation of personal, or legal personal representatives. 3 Ves. 486; Anstr. 128.

30.—3. The next of kin and not the executors or administrators, were, in the following cases, held to be entitled under the same designation. 3 Bro. C. C. 224, approved by Lord Rosslyn in 3 Ves. 486; 3 Ves. 146; 19 Ves. 404.

31.—4. The same words were held to mean children, grandchildren, &c., to the exclusion of those persons who technically answer the description of "personal representatives." 3 Ves. 383.

32.—5. A husband or wife may take as such, if there is a manifest intention in the will that they should; and if either be clothed with the character of executor or administrator of the other, the *primâ facie* legal title attaches to the office, which will prevail, unless an intention to the contrary be expressed or clearly apparent in the instrument. See 14 Ves. 382; 18 Ves. 49; 3 Ves. 231; 2 Ves. sen. 84; 3 Atk. 758; 1 Rop. Husb. and Wife, 326; 2 Rop. Husb. and Wife, 64.

33.—§ 8. *The construction of bequests when limited to executors and administrators.* 1. Where personal estate is given to B, his executors and administrators, the law transfers to B the absolute interest in the legacy. 15 Ves. 537; 2 Mad. 155.

34.—2. If no interest were given to B, and the bequest were to his executors and administrators, it should seem that the individual answering the description would be beneficially entitled as *personæ designatæ*, in analogy to the devise of real estate to the heir of B, without a previous limitation to B, whose heir would take by purchase in his own right, and not by force of the word "heir" considered as a term of limitation. 2 Mad. 155. See 8 Com. Dig. Devise of Personal Property, xxxvi.

35.—§ 9. *Legacies to descendants.* 1. A legacy to the descendants of A, will com-

prehend all his children, grandchildren, &c.; and if the will direct the bequest to be divided equally among them, they are entitled to the fund *per capita*. Ambl. 397; 3 Bro. C. C. 369.

36.—§ 10. *Legacies to a family*. 1. The word family, when applied to personal property, is synonymous with "kindred," or "relations;" see 9 Ves. 323. This being the ordinary acceptance of the word family, it may nevertheless be confined to particular relations by the context of the will; or the term may be enlarged by it, so that the expression may, in some cases, mean children, or next of kin, and in others may even include relations by marriage. See 8 Ves. 604; Dy. 333; 5 Ves. 166; Hob. 33; Coop. 122; 5 M. & S. 126; 17 Ves. 263; 1 Taunt. 266; 14 Ves. 488; 9 Ves. 319; 3 Meriv. 689.

37.—§ 11. *Legacies to servants*. 1. To entitle himself to a bequest "to servants," the relation of master and servant must have arisen out of a contract by which the claimant must have formed an engagement which entitled the master to the service of the individual during the whole period, or each and every part of the time for which he contracted to serve. 12 Ves. 114; 2 Vern. 546.

38.—2. To claim as a servant, the legatee must in general be in the actual service of the testator at the time of his death. Still a servant may be considered by a testator as continuing in his employment, and be intended to take under the bequest, although he quitted the testator's house previous to his death, so as to answer the description in the instrument; and to establish which fact declarations of the testator upon the subject cannot be rejected; but testimony that the testator meant a servant notwithstanding his having left the testator's service, to take a legacy bequeathed only to servants in his employment at his death, cannot be received as in direct opposition to the will. 16 Ves. 486, 489.

39.—§ 12. *The different periods of time at which persons answering the descriptions of next of kin, family relations, issue, heirs, descendants and personal representatives, (to whom legacies are given by those terms generally, and without discrimination,) were required to be in esse, for the purpose of participating in the legatory fund*. 1. When the will expresses or clearly shows that a testator in bequeathing to the relations, &c. of a deceased individual, referred to such

of them as were in existence when the will was made, they only will be entitled; as if the bequest was, "I give £1000 to the descendants of the late A B, now living," those descendants only *in esse* at the date of the will can claim the legacy. Ambl. 397.

40.—2. But, in general, a will begins to speak at the death of the testator, and consequently in ordinary cases, relations, next of kin, issue, descendants, &c., living at that period will alone divide the property bequeathed to them by those words. See 1 Ball & Beat. 459; 1 Bro. C. C. 532; 3 Bro. C. C. 224; 5 Ves. 399; 1 Jac. & Walk, 888, n.; 3 Meriv. 689; 5 Binn. 607; 2 Murph. 178.

41.—3. If a testator express, or his intention otherwise appear from his will, that a bequest to his relations, &c., living at the death of a person, or upon the happening of any other event, should take the fund, his next of kin only in existence at the period described, will be entitled, in exclusion of the representatives of such of them as happened to be then dead. 3 Ves. 486; 9 Ves. 325; 1 Atk. 469; 15 Ves. 27; 4 Vin. Abr. 485, pl. 16; 8 Ves. 38; 5 Binn. 606; see 6 Munf. 47.

42.—§ 13. *When the fund given to legatees, by the description of "family," "relations," "next in kin," &c., is to be divided among them either per capita, or per stirpes, or both per stirpes et capita*.

1. Where the testator gives a legacy to his relations generally, if his next of kin be related to him in equal degree, as brothers, there being no children of a deceased brother, the brothers will divide the fund among them in equal shares, or *per capita*; each being entitled in his own right to an equal share. So it would be if all the brothers had died before the testator, one leaving two children, another three, &c., all the nephews and nieces would take in equal shares, *per capita*, in their own rights, and not as representing their parents; because they are sole next of kin, and related to the testator in equal degree. Pre. Ch. 54; and see 1 P. Wms. 595; 1 Atk. 454; 3 P. Wms. 50. But if the testator's next of kin happen not to be related to him in equal degrees, as a brother, and the children of a deceased brother, so as that under the statute the children would take *per stirpes* as representing their parent, namely, the share he would have taken, had he been living; yet if the testator has shown an intention

that his next of kin shall be entitled to his property in equal shares, i. e. *per capita*, the distribution by the statute will be superseded. This may happen where the bequest is to relations, next of kin, &c., to be *equally divided* among them; or by expressions of like import. Forrest. 251; and see 1 Bro. C. C. 33; 8 Serg. & Rawle, 43; 11 Serg. & Rawle, 103; 1 Murph. 383.

43.—2. Where a bequest is to relations, &c., those persons only who are next of kin are entitled, and the statute of distributions is adopted, not only to ascertain the persons who take, but also the proportions and manner in which the property is to be divided; the will being silent upon the subject, if the next of kin of the person described be not related to him in equal degree, those most remote can only claim *per stirpes*, or in right of those who would have been entitled under the statute if they had been living. Hence it appears that taking *per stirpes*, always supposes an inequality in relationship. For example, where a testator bequeaths a legacy to his "relations," or "next of kin," and leaves at his death two children, and three grandchildren, the children of a deceased child; the grandchildren would take their parents' share, that is, one-third *per stirpes* under the statute, as representing their deceased parent. 1 Cox, 235.

44.—3. Where a testator bequeaths personal estate to several persons as tenants in common, with a declaration that upon all or any of their deaths before a particular time, their respective shares shall be equally divided among the issue or descendants of each of them, and they die before the arrival of the period, some leaving children, others grandchildren, and great grandchildren, and others grandchildren and more remote descendants; in such case the issue of each deceased person will take their parents' share *per stirpes*; and such issue, whether children only, or children and grandchildren, &c., will divide each parent's share among them equally *per capita*. 1 Ves. sen. 196.

45.—§ 14. *The effect of a mistake in the names of legatees.* 1. Where the name has been mistaken in a will or deed, it will be corrected from the instrument, if the intention appear in the description of the legatee or donee, or in other parts of the will or deed. For example, if a testator give a bequest to *Thomas* second son of his brother John, when in fact John had no son named *Thomas*, and his second son was called *William*; it was held *William* was entitled.

19 Ves. 381; Coop. 229; and see Ambl. 175; Co. Litt. 3, a; Finch's R. 403; 3 Leon. 18. When a bequest is made to a class of individuals, *nominatim*, and the name or christian name of one of them is omitted, and the name or christian name of another is repeated; if the context of the will show that the repetition of the name was error, and the name of the person omitted was intended to have been inserted, the mistake will be corrected. As where a testator gave his residuary estate to his six grandchildren, by their christian names. The name of *Ann*, one of them, was repeated, and the name of *Elizabeth*, another of them, was omitted. The context of the will clearly showed the mistake which had occurred, and Elizabeth was admitted to an equal share in the bequest. 1 Bro. C. C. 30; see 2 Cox, 186. And as to cases where parol evidence will be received to prove the mistakes in the names or additions of legatees, and to ascertain the proper person, see 3 B. & A. 632 to 642; 6 T. R. 676; 2 P. Wms. 137; 1 Atk. 410; 1 P. Wms. 421; 5 Rep. 68, b; 6 Ves. 42; 7 East, 302; Ambl. 75.

46.—§ 15. *The effect of mistakes in the descriptions of legatees, and the admission of parol evidence in those cases.* 1. Where the description of the legatee is erroneous, the error not having been occasioned by any fraud practiced upon the testator, and there is no doubt as to the person who was intended to be described, the mistake will not disappoint the bequest. Hence if a legacy be given to a person by a correct name, but a wrong description or addition, the mistaken description will not vitiate the bequest, but be rejected; for it is a maxim that *veritas nominis tollit errorem demonstrationis*. Ld. Bac. Max. reg. 25; and see 2 Ves. jr. 589; Ambl. 75; 4 Ves. 808; Plowd. 344; 19 Ves. 400.

47.—2. Wherever a legacy is given to a person under a particular description and character which he himself has falsely assumed; or, where a testator, induced by the false representations of third persons to regard the legatee in a relationship which claims his bounty, bequeaths him a legacy according with such supposed relationship, and no motive for such bounty can be supposed, the law will not, in either case, permit the legatee to avail himself of the description, and therefore he cannot demand his legacy. See 4 Ves. 802; 4 Bro. C. C. 20.

48.—3. The same principle which has established the admissibility of parol evidence to correct errors in naming legatees, autho-

rizes its allowance to rectify mistakes in the description of them. Ambl. 374: 1 Ves. jr. 266; 1 Meriv. 184.

49.—4. If neither the will nor extrinsic evidence is sufficient to dispel the ambiguity arising from the attempt to apply the description of the legatee to the person intended by the testator, the legacy must fail, from the uncertainty of its object. 7 Ves. 508: 6 T. R. 671.

50.—§ 16. *The consequences of imperfect descriptions of, or reference to legatees, appearing upon the face of wills, and when parol evidence is admissible.* These cases occur, 1. When a blank is left for the Christian name of the legatee. 2. When the whole name is omitted. 3. When the testator has merely written the initials of the name; and, 4. When legatees have been once accurately described, but in a subsequent reference to one of them, to take an additional bounty, the person intended is doubtful, from ambiguity in the terms.

51.—1. When a blank is left for the Christian name of the legatee, evidence is admissible to supply the omission. 4 Ves. 680.

52.—2. When the omission consists of the entire name of the legatee, parol evidence cannot be admitted to supply the blank. 2 Ch. Ca. 51; 2 Atk. 239; 3 Bro. C.C. 311.

53.—3. When a legatee is described by the initials of his name only, parol evidence may be given to prove his identity. 3 Ves. 148. When a patent ambiguity arises from an imperfect reference to one of two legatees correctly described in a prior part of the will, parol evidence is admitted to show which of them was intended, so that the additional legacy intended for the one will depend upon the removal of the obscurity by a sound interpretation of the whole will. 3 Atk. 257; and see 2 Ves. 217; 2 Eden, 107.

See further, upon this subject, Lownd on Leg. ch. 4; 1 Roper on Leg. ch. 2; Com. Dig. Chancery, 3 Y; Bac. Abr. h. t.; Vin. Abr. h. t.; Nels. Abr. h. t.; Whart. Dig. Wills, G. P.; Hamm. Dig. 756; Grimké on Exec. ch. 5; Toll. on Executors, ch. 4.

LEGALIS HOMO. A person who stands *rectus in curia*, who possesses all his civil rights. A lawful man. One who stands *rectus in curia*, not outlawed nor infamous. In this sense are the words *probi et legales homines*.

LEGANTINE CONSTITUTIONS. The name of a code of ecclesiastical laws, enacted

in national synods under Pope Gregory IX., and Pope Clement IV., about the years from 1220 to 1230.

LEGATARY. One to whom anything is bequeathed; a legatee. This word is sometimes though seldom used to designate a legate or nuncio.

LEGATION. An embassy; a mission.

2. All persons attached to a foreign legation, lawfully acknowledged by the government of this country, whether they are ambassadors, envoys, ministers, or attaches, are protected by the act of April 30, 1790, 1 Story's L. U. S. 83, from violence, arrest or molestation. 1 Dall. 117; 1 W. C. C. R. 232; 11 Wheat. 467; 2 W. C. C. Rep. 435; 4 W. C. C. R. 531; 1 Miles, 366; 1 N & M. 217; 1 Bald. 240; Wheat. Int. Law, 167. Vide *Ambassador*; *Envoy*; *Minister*.

LEGATORY, dead man's part or share. (q. v.) The third part of a freeman's personal estate, which by the custom of London, in case he had a wife and children, the freeman might always have disposed of by will. Bac. Ab. Customs of London, D 4.

LEGISLATIVE POWER. The authority, under the constitution, to make laws, and to alter or repeal them.

LEGISLATOR. One who makes laws.

2. In order to make good laws, it is necessary to understand those which are in force; the legislator ought, therefore, to be thoroughly imbued with a knowledge of the laws of his country, their advantages and defects; to legislate without this previous knowledge is to attempt to make a beautiful piece of machinery with one's eye shut. There is unfortunately too strong a propensity to multiply our laws and to change them. Laws must be yearly made, for the legislatures meet yearly, but whether they are always for the better may be well questioned. A mutable legislation is always attended with evil. It renders the law uncertain, weakens its effects, hurts credit, lessens the value of property, and as they are made frequently, in consequence of some extraordinary case, laws sometimes operate very unequally. Vide 1 Kent, Com. 227; and Le Magazin Universel, tome ii. p. 227, for a good article against excessive legislation; Matter, De l'Influence des Lois sur les Mœurs, et de l'Influence des Mœurs sur les Lois.

LEGISLATURE, government. That body of men in the state which has the power of making laws.

2. By the Constitution of the United States, art. 1, s. 1, all legislative powers granted by it are vested in a congress of the United States, which shall consist of a senate and house of representatives.

3. It requires the consent of a majority of each branch of the legislature in order to enact a law, and then it must be approved by the president of the United States, or in case of his refusal, by two-thirds of each house. Const. U. S. art. 1, s. 7, 2.

4. Most of the constitutions of the several states, contain provisions nearly similar to this. In general, the legislature will not exercise judicial functions; yet the use of such power, upon particular occasions, is not without example. Vide *Judicial*.

LEGITIMACY. The state of being born in wedlock; that is, in a lawful manner.

2. Marriage is considered by all civilized nations as the only source of legitimacy; the qualities of husband and wife must be possessed by the parents in order to make the offspring legitimate; and furthermore the marriage must be lawful, for if it is void ab initio, the children who may be the offspring of such marriage are not legitimate. 1 Phil. Ev. Index, h. t.; Civ. Code L. art. 203 to 216.

3. In Virginia, it is provided by statute of 1787, "that the issue of marriages deemed null in law, shall nevertheless be legitimate." 3 Hen. & Munf. 228, n.

4. A conclusive presumption of legitimacy arises from marriage and cohabitation; and proof of the mother's irregularities will not destroy this presumption: *pater est quem nuptiæ demonstrant*. To rebut this presumption, circumstances must be shown, which render it impossible that the husband should be the father, as impotency and the like. 3 Bouv. Inst. n. 3062. Vide *Bastard*; *Bastardy*; *Paternity*; *Pregnancy*.

LEGITIMATE. That which is according to law; as, legitimate children, are lawful children, born in wedlock, in contradistinction to bastards; legitimate authority, or lawful power, in opposition to usurpation.

LEGITIMATION. The act of giving the character of legitimate children to those who were not so born.

2. In Louisiana, the Civil Code, art. 217, enacts that "children born out of marriage, except those who are born of an incestuous or adulterous connexion, may be legitimated by the subsequent marriage of their father and mother whenever

the latter have legally acknowledged them for their children, either before their marriage, or by the contract of marriage itself."

3. In most of the other states the character of legitimate children is given to those who are not so, by special acts of assembly. In Georgia, real estate may descend from a mother to her illegitimate children and their representatives, and from such child, for want of descendants, to brothers and sisters, born of the same mother, and their representatives. Prince's Dig. 202. In Alabama, Kentucky, Mississippi, Vermont and Virginia, subsequent marriages of parents, and recognition by the father, legitimize an illegitimate child; and in Massachusetts, for all purposes except inheriting from their kindred. Mass. Rev. St. 414.

4. The subsequent marriage of parents legitimizes the child in Illinois, but he must be afterwards acknowledged. The same rule seems to have been adopted in Indiana and Missouri. An acknowledgment of illegitimate children, of itself, legitimizes in Ohio, and in Michigan and Mississippi marriage alone between the reputed parents has the same effect. In Maine, a bastard inherits to one who is legally adjudged, or in writing owns himself to be the father. A bastard may be legitimated in North Carolina, on application of the putative father to court, either where he has married the mother, or she is dead, or married another, or lives out of the state. In a number of the states, namely, in Alabama, Connecticut, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and Virginia, a bastard takes by descent from his mother, with modifications regulated by the laws of these states. 2 Hill, Ab. s. 24 to 35, and the authorities there referred to. Vide *Bastard*; *Bastardy*; *Descent*.

LEGITIME, civil law. That portion of a parent's estate of which he cannot disinherit his children, without a legal cause.

2. The civil code of Louisiana declares, that donations *inter vivos* or *mortis causâ* cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one half if he leaves two children; and one-third if he leaves three or a greater number. Under the name of children are included descendants of whatever degree they may be; it must be under-

stood that they are only counted for the child they represent. Civil Code of Lo. art. 1480.

3. Donation *inter vivos* or *mortis causâ*, cannot exceed two-thirds of the property if the disposer having no children have a father, mother, or both. Id. art. 1481. Where there are no descendants, and in case of the previous decease of the father and mother, donations *inter vivos* and *mortis causâ*, may, in general, be made of the whole amount of the property of the disposer. Id. art. 1483. The Code Civil makes nearly similar provisions. Code Civ. L. 3, t. 2, c. 3, s. 1, art. 913 to 919.

4. In Holland, Germany, and Spain, the principles of the Falcidian law, more or less limited, have been generally adopted. Coop. Just. 516.

5. In the United States, other than Louisiana, and in England, there is no restriction on the right of bequeathing. But this power of bequeathing did not originally extend to *all* a man's personal estate; on the contrary, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. Glanv. l. 2, c. 5; Bract. l. 2, c. 26. The shares of the wife and children were called their reasonable part. 2 Bl. Comm. 491-2. See *Death's part; Falcidian law*.

LENDER, contracts. He from whom a thing is borrowed.

2. The contract of loan confers rights, and imposes duties on the lender. 1. The lender has the right to revoke the loan at his mere pleasure; 9 Cowen, R. 687; 8 Johns. Rep. 432; 1 T. R. 480; 2 Campb. Rep. 464; and is deemed the owner or proprietor of the thing during the period of the loan; so that an action for a trespass or conversion will lie in favor of the lender against a stranger, who has obtained a wrongful possession, or has made a wrongful conversion of the thing loaned; as mere gratuitous permission to a third person to use a chattel does not, in contemplation of the common law, take it out of the posses-

sion of the owner. 11 Johns. Rep. 285; 7 Cowen, Rep. 753; 9 Cowen, Rep. 687; 2 Saund. Rep. 47 b; 8 Johns. Rep. 432; 13 Johns. Rep. 141, 561; Bac. Abr. Trespass, C 2; Id. Trover, C 2. And in this the civil agrees with the common law. Dig. 13, 6, 6, 8; Pothier, Prêt à Usage, ch. 1, § 1, art. 2, n. 4; art. 3, n. 9; Ayliffe's Pand. B. 4, t. 16, p. 517; Domat, B. 1, t. 5, § 1, n. 4; and so does the Scotch law. Ersk. Pr. Laws of Scotl. B. 3, t. 1, § 8.

3.—2. In the civil law, the first obligation on the part of the lender, is to suffer the borrower to use and enjoy the thing loaned during the time of the loan, according to the original intention. Such is not the doctrine of the common law. 9 Cowen, Rep. 687. The lender is obliged, by the civil law, to reimburse the borrower the extraordinary expenses to which he has been put for the preservation of the thing lent. And in such a case, the borrower would have a lien on the thing, and may detain it, until these extraordinary expenses are paid; and the lender cannot, even by an abandonment of the thing to the borrower, excuse himself from re-payment; nor is he excused by the subsequent loss of the thing by accident, nor by a restitution of it by the borrower, without insisting upon re-payment. Pothier, Prêt à Usage, ch. 3, n. 82, 83; Dig. 13, 6, 18, 4; Ersk. Pr. Laws, of Scotl. B. 3, t. 1, § 9. What would be decided at common law does not seem very clear. Story on Bailm. § 274. Another case of implied obligation on the part of the lender by the civil law is, that he is bound to give notice to the borrower of the defects of the thing loaned; and if he does not and conceals them, and any injury occurs to the borrower thereby, the lender is responsible. Dig. 13, 6, 98, 3; Poth. Prêt à Usage, n. 84; Domat, Liv. 1, t. 5, s. 3, n. 3. In the civil law there is also an implied obligation on the part of the lender where the thing has been lost by the borrower, and after he has paid the lender the value of it, the thing has been restored to the lender; in such case the lender must return to the borrower either the price or thing. Dig. 13, 6, 17, 5; Poth. Id. n. 85. "The common law seems to recognize the same principles, though," says Judge Story, Bailm. § 276, "it would not perhaps be easy to cite a case on a gratuitous loan directly on the point." See *Borrower; Commodate*; Story, Bailm. ch. 4; Domat. Liv. 2, tit. 5. 1 Bouv. Inst. n. 1078, et seq.

LESION, contracts. In the civil law this term is used to signify the injury suffered, in consequence of inequality of situation, by one who does not receive a full equivalent for what he gives in a commutative contract.

2. The remedy given for this injury, is founded on its being the effect of implied error or imposition; for in every commutative contract, equivalents are supposed to be given and received. Louis. Code, 1854. Persons of full age, however, are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive. Poth. Oblig. P. 1, c. 1, s. 1, art. 3, § 4. But minors are admitted to restitution, not only against any excessive inequality, but against any inequality whatever. Poth. Oblig. P. 1, c. 1, s. 1, art. 3, § 5; Louis. Code, art. 1858.

3. Courts of chancery relieve upon terms of redemption and set aside contracts entered into by expectant heirs dealing for their expectancies, on the ground of mere inadequacy of price. 1 Vern. 167; 2 Cox, 80; 2 Cas. in Ch. 136; 1 Vern. 141; 2 Vern. 121; 2 Freem. 111; 2 Vent. 359; 2 Vern. 14; 2 Rep. in Ch. 396; 1 P. W. 312; 1 Bro. C. C. 7; 3 P. Wms. 393, n.; 2 Atk. 183; 2 Ves. 125; 1 Atk. 301; 1 Wils. 286; 1 Wils. 320; 4 Bro. P. C. ed. Toml. 198; 1 Bro. C. C. 1; 16 Ves. 512; Sugd. on Vend. 231, n. k.; 1 Ball & B. 330; Wightw. 25; 3 Ves. & Bea. 117; 2 Swanst. R. 147, n.; Fonb. notes to the Treatise of Equity, B. 1, c. 2, s. 9. A contract cannot stand where the party has availed himself of a confidential situation, in order to obtain some selfish advantage. Note to Crowe v. Ballard. 1 Ves. jun. 125; 1 Hov. Supp. 66, 7. Note to Wharton v. May. 5 Ves. 27; 1 Hov. Supp. 378. See *Catching bargain; Fraud; Sale.*

LESSEE. He to whom a lease is made. The subject will be considered by taking a view, 1. Of his rights. 2. Of his duties.

2.—1. He has a right to enjoy the premises leased for the term mentioned in the lease, and to use them for the purpose agreed upon. He may, unless, restrained by the covenants in the lease, either assign it, or underlet the premises. 1 Cruise, Dig. 174. By an assignment of the lease is meant the transfer of all the tenant's interest in the estate to another person; on the contrary, an underletting is but a par-

tial transfer of the property leased, the lessee retaining a reversion to himself.

3.—2. The duties of the lessee are numerous. First, he is bound to fulfil all express covenants he has entered into in relation to the premises leased; and, secondly, he is required to fulfil all implied covenants, which the relation of lessee imposes upon him towards the lessor. For example, he is bound to put the premises to no other use than that for which it was hired; when a farm is let to him for common farming purposes, he cannot open a mine and dig ore which may happen to be in the ground; but if the mine has been opened, it is presumed both parties intended it should be used, unless the lessee were expressly restrained. 1 Cruise, Dig. 132. He is required to use the property in a tenant-like and proper manner; to take reasonable care of it, and to restore it at the end of his term, subject only to the deterioration produced by ordinary wear and the reasonable use for which it was demised. 12 M. & W. 827. Although he is not bound, in the absence of an express covenant, to rebuild in case of destruction by fire or other accident, yet he must keep the house in a habitable state, if he received it in good order. See *Repairs*. The lessee is required to restore the property to the lessor at the end of the term.

4. The lessee remains chargeable, after an assignment of his term, as before, unless the lessor has accepted the assignee; and even then he continues liable in covenant on an express covenant, as for repairs or to pay rent; 2 Keb. 640; but not for the performance of an implied one, or, as it is usually termed, a covenant in law. By the acceptance, he is discharged from debt for arrears of future rent. Cro. Jac. 309, 334; Ham. on Parties, 129, 130.

Vide *Estate for years; Lease; Notice to quit; Tenant for years; Underlease.*

LESSOR, contr. He who grants a lease. Civ. Code of L. art. 2647.

LESTAGE, Eng. law. Duties paid for unloading goods in port. Harg. L. Tr. 75.

LET. Hinderance, obstacle, obstruction; as, without let, molestation or hinderance.

TO LET. To hire, to lease; to grant the use and possession of something for a compensation.

2. This term is applied to real estate, and the words to hire are more commonly used when speaking of personal estate. See *Hire, Hirer, and Letter.*

3. Letting is very similar to selling; the difference consists in this; that instead of selling the thing itself, the letter sells only the use of it.

LETTER, *com. law, crim. law.* An epistle; a despatch; a written message, usually on paper, which is folded up and sealed, sent by one person to another.

2. A letter is always presumed to be sealed, unless the presumption be rebutted. 1 Caines, R. 582.

3. This subject will be considered by 1st. Taking a view of the law relating to the transmission of letters through the post office; and, 2. The effect of letters in making contracts. 3. The ownership of letters sent and received.

4.—§ 1. Letters are commonly sent through the post office, and the law has carefully provided for their conveyance through the country, and their delivery to the persons to whom they are addressed. The act to reduce into one the several acts establishing and regulating the post office department, section 21, 3 Story's Laws United States, 1991, enacts, that if any person employed in any of the departments of the post office establishment, shall unlawfully detain, delay, or open, any letter, packet, bag, or mail of letters, with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or, if any such person shall secrete, embezzle, or destroy, any letter or packet entrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to money, as hereinafter described, every such offender, being thereof duly convicted, shall, for every such offence, be fined, not exceeding three hundred dollars, or imprisoned, not exceeding six months, or both, according to the circumstances and aggravations of the offence. And if any person, employed as aforesaid, shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters, with which he or she shall be entrusted, or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, bill of exchange, warrant of the treasury of the United States, note of assignment of stock in the funds, letters of attorney for receiving annuities or dividends, or for selling stock in the funds, or for receiving the interest thereof, or any letter of credit, or note for, or relating to, payment of moneys,

or any bond, or warrant, draft, bill, or promissory note, covenant, contract, or agreement whatsoever, for, or relating to, the payment of money, or the delivery of any article of value, or the performance of any act, matter, or thing, or any receipt, release, acquittance, or discharge of, or from, any debt, covenant, or demand, or any part thereof, or any copy of any record of any judgment, or decree, in any court of law or chancery, or any execution which may have issued thereon; or any copy of any other record, or any other article of value, or any writing representing the same; or if any such person, employed as aforesaid, shall steal, or take, any of the same out of any letter, packet, bag, or mail of letters, that shall come to his or her possession, such person shall, on conviction for any such offence, be imprisoned not less than ten years, nor exceeding twenty-one years; and if any person who shall have taken charge of the mails of the United States, shall quit or desert the same before such person delivers it into the post office kept at the termination of the route, or some known mail carrier, or agent of the general post office, authorized to receive the same, every such person, so offending, shall forfeit and pay a sum not exceeding five hundred dollars, for every such offence; and if any person concerned in carrying the mail of the United States, shall collect, receive, or carry any letter, or packet, or shall cause or procure the same to be done, contrary to this act, every such offender shall forfeit and pay for every such offence a sum not exceeding fifty dollars.

5.—§ 2. Most contracts may be formed by correspondence; and cases not unfrequently arise where it is difficult to say whether the concurrence of the will of the contracting parties took place or not. In order to form a contract both parties must concur at the same time, or there is no agreement. Suppose, for example, that Paul of Philadelphia, is desirous of purchasing a thousand bales of cotton, and offers by letter to Peter of New Orleans, to buy them from him at a certain price; but on the next day he changes his mind, and then he writes to Peter that he withdraws his offer; or on the next day he dies; in either case, there is no contract, because Paul did not continue in the same disposition to buy the cotton, at the time that his offer was accepted. The precise moment when the consent of both parties

is perfect, is, in strictness, when the person who made the offer becomes acquainted with the fact that it has been accepted. But this may be presumed from circumstances. The acceptance must be of the same precise terms without any variance whatever. 4 Wheat. 225; see 1 Pick. 278; 10 Pick. 326; 6 Wend. 103.

6.—§ 3. A letter received by the person to whom it is directed, is the qualified property of such person; but where it is of a private nature, the receiver has no right to publish it without the consent of the writer, unless under very extraordinary circumstances; as, for example, when it is requisite to the defence of the character of the party who received it. 2 Ves. & B. 19; 2 Atk. 542; Amb. 737; 1 Ball. & B. 207; 1 Mart. (Lo.) R. 297; Denisart, verbo *Lettres Missives*. Vide *Dead Letter*; *Jeopardy*; *Mail*; *Newspaper*; *Postage*; *Post Master General*.

LETTER, *contracts*. In the civil law, *locator*, and in the French law, *locateur*, *loueur*, or *bailleur*, is he who, being the owner of a thing, lets it out to another for hire or compensation. See *Hirer*; *Locator*; *Conductor*; Story on Bailm. § 369.

2. According to the French and civil law, in virtue of the contract, the letter of a thing to hire impliedly engages that the hirer shall have the full use and enjoyment of the thing hired, and that he will fulfil his own engagements and trusts in respect to it, according to the original intention of the parties. This implies an obligation to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer during the period of the bailment; to do no act which shall deprive the hirer of the thing; to warrant the title and possession to the hirer, to enable him to use the thing or to perform the service; to keep the thing in suitable order and repair for the purpose of the bailment; and finally to warrant the thing free from any fault inconsistent with the use of it. These are the main obligations deduced from the nature of the contract; and they seem generally founded on unexceptionable reasoning. Pothier, *Louage*, n. 53; Id. n. 277; Domat, B. 1, tit. 4, § 3; Code Civ. of L. tit. 9, c. 2, s. 2. It is difficult to say how far (reasonable as they are in a general sense) these obligations are recognized in the common law. In some respects the common law certainly differs. See *Repairs*; Dougl. 744, 748; 1 Saund. 321, 323, and

ibid. note 7; 4 T. R. 318; 1 Bouv. Inst. n. 980 et seq.

LETTER, *civil law*. The answer which the prince gave to questions of law which had been submitted to him by magistrates, was called *letters* or *epistles*. See *Rescripts*.

LETTER OF ADVICE, *comm. law*. A letter containing information of any circumstances unknown to the person to whom it is written; generally informing him of some act done by the writer of the letter.

2. It is usual and perfectly proper for the drawer of a bill of exchange to write a letter of advice to the drawee, as well to prevent fraud or alteration of the bill, as to let the drawee know what provision has been made for the payment of the bill. Chitt. Bills, 185. (ed. of 1836.)

LETTER OF ATTORNEY, *practice*. A written instrument under seal, by which one or more persons, called the constituents, authorize one or more other persons called the attorneys, to do some lawful act by the latter, for or instead, and in the place of the former. 1 Moody, Cr. Cas. 52, 70.

2. The authority given in the letter of attorney is either general, as to transact all the business of the constituent; or special, as to do some special business, particularly named, as to collect a debt.

3. It is revocable or irrevocable; the former when no interest is conveyed to the attorney, or some other person. It is irrevocable when the constituent conveys a right to the attorney in the matter which is the subject of it; as, when it is given as part security. 2 Esp. R. 565. Civil Code of Lo. art. 2954 to 2970.

LETTER BOOK, *commerce*. A book containing the copies of letters written by a merchant or trader to his correspondents.

2. After notice to the plaintiff to produce a letter which he admitted to have received from the defendant, it was held that an entry by a deceased clerk, in a letter book professing to be a copy of a letter from the defendant to the plaintiff of the same date, was admissible evidence of the contents, proof having been given, that according to the course of business, letters of business written by the plaintiff were copied by this clerk and then sent off by the post. 3 Campb. R. 305. Vide 1 Stark Ev. 356; Bouv. Inst. n. 3139.

LETTER CARRIER. A person employed to carry letters from the post office to the persons to whom they are addressed.

2. The act of congress of March 3, 1851, Statutes at Large of U. S. by Minot, 591, directs, § 10, That it shall be in the power of the postmaster general, at all post offices where the postmasters are appointed by the president of the United States, to establish post routes within the cities or towns, to provide for conveying letters to the post office by establishing suitable and convenient places of deposit, and by employing carriers to receive and deposit them in the post office; and at all such offices it shall be in his power to cause letters to be delivered by suitable carriers, to be appointed by him for that purpose, for which not exceeding one or two cents shall be charged, to be paid by the person receiving or sending the same, and all sums so received shall be paid into the post office department: *Provided*, The amount of compensation allowed by the postmaster general to carriers shall in no case exceed the amount paid into the treasury by each town or city, under the provisions of this section.

3. It is further enacted by c. xxi. s. 2, That the postmaster general shall be, and he is hereby, authorized to appoint letter carriers for the delivery of letters from any post office in California or Oregon, and to allow the letter carriers who may be appointed at any such post office to demand and receive such sum for all letters, newspapers, or other mailable matter delivered by them, as may be recommended by the postmaster for whose office such letter carrier may be appointed, not exceeding five cents for every letter, two cents for every newspaper, and two cents for every ounce of other mailable matter; and the postmaster general shall be, and he is hereby, authorized to empower the special agents of the post office department in California and Oregon to appoint such letter carriers in their districts respectively, and to fix the rates of their compensation within the limits aforesaid, subject to, and until the final action of, the postmaster general thereon. And such appointments may be made, and rates of compensation modified from time to time, as may be deemed expedient; and the rates of compensation may be fixed and graduated in respect to the distance of the place of delivery from the post office for which such carriers are appointed; but the rate of compensation of any such letter carrier shall not be changed after his appointment, except by the order of the postmaster general; and such letter carriers

shall be subject to the provisions of the forty-first section of the act entitled "An Act to change the organization of the post office department, and to provide more effectually for the settlement of the accounts thereof," approved July second, eighteen hundred and thirty-six; except in cases otherwise provided for in this act.

LETTER OF CREDENCE, *international law*. A written instrument addressed by the sovereign or chief magistrate of a state, to the sovereign or state to whom a public minister is sent, certifying his appointment as such, and the general object of his mission, and requesting that full faith and credit may be given to what he shall do and say on the part of his court.

2. When it is given to an ambassador, envoy, or minister accredited to a sovereign, it is addressed to the sovereign or state to whom the minister is delegated; in the case of a chargé d'affaires, it is addressed by the secretary or minister of state charged with the department of foreign affairs to the minister of foreign affairs of the other government. Wheat. *International Law*, pt. 3, c. 1, § 7; Wicquefort, *de l'Ambassadeur*, l. 1, § 15.

LETTER OF CREDIT, *contracts*. An open or sealed letter, from a merchant in one place, directed to another, in another place or country, requiring him that if a person therein named, or the bearer of the letter, shall have occasion to buy commodities, or to want money to any particular or unlimited amount, either to procure the same, or to pass his promise, bill, or other engagement for it, the writer of the letter undertaking to provide him the money for the goods, or to repay him by exchange, or to give him such satisfaction as he shall require, either for himself or the bearer of the letter. 3 Chit Com., Law, 336; and see 4 Chit. Com. Law, 259, for a form of such letter.

2. These letters are either general or special; the former is directed to the writer's friends or correspondents generally, where the bearer of the letter may happen to go; the latter is directed to some particular person. When the letter is presented to the person to whom it is addressed, he either agrees to comply with the request, in which case he immediately becomes bound to fulfil all the engagements therein mentioned; or he refuses; in which case the bearer should return it to the giver without any other proceeding, unless, indeed, the merchant to whom the letter is directed is a debtor of the merchant who gave the letter, in which

case he should procure the letter to be protested. 3 Chit. Com. Law, 337; Malyn, 76; 1 Beaw. Lex Mer. 607; Hall's Adm. Pr. 14; 4 Ohio R. 197; 1 Wilc. R. 510.

3. The debt which arises on such letter, in its simplest form, when complied with, is between the mandatory and the mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. 1. When the letter is purchased with money by the person wishing for the foreign credit; or is granted in consequence of a check on his cash account; or procured on the credit of securities lodged with the person who granted it; or in payment of money due by him to the payee; the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter; but raises no debt to the person who pays on the letter, against him to whom the money is paid. 2. When not so purchased, but truly an accommodation, and meant to raise a debt on the person accommodated, the engagement generally is, to see paid any advances made to him, or to guaranty any draft accepted or bill discounted; and the compliance with the mandate, in such case, raises a debt, both against the writer of the letter, and against the person accredited. 1 Bell's Com. 371, 5th ed. The bearer of the letter of credit is not considered bound to receive the money; he may use the letter as he pleases, and he contracts an obligation only by receiving the money. Poth. Contr. de Change, 237.

LETTER OF LICENSE, contracts. An instrument or writing made by creditors to their insolvent debtor, by which they bind themselves to allow him a longer time than he had a right to, for the payment of his debts; and that they will not arrest or molest him in his person or property till after the expiration of such additional time.

LETTER OF MARQUE AND REPRISAL, war. A commission granted by the government to a private individual, to take the property of a foreign state, or of the citizens or subjects of such state; as a reparation for an injury committed by such state, its citizens or subjects. A vessel loaded with merchandise, on a voyage to a friendly port, but armed for its own defence, in case of attack by an enemy, is also called a *letter of marque*. 1 Boul. Paty, tit. 3, s. 2, p. 300.

2. By the constitution, art. 1, s. 8, cl. 11, congress have power to grant letters of marque and reprisal. Vide Chit. Law of Nat. 73; 1 Black. Com. 251; Vin. Ab. Prerogative, N a; Com. Dig. Prerogative, B 4; Molloy, B. 1, c. 2, s. 10; 2 Wooddes. 440; 5 Rob. Rep. 9; 5 Id. 360; 2 Rob. Reb. 224. And vide *Reprisal*.

LETTER MISSIVE, Engl. law. After a bill has been filed against a peer or peeress or lord of parliament, a petition is presented to the lord chancellor for his letter, called a letter missive, which requests the defendant to appear and answer to the bill. A neglect to attend to this, places the defendant, in relation to such suit, on the same ground as other defendants, who are not peers, and a subpoena may then issue. Newl. Pr. 9; 2 Madd. Ch. Pr. 196; Coop. Eq. Pl. 16.

LETTER OF RECALL. A written document addressed by the executive of one government to the executive of another, informing the latter that a minister sent by the former to him, has been recalled.

LETTER OF RECOMMENDATION, com. law. An instrument given by one person to another, addressed to a third, in which the bearer is represented as worthy of credit. 1 Bell's Com. 371, 5th ed.; 3 T. R. 51; 7 Cranch, R. 69; Fell on Guar. c. 8; 6 Johns. R. 181; 13 Johns. R. 224; 1 Day's Cas. Er. 22; and the article *Recommendation*.

LETTER OF RECREDENTIALS. A document delivered to a minister, by the secretary of state of the government to which he was accredited. It is addressed to the executive of the minister's country. This is in reply to the *letter of recall*.

LETTERS CLOSE, Engl. law. Close letters are grants of the king, and being of private concern, they are thus distinguished from letters patent.

LETTERS AD COLLIGENDUM BONA DEFUNCTI, practice. In default of the representatives and creditors to administer to the estate of an intestate, the officer entitled to grant letters of administration, may grant to such person as he approves, *letters to collect the goods of the deceased*, which neither make him executor nor administrator; his only business being to collect the goods and keep them in his safe custody. 2 Bl. Com. 505.

LETTERS PATENT. The name of an instrument granted by the government to convey a right to the patentee; as, a patent for a tract of land; or to secure to him a

right which he already possesses, as, a patent for a new invention or discovery. Letters patent are matter of record. They are so called because they are not sealed up, but are granted open. *Vide Patent.*

LETTERS OF REQUEST, *Eng. eccl. law.* An instrument by which a judge of an inferior court waives or remits his own jurisdiction in favor of a court of appeal immediately superior to it.

2. Letters of request, in general, lie only where an appeal would lie, and lie only to the next immediate court of appeal, waiving merely the primary jurisdiction to the proper appellate court, except letters of request from the most inferior ecclesiastical court, which may be direct to the court of arches, although one or two courts of appeal may, by this, be ousted of their jurisdiction as courts of appeal. 2 Addams, R. 406. The effect of letters of request is to give jurisdiction to the appellate court in the first instance. *Id.* See a form of letters of request in 2 Chit. Pr. 498, note *h*.

LETTERS ROGATORY. A letter rogatory is an instrument sent in the name and by the authority of a judge or court to another, requesting the latter to cause to be examined, upon interrogatories filed in a cause depending before the former, a witness who is within the jurisdiction of the judge or court to whom such letters are addressed. In letters rogatory there is always an offer, on the part of the court whence they issued, to render a similar service to the court to which they may be directed whenever required. *Pet. C. C. Rep.* 236.

2. Though formerly used in England in the courts of common law, 1 Roll. Ab. 530, pl. 13, they have been superseded by commissions of *Dedimus potestatem*, which are considered to be but a feeble substitute. *Dunl. Pr.* 223, n.; *Hall's Ad. Pr.* 37. The courts of admiralty use these letters, which are derived from the civil law, and are recognized by the law of nations. See *Fœlix, Dr. Intern.* liv. 2, t. 4, p. 300; *Denisart, h. t.*

LETTERS TESTAMENTARY, AND OF ADMINISTRATION. It is proposed to consider, 1. Their different kinds. 2. Their effect.

2.—§ 1. *Their different kinds.* 1. Letters testamentary. This is an instrument in writing, granted by the judge or officer having jurisdiction of the probate of wills, under his hand and official seal, making known that on the day of the date of the said letters, the last will of the (testator,

naming him,) was duly proved before him; that the testator left goods, &c., by reason, whereof, and the probate of the said will, he certifies "that administration of all and singular, the goods, chattels, rights and credits of the said deceased, any way concerning his last will and testament, was committed to (the executor, naming him,) in the said testament named." 2. Letters of administration may be described to be an instrument in writing, granted by the judge or officer having jurisdiction and power of granting such letters, thereby giving (the administrator, naming him,) "full power to administer the goods, chattels, rights and credits, which were of the said deceased, in the county or district in which the said judge or officer has jurisdiction; as also to ask, collect, levy, recover and receive the credits whatsoever, of the said deceased, which at the time of his death were owing, or did in any way belong to him, and to pay the debts in which the said deceased stood obliged, so far forth as the said goods and chattels, rights and credits will extend, according to the rate and order of law."

3. Letters of administration *pendente lite*, are letters granted during the pendency of a suit in relation to a paper purporting to be the last will and testament of the deceased. 4. Letters of administration *de bonis non*, are granted, where the former executor or administrator did not administer all the personal estate of the deceased, and where he is dead or has been discharged or dismissed. 5. Letters of administration, *durante minori ætate*, are granted where the testator, by his will, appoints an infant executor, who is incapable of acting on account of his infancy. Such letters remain in force until the infant arrives at an age to take upon himself the execution of the will. *Com. Dig. Administration, F*; *Off. Ex.* 215, 216. And see 6 Rep. 67, b.; 5 Rep. 29, a; 11 Vin. Abr. 103; *Bac. Ab. h. t.* 6. Letters of administration *durante absentia*, are granted when the executor happens to be absent at the time when the testator died, and it is necessary that some person should act immediately in the management of the affairs of the estate.

3.—§ 2. *Of their effect.* 1. Generally. 2. Of their effect in the different states, when granted out of the state in which legal proceedings are instituted.

4.—1. Letters testamentary are conclusive as to personal property, while they remain unrevoked; as to realty they are

merely *prima facie* evidence of right. 3 Binn. 498; Gilb. Ev. 66; 6 Binn. 409; Bac. Abr. Evidence, F. See 2 Binn. 511. Proof that the testator was insane, or that the will was forged, is inadmissible. 16 Mass. 433; 1 Lev. 236. But if the nature of his plea allow the defendant to enter into such proof, he may show that the seal of the supposed probate has been forged, or that the letters have been obtained by surprise; 1 Lev. 136; or been revoked; 15 Serg. & Rawle, 42; or that the testator is alive. 15 Serg. & Rawle, 42; 3 T. R. 130.

5.—2. The effect of letters testamentary, and of administration granted, in some one of the United States, is different in different states. A brief view of the law on this subject, will here be given, taking the states in alphabetical order.

6. *Alabama*. Administrators may sue upon letters of administration granted in another state, where the intestate had no known place of residence in Alabama at the time of his death, and no representative has been appointed in the state; but before rendition of the judgment, he must produce to the court his letters of administration, authenticated according to the laws of the United States, and the certificate of the clerk of some county court in this state, that the letters have been recorded in his office. Before he is entitled to the money on the judgment, he must also give bond, payable to the judge of the court where the judgment is rendered, for the faithful administration of the money received. Aiken's Dig. 183; Toulm. Dig. 342.

7. *Arkansas*. When the deceased had no residence in Arkansas, and he devised lands by will, or where the intestate died possessed of lands, letters testamentary or of administration shall be granted in the county where the lands lie, or of one of them, if they lie in several counties; and if the deceased had no such place of residence and no lands, such letters may be granted in the county in which the testator or intestate died, or where the greater part of his estate may be. Rev. Stat. c. 4, s. 2.

8. *Connecticut*. Letters testamentary issued in another state, are not available in this. 3 Day, 303. Nor are letters of administration. 3 Day, 74; and see 2 Root, 462.

9. *Delaware*. By the act of 1721, 1 State Laws, 82, it is declared in substance, that when any person shall die, leav-

ing *bona notabilia*, in several counties in the state and in Pennsylvania or elsewhere; and any person not residing in the state, obtains letters of administration out of the state, the deceased being indebted to any of the inhabitants of the state, for a debt contracted within the same, to the value of £20, then, and in such case, such administrator, before he can obtain any judgment in any court of record within the state against any inhabitant thereof, by virtue of such letters of administration, is obliged to file them with some of the registers in this state; and must enter into bonds with sufficient sureties, who have visible estates here, with condition to pay and satisfy all such debts as were owing by the intestate at the time of his death to any person residing in this state, so far as the effects of the deceased in this state will extend. By the act of June 16, 1769, 1 State Laws, 448, it is enacted in substance that any will in writing made by a person residing out of the state, whereby any lands within the state are devised, which shall be proved in the chancery in England, Scotland, Ireland, or any colony, plantation, or island in America, belonging to the king of Great Britain, or in the hustings, or mayor's court, in London, or in some manor court, or before such persons as have power or authority at the time of proving such wills, in the places aforesaid, to take probates of wills, shall be good and available in law for granting the lands devised, as well as of the goods and chattels bequeathed by such will. The copies of such will, and of the bill, answer, depositions and decree, where proved in any court of chancery, or copies of such wills and the probate thereof, where proved in any other court, or in any office as aforesaid, being transmitted to this state, and produced under the public or common seal of the court or office where the probate is taken, or under the great seal of the kingdom, colony, plantation or island, within which such will is proved, (except copies of such wills and probates as shall appear to be revoked,) are declared to be matter of record, and to be good evidence in any court of law or equity in this state, to prove the gift or devise made in such will; and such probates are declared to be sufficient to enable executors to bring their actions within any court within this state, as if the same probates or letters testamentary were granted here, and produced under the seal of any of the registers' offices within this

state. By the 3d section of the act, it is declared that the copies of such wills and probates so produced and given in evidence, shall not be returned by the court to the persons producing them, but shall be recorded in the office of the recorder of the county where the same are given in evidence, at the expense of the party producing the same.

10. *Florida.* Copies of all wills, and letters testamentary and of administration, heretofore recorded in any public office of record in the state, when duly certified by the keeper of said records, shall be received in evidence in all courts of record in this state; and the probate of wills granted in any of the United States or of the territories thereof, in any foreign country or state, duly authenticated and certified according to the laws of the state or territory, or of the foreign country or state, where such probate may have been granted, shall likewise be received in evidence in all courts of record in this state.

11. *Georgia.* To enable executors and administrators to sue in Georgia, the former must take out letters testamentary in the county where the property or debt is; and administrators, letters of administration. Prince's Dig. 238; Act of 1805, 2 Laws of Geo. 268.

12. *Illinois.* Letters testamentary must be taken out in this state, and when the will is to be proved, the original must be produced; administrators of other states must take out letters in Illinois, before they can maintain an action in the courts of the state. 3 Griff. L. R. 419.

13. *Indiana.* Executors and administrators appointed in another state may maintain actions and suits, and do all other acts coming within their powers, as such, within this state, upon producing authenticated copies of such letters and filing them with the clerk of the court in which such suits are to be brought. Rev. Code, c. 24, Feb. 17, 1838, sec. 44.

14. *Kentucky.* Executors and administrators appointed in other states, may sue in Kentucky "upon filing with the clerk of the court, where the suit is brought, an authenticated copy of the certificate of probate, or orders granting letters of administration of said estate, given in such non-resident's state." 1 Dig. Stat. 536; 2 Litt. 194; 3 Litt. 182.

15. *Louisiana.* Executors or administrators of other states must take out letters

of *curatorship* in this state. Exemplifications of wills and testaments are evidence. 4 Griff. L. R. 683; 8 N. S. 586.

16. *Maine.* Letters of administration must be taken from some court of probate in this state. Copies of wills which have been proved in a court of probate in any of the United States, or in a court of probate of any other state or kingdom, with a copy of the probate thereof, under the seal of the court where such wills have been proved, may be filed and recorded in any probate court in this state, which recording shall be of the same force as the recording and proving the original will. Rev. Stat. T. 9, c. 107, § 20; 3 Mass. 514; 9 Mass. 337; 11 Mass. 256; 1 Pick. 80; 3 Pick. 128.

17. *Maryland.* Letters testamentary or of administration granted out of Maryland have no effect in this state, except only such letters issued in the District of Columbia, and letters granted there authorize executors or administrators to claim and sue in this state. Act of April 1813, chap. 165. By the act of 1839, chap. 41, when non-resident owners of any public or state of Maryland stocks, or stocks of the city of Baltimore, or any other corporation in this state die, their executors or administrators constituted under the authority of the state, district, territory or country, where the deceased resided at his death, have the same power as to such stocks, as if they were appointed by authority of the state of Maryland. But, before they can transfer the stocks, they must, during three months, give notice in two newspapers, published in Baltimore, of the death of the testator or intestate, and of the "amount and description of the stock designed to be transferred." Administration must be granted in this state, in order to recover a debt due here to a decedent, or any of his property, with the exceptions above noticed.

18. *Massachusetts.* When any person shall die intestate in any other state or country, leaving estate to be administered within this state, administration thereof shall be granted by the judge of probate of any county, in which there is any estate to be administered; and the administration which shall be first lawfully granted shall extend to all the estate of the deceased within the state, and shall exclude the jurisdiction of the probate court in every other county. Rev. Stat. ch. 64, s. 8. See 3 Mass. 514; 5 Mass. 67; 11 Mass. 256. Id. 314; 1 Pick. 81.

19. *Michigan.* Letters testamentary or letters of administration granted out of the state, are not of any validity in it. In order to collect the debts or to obtain the property of a deceased person who was not a resident of the state, it is requisite to take out letters testamentary or letters of administration from a probate court of this state, within whose jurisdiction the property lies, which letters operate over all the state, and then sue in the name of the executor or administrator so appointed. Rev. Stat. 280. When the deceased leaves a will executed according to the laws of this state, and the same is admitted to proof and record where he dies, a certified transcript of the will and probate thereof, may be proved and recorded in any county in this state, where the deceased has property real or personal, and letters testamentary may issue thereon. Rev. Stat. 272, 273.

20. *Mississippi.* Executors or administrators in another state or territory cannot, as such, sue nor be sued in this state. In order to recover a debt due to a deceased person or his property, there must be taken out in the state, letters of administration or letters with the will annexed, as the case may be. These may be taken out from the probate court of the county where the property is situated, by a foreign as well as a local creditor, or any person interested in the estate of the deceased, if properly qualified in other respects. Walker's R. 211.

21. *Missouri.* Letters testamentary or of administration granted in another state have no validity in this; to maintain a-suit, the executors or administrators must be appointed under the laws of this state. Rev. Code, § 2, p. 41.

22. *New Hampshire.* One who has obtained letters of administration; Adams' Rep. 193; or letters testamentary under the authority of another state, cannot maintain an action in New Hampshire by virtue of such letters. 3 Griff. L. R. 41.

23. *New Jersey.* Executors having letters testamentary, and administrators letters of administration, granted in another state, cannot sue thereon in New Jersey, but must obtain such letters in that state as the law prescribes. 4 Griff. L. R. 1240. By the act of March 6, 1828, Harr. Comp. 195, when a will has been admitted to probate in any state or territory of the United States, or foreign nation, the surrogate of any county of this state is authorized, on application of the executor or any person interested, on

filing a duly exemplified copy of the will, to appoint a time not less than thirty days, and not more than six months distant, of which notice is to be given as he shall direct, and if, at such time, no sufficient reason be shown to the contrary, to admit such will to probate, and grant letters testamentary or of administration *cum testamento annexo*, which shall have the same effect as though the original will had been produced and proved under form. If the person to whom such letters testamentary or of administration be granted, is not a resident of this state, he is required to give security for the faithful administration of the estate. By the statute passed February 28, 1838, Elmer's Dig. 602, no instrument of writing can be admitted to probate under the preceding act unless it be *signed* and published by the testator as his will. See Saxton's Ch. R. 332.

24. *New York.* An executor or administrator appointed in another state has no authority to sue in New York. 6 John. Ch. Rep. 353; 7 John. Ch. Rep. 45; 1 Johns. Ch. Rep. 153. Whenever an intestate, not being an inhabitant of this state, shall die out of the state, leaving assets in several counties, or assets shall after his death come in several counties, the surrogate of any county in which assets shall be, shall have power to grant letters of administration on the estate of such intestate; but the surrogate, who shall first grant letters of administration on such estate, shall be deemed thereby to have acquired sole and exclusive jurisdiction over such estate, and shall be vested with the powers incidental thereto. Rev. Stat. part 2, c. 6, tit. 2, art. 2, s. 24; 1 R. L. 455, § 3; Laws of 1823, p. 62, s. 2, 1824, p. 332.

25. *North Carolina.* It was decided by the court of conference, then the highest tribunal in North Carolina, that letters granted in Georgia were insufficient. Conf. Rep. 68. But the supreme court have since held that letters testamentary granted in South Carolina, were sufficient to enable an executor to sue in North Carolina. 1 Car. Law Repos. 471. See 1 Hayw. 354.

26. By the revised statutes, ch. 46, s. 6, it is provided, that "when a testator or testatrix shall appoint any person, residing out of this state, executor or executrix of his or her last will and testament, it shall be the duty of the court of pleas and quarter sessions, before which the said will shall

be offered for probate, to cause the executor or executrix named therein, to enter into bond with good and sufficient security for his or her faithful administration of the estate of the said testator or testatrix, and for the distribution thereof in the manner prescribed by law; the penalty of said bond shall be double the supposed amount of the personal estate of the said testator or testatrix; and until the said executor or executrix shall enter into such bond, he or she shall have no power nor authority to intermeddle with the estate of the said testator or testatrix, and the court of the county, in which the testator or testatrix had his or her last usual place of residence, shall proceed to grant letters of administration with the will annexed, which shall continue in force until the said executor or executrix shall enter into bond as aforesaid. *Provided nevertheless*, and it is hereby declared, that the said executor or executrix shall enter into bond as by this act directed within the space of one year after the death of the said testator or testatrix, and not afterwards."

27. *Ohio*. Executors and administrators appointed under the authority of another state, may, by virtue of such appointment, sue in this. *Ohio Stat.* vol. 38, p. 146; Act of March 23, 1840, which went into effect the first day of November following; *Swan's Coll.* 184.

28. *Pennsylvania*. Letters testamentary or of administration, or otherwise purporting to authorize any person to intermeddle with the estate of a decedent, granted out of the commonwealth, do not in general confer on any such person any of the powers and authorities possessed by an executor or administrator, under letters granted within the state. Act of March 15, 1832, s. 6. But by the act of April 14, 1835, s. 3, this rule is declared not to apply to any public debt or loan of this commonwealth; but such public debt or loan shall pass and be transferable, and the dividends thereon accrued and to accrue, be receivable in like manner and in all respects and under the same and no other regulations, powers and authorities as were used and practiced before the passage of the above mentioned act. And the act of June 16, 1836, s. 3, declares that the above act of March 15, 1832, s. 6, shall not apply to shares of stock in any bank or other incorporated company, within this commonwealth, but such shares of stock shall pass

and be transferable, and the dividends thereon accrued and to accrue, be receivable in like manner in all respects, and under the same regulations, powers and authorities as were used and practiced with the loans or public debts of the United States, and were used and practiced with the loans or public debt of this commonwealth, before the passage of the said act of March 15, 1832, s. 6, unless the by-laws, rules and regulations of any such bank or corporation, shall otherwise provide and declare. Executors and administrators who had been lawfully appointed in some other of the United States, might, by virtue of their letters duly authenticated by the proper officer, have sued in this state. 4 *Dall.* 492; *S. C.*, 1 *Binn.* 63. But letters of administration granted by the archbishop of York, in England, give no authority to the administrator in Pennsylvania. 1 *Dall.* 456.

29. *Rhode Island*. It does not appear to be settled whether executors and administrators appointed in another state, may, by virtue of such appointment, sue in this. 3 *Griff. L. R.* 107, 8.

30. *South Carolina*. Executors and administrators of other states, cannot, as such, sue in South Carolina; they must take out letters in the state. 3 *Griff. L. R.* 848.

31. *Tennessee*. § 1. Where any person or persons may obtain administration on the estate of any intestate, in any one of the United States, or territory thereof, such person or persons shall be enabled to prosecute suits in any court in this state, in the same manner as if administration had been granted to such person or persons by any court in the state of Tennessee. Provided, that such person or persons shall produce a copy of the letters of administration, authenticated in the manner which has been prescribed by the congress of the United States, for authenticating the records or judicial acts of any one state, in order to give them validity in any other state; and that such letters of administration had been granted in pursuance of, and agreeable to the laws of the state or territory in which such letters of administration were granted.

32—§ 2. When any executor or executors may prove the last will and testament of any deceased person, and take on him or themselves the execution of said will in any state in the United States, or in any

territory thereof, such person or persons shall be enabled to prosecute suits in any court in this state, in the same manner as if letters testamentary had been granted to him or them, by any court within the state of Tennessee. Provided, That such executor or executors shall produce a certified copy of the letters testamentary under the hand and seal of the clerk of the court, where the same were obtained, and a certificate by the chief justice, presiding judge, or chairman of such court, that the clerk's certificate is in due form, and that such letters testamentary had been granted, in pursuance of, and agreeable to, the laws of the state or territory in which such letters testamentary were granted. Act of 1839, Carr. & Nich. Comp. 78.

33. *Vermont.* If the deceased person shall, at the time of his death, reside in any other state or country, leaving estate to be administered in this state, administration thereof shall be granted by the probate court of the district in which there shall be estate to administer; and the administration first legally granted, shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the probate court of every other district. Rev. Stat. tit. 12, c. 47, s. 2.

34. *Virginia.* Authenticated copies of wills, proved according to the laws of any of the United States, or of any foreign country, relative to any estate in Virginia, may be offered for probate in the general court; or if the estate lie altogether in any one county or corporation, in the circuit, county or corporation court of such county or corporation. 3 Griff. L. R. 345. It is understood to be the settled law of Virginia, though there is no statutory provision on the subject, that no probate of a will or grant of administration in another state of the Union, or in a foreign country, and no qualification of an executor or administrator, elsewhere than in Virginia, give any such executor or administrator any right to demand the effects or debts of the decedent, which may happen to be within the jurisdiction of the state. There must be a regular probate or grant of administration and qualification of the executor or administrator in Virginia, according to her laws. And the doctrine prevails in the federal courts held in Virginia, as well as in the state courts. 3 Griff. L. R. 348.

LEVANT ET COUCHANT. This French phrase, which ought perhaps more

properly to be *couchant et levant*, signifies literally rising and lying down. In law it denotes that space of time which cattle have been on the land in which they have had time to lie down and rise again, which, in general, is held to be one night at least. 3 Bl. Com. 9; Dane's Ab. Index, h. t.; 2 Lilly's Ab. 167; Wood's Inst. 190; 2 Bouv. Inst. n. 1641.

LEVARI FACIAS, Eng. law. A writ of execution against the goods and chattels of a clerk. Also the writ of execution on a judgment at the suit of the crown. When issued against an ecclesiastic, this writ is in effect the writ of *feri facias*, directed to the bishop of the diocese, commanding him to cause execution to be made of the goods and chattels of the defendant in his diocese. The writ also recites, that the sheriff had returned that the defendant had no lay fee, or goods or chattels whereof he could make a levy, and that the defendant was a beneficed clerk, &c. See 1 Chit. R. 428; Id. 583, for cases when it issues at the suit of the crown. This writ is also used to recover the plaintiff's debt; the sheriff is commanded to levy such debt on the lands and goods of the defendant, in virtue of which he may seize his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. 3 Bl. Com. 417; 11 Vin. Ab. 14; Dane's Ab. Index, h. t.

2. In Pennsylvania, this writ is used to sell lands mortgaged, after a judgment has been obtained by the mortgagee, or his assignee, against the mortgagor, under a peculiar proceeding authorized by statute. 3 Bouv. Inst. n. 3396.

LEVITICAL DEGREES. Those degrees of kindred set forth in the eighteenth chapter of Leviticus, within which persons are prohibited to marry. Vide *Branch; Descent; Line*.

LEVY, practice. A seizure; (q. v.) the raising of the money for which an execution has been issued.

2. In order to make a valid levy on personal property the sheriff must have it within his power and control, or at least within his view; and if, having it so, he makes a levy upon it, it will be good if followed up afterwards within a reasonable time, by his taking possession in such manner as to apprise everybody of the fact of its having been taken into execution. 3 Rawle R. 405-6; 1 Whart. 377; 2 S. & R. 142; 1 Wash. C. C. R. 29; 6 Watts, 468; 1 Whart. 116. The usual mode of making

levy upon real estate, is to describe the land which has been seised under the execution, by metes and bounds, as in a deed of conveyance. 3 Bouv. Inst. n. 8391.

3. It is a general rule, that when a sufficient levy has been made, the officer cannot make a second. 12 John. R. 208; 8 Cowen, R. 192.

LEVYING WAR, *crim. law*. The assembling of a body of men for the purpose of effecting by force a treasonable object; and all who perform any part however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are considered as engaged in levying war, within the meaning of the constitution. 4 Cranch, R. 473-4; Const. art. 3, s. 3. Vide *Treason*; Fries' Trial, Pamphl. This is a technical term, borrowed from the English law, and its meaning is the same as it is when used in stat. 25 Ed. III. 4 Cranch's R. 471; U. S. v. Fries, Pamphl. 167; Hall's Am. Law Jo. 351; Burr's Trial; 1 East, P. O. 62 to 77; Alis. Cr. Law of Scotl. 606; 9 C. & P. 129.

LEX. The law. A law for the government of mankind in society. Among the ancient Romans, this word was frequently used as synonymous with right, *jus*. When put absolutely, *lex* meant the Law of the Twelve Tables.

LEX FALCIDIA, *civ. law*. The name of a law which permitted a testator to dispose of three-fourths of his property, but he could not deprive his heir of the other fourth. It was made during the reign of Augustus, about the year of Rome 714, on the requisition of Falcidius, a tribune. Inst. 2, 22; Dig. 35, 2; Code, 6, 50; and Nov. 1 and 131. Vide article *Legitime*, and Coop. Just. 486; Rob. Frauds, 290, note 118.

LEX FORI, *practice*. The law of the court or forum.

2. The forms of remedies, the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted; or as the civilians uniformly express it, according to the *lex fori*. Story, Conf. of Laws, § 556; 1 Caines' Rep. 402; 3 Johns. Ch. R. 190; 5 Johns. R. 132; 2 Mass. R. 84; 7 Mass. R. 515; 3 Conn. R. 472; 7 M. R. 214; 1 Bouv. Inst. n. 860.

LEX LOCI CONTRACTUS, *contracts*. The law of the place where an agreement is made.

2. Generally, the validity of a contract is to be decided by the law of the place where the contract is made; if valid there,

it is, in general, valid everywhere. Story, Conf. of Laws, § 242, and the cases there cited. And *vice versa*, if void or illegal there, it is generally void everywhere. Id. § 243; 2 Kent, Com. 457; 4 M. R. 584; 7 M. R. 213; 11 M. R. 780; 12 M. R. 475; 1 N. S. 202; 5 N. S. 585; 6 N. S. 76; 6 L. R. 676; 6 N. S. 631; 4 Blackf. R. 89.

3. There is an exception to the rule as to the universal validity of contracts. The comity of nations, by virtue of which such contracts derive their force in foreign countries, cannot prevail in cases where it violates the law of our own country, the law of nature, or the law of God. 2 Barn. & Cresw. 448, 471. And a further exception may be mentioned, namely, that no nation will regard or enforce the revenue laws of another country. Cas. Temp. 85, 89, 194.

4. When the contract is entered into in one place, to be executed in another, there are two *loci contractus*; the *locus celebrati contractus*, and the *locus solutionis*; the former governs in everything which relates to the mode of construing the contract, the meaning to be attached to the expressions, and the nature and validity of the engagement; but the latter governs the performance of the agreement. 8 N. S. 34. Vide 15 Serg. & Rawle, 84; 2 Mass. R. 88; 1 Nott & M'Cord, 173; 2 Harr. & Johns. 193, 221; 2 N. H. Rep. 42; 5 Id. 401; 2 John. Cas. 355; 5 Pardes. n. 1482; Bac. Abr. Bail in Civil Causes, B 5; 1 Com. Dig. 545, n.; 1 Supp. to Ves. jr. 270; 3 Ves. 198; 5 Ves. 750.

LEX LONGOBARDORUM. The name of an ancient code in force among the Lombards. It contains many evident traces of feudal policy. It survived the destruction of the ancient government of Lombardy, by Charlemagne, and is said to be still partially in force in some districts of Italy.

LEX MERCATORIA. That system of laws which is adopted by all commercial nations, and which, therefore, constitutes a part of the law of the land. Vide *Law Merchant*.

LEX TALIONIS. The law of retaliation; an example of which is given in the law of Moses, an eye for an eye, a tooth for a tooth, &c.

2. Jurists and writers on international law are divided as to the right of one nation punishing with death, by way of retaliation, the citizens or subjects of another nation; in the United States no example of

such barbarity has ever been witnessed ; but prisoners have been kept in close confinement in retaliation for the same conduct towards American prisoners. Vide Rutherf. Inst. b. 2, c. 9 ; Mart. Law of Nat. b. 8, c. 1, a. 3, note ; 1 Kent, Com. 93.

3. Writers on the law of nations have divided retaliation into vindictive and amicable. By the former are meant those acts of retaliation which amount to a war ; by the latter those acts of retaliation which correspond to the acts of the other nation under similar circumstances. Wheat. Intern. Law, pt. 4, c. 1, § 1.

LEX TERRÆ. The law of the land. The phrase is used to distinguish this from the civil or Roman law.

2. By *lex terræ*, as used in *Magna Charta*, is meant one process of law, namely, proceeding by indictment or presentment of good and lawful men. 2 Inst. 50 ; 19 Wend. 659 ; 4 Dev. R. 15. In the constitution of Tennessee, the words "the law of the land" signify a general and public law, operating equally upon every member of the community. 10 Yerg. 71.

LEY. This word is old French, a corruption of *loi*, and signifies law ; for example, *Termes de la Ley*, Terms of the Law. In another, and an old technical sense, *ley* signifies an oath, or the oath with compurgators ; as, *il tend sa ley au pleyntiffe*. Brit. c. 27.

LEY-GAGER. *Wager of Law* : (q. v.)

LIABILITY. Responsibility ; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed.

2. The liabilities of one man are not in general transferred to his representatives, further than to reach the estate in his hands. For example, an executor is not responsible for the liabilities of his testator further than the estate of the testator which has come to his hands. See Hamm. on Part. 169, 170.

3. The husband is liable for his wife's contracts made *dum sola*, and for those made during coverture for necessities, and for torts committed either while she was sole or since her marriage with him ; but this liability continues only during the coverture as to her torts, or even her contracts made before marriage ; for the latter, however, he may be sued as her executor or administrator, when he assumes that character.

4. A master is liable for the acts of his servant while in his employ, performed in the usual course of his business, upon the presumption that they have been authorized by him ; but he is responsible only in a civil point of view and not criminally, unless the acts have been actually authorized by him. See Bouv. Inst. Index, h. t. ; *Driver* ; *Quasi Offence* ; *Servant*.

LIBEL, practice. A libel has been defined to be "the plaintiff's petition or allegation, made and exhibited in a judicial process, with some solemnity of law ;" it is also said to be "a short and well ordered writing, setting forth in a clear manner, as well to the judge as to the defendant, the plaintiff's or accuser's intention in judgment." It is a written statement by a plaintiff, of his cause of action, and of the relief he seeks to obtain in a suit. Law's Eccl. Law, 147 ; Ayl. Par. 346 ; Shelf. on M. & D. 506 ; Dunl. Adm. Pr. 111 ; Betts. Pr. 17 ; Proct. Pr. h. t. ; 2 Chit. Pr. 487, 533.

2. The libel should be a narrative, specious, clear, direct, certain, not general nor alternative. 3 Law's Eccl. Law, 147. It should contain, substantially, the following requisites : 1. The name, description, and addition of the plaintiff, who makes his demand by bringing his action. 2. The name, description, and addition of the defendant. 3. The name of the judge, with a respectful designation of his office and court. 4. The thing or relief, general or special, which is demanded in the suit. 5. The grounds upon which the suit is founded. All these things are summed up in Latin, as follows :

Quis, quid, coram quo, quo jure petitur, et a quo, Recte compositus quique libellus habet :

which has been translated,

Each plaintiff and defendant's name,
And eke the judge who tries the same,
The thing demanded and the right whereby
You urge to have it granted instantly :
He doth a libel write and well compose,
Who forms the same, omitting none of those.

3. The form of a libel is either simple or articulate. The simple form is, when the cause of action is stated in a continuous narration, when the cause of action can be briefly set forth. The articulate form, is when the cause of action is stated in distinct allegations, or articles. 2 Law's Eccl. Law, 148 ; Hall's Adm. Pr. 123 ; 7 Cranch, 349. The material facts should be stated in distinct articles in the libel, with as much exactness and attention to times and circumstances, as in a declaration at common

law. 4 Mason, 541. Pompons diction and strong epithets are out of place in a legal paper designed to obtain the admission of the opposite party of the averments it contains, or to lay before the court the facts which the actor will prove.

4. Although there is no fixed formula for libels, and the courts will receive such an instrument from the party in such form as his own skill, or that of his counsel may enable him to give it, yet long usage has sanctioned forms, which it may be most prudent to adopt. The parts and arrangement of libels commonly employed are,

5.—1. The address to the court; as, To the Honorable John K. Kane, Judge of the district court of the United States, within and for the eastern district of Pennsylvania.

6.—2. The names and descriptions of the parties. Persons competent to sue at common law may be parties libellants, and similar regulations obtain in the admiralty courts and the common law courts, respecting those disqualified from suing in their own right or name. Married women prosecute by their husbands, or by *prochein ami*, when the husband has an adverse interest to hers; minors, by guardians, tutors, or *prochein ami*; lunatics and persons *non compos mentis*, by tutor, guardian *ad litem*, or committee; the rights of deceased persons are prosecuted by executors or administrators; and corporations are represented and proceeded against as at common law.

7.—3. The averments or allegations setting forth the cause of action. These should be conformable to the truth, and so framed as to correspond with the evidence. Every fact requisite to establish the libellant's right should be clearly stated, so that it may be directly met by the opposing party by admission, denial or avoidance; this is the more necessary, because no proof can be given, or decree rendered, not covered by and conformable to the allegations. 1 Law's Eccl. Laws, 150; Hall's Pr. 126; Dunl. Adm. Pr. 113; 7 Cranch, 394.

8.—4. The conclusion, or prayer for relief and process; the prayer should be for the specific relief desired; for general relief, as is usual in bills in chancery; the conclusion should also pray for general or particular process. Law's Eccl. Law, 149; and see 3 Mason, R. 503. Interrogatories are sometimes annexed to the libel; when this is the case, there is usually a special prayer, that the defendant may be required

to answer the libel, and the interrogatories annexed and propounded. This, however, is a dangerous practice, because it renders the answers of the defendant evidence, which must be disproved by two witnesses, or by one witness, corroborated by very strong circumstances.

9. The libel is the first proceeding in a suit in admiralty in the courts of the United States. 3 Mason, R. 504. It is also used in some other courts. Vide, generally, Dunl. Adm. Pr. ch. 3; Bett's Adm. Pr. s. 3; Shelf. on M. & D. 506; Hall's Adm. Pr. Index, h. t.; 3 Bl. Com. 100; Ayl. Par. Index, h. t.; Com. Dig. Admiralty, E; 2 Roll. Ab. 298.

LIBEL, libellus, criminal law. A malicious defamation expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of one who is dead, with intent to provoke the living; or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule. Hawk. b. 1, c. 73, s. 1; Wood's Inst. 444; 4 Bl. Com. 150; 2 Chitty, Cr. Law, 867; Holt on Lib. 73; 5 Co. 125; Salk. 418; Ld. Raym. 416; 4 T. R. 126; 4 Mass. R. 168; 9 John. 214; 1 Den. Rep. 347; 2 Pick. R. 115; 2 Kent, Com. 13. It has been defined perhaps with more precision to be a censorious or ridiculous writing, picture or sign, made with a malicious or mischievous intent, towards government, magistrates or individuals. 3 John. Cas. 354; 9 John. R. 215; 5 Binn. 340.

2. In briefly considering this offence, we will inquire, 1st. By what mode of expression a libel may be conveyed. 2d. Of what kind of defamation it must consist. 3d. How plainly it must be expressed. 4th. What mode of publication is essential.

3.—1. The reduction of the slanderous matter to writing, or printing, is the most usual mode of conveying it. The exhibition of a picture, intimating that which in print would be libelous, is equally criminal. 2 Camp. 512; 5 Co. 125; 2 Serg. & Rawle, 91. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel. Hawk. b. 1, c. 73, s. 2; 11 East, R. 227.

4.—2. There is perhaps no branch of the law which is so difficult to reduce to exact principles, or to compress within a small compass, as the requisites of a libel. All publications denying the Christian religion to be true; 11 Serg. & Rawle, 394; Holt on Libels, 74; 8 Johns. R. 290; Vent.

293; Keb. 607; all writings subversive of morality and tending to inflame the passions by indecent language, are indictable at common law. 2 Str. 790; Holt on Libels, 82; 4 Burr. 2527. In order to constitute a libel, it is not necessary that anything criminal should be imputed to the party injured; it is enough if the writer has exhibited him in a ludicrous point of view; has pointed him out as an object of ridicule or disgust; has, in short, done that which has a natural tendency to excite him to revenge. 2 Wils. 403; Bacon's Abr. Libel, A 2; 4 Taunt. 355; 3 Camp. 214; Hardw. 470; 5 Binn. 349. The case of *Villars v. Monsley*, 2 Wils. 403, above cited, was grounded upon the following verses, which were held to be libelous, namely:—

"Old Villars, so strong of brimstone you smell,
As if not long since you had got out of hell,
But this damnable smell I no longer can bear,
Therefore I desire you would come no more here;
You old stinking, old nasty, old itchy, old toad,
If you come any more you shall pay for your board,
You'll therefore take this as a warning from me,
And never enter the doors, while they belong to J. P.
Wincolt, December 4, 1787."

5. Libels against the memory of the dead, which have a tendency to create a breach of the peace, by inciting the friends and relatives of the deceased to avenge the insult of the family, render their authors liable to legal animadversion. 5 Co. 123; 5 Binn. 281; 2 Chit. Cr. Law, 868; 4 T. R. 186.

6.—3. If the matter be understood as scandalous, and is calculated to excite ridicule or abhorrence against the party intended, it is libelous, however it may be expressed. 5 East, 463; 1 Price, 11, 17; Hob. 215; Chit. Cr. Law, 868; 2 Campb. 512.

7.—4. The malicious reading of a libel to one or more persons, it being on the shelves in a bookstore, as other books, for sale; and where the defendant directed the libel to be printed, took away some and left others; these several acts have been held to be publications. The sale of each copy, where several copies have been sold, is a distinct publication, and a fresh offence. The publication must be malicious; evidence of the malice may be either express or implied. Express proof is not necessary: for where a man publishes a writing which on the face of it is libelous, the law presumes he does so from that malicious intention which constitutes the offence, and it is unnecessary, on the part of the prosecution,

to prove any circumstance from which malice may be inferred. But no allegation, however false and malicious, contained in answers to interrogatories, in affidavits duly made, or any other proceedings in courts of justice, or petitions to the legislature, are indictable. 4 Co. 14; 2 Burr. 807; Hawk. B. 1, c. 73, s. 8; 1 Saund. 131, n. 1; 1 Lev. 240; 2 Chitty's Cr. Law, 869; 2 Serg. & Rawle, 23. It is no defence that the matter published is part of a document printed by order of the house of commons. 9 A. & E. 1.

8. The publisher of a libel is liable to be punished criminally by indictment; 2 Chitty's Cr. Law, 875; or is subject to an action on the case by the party grieved. Both remedies may be pursued at the same time. Vide, generally, Holt on Libels; Starkie on Slander; 1 Harr. Dig. Case, I; Chit. Cr. L. Index, h. t.; Chit. Pr. Index, h. t.

LIBEL OF ACCUSATION. A term used in Scotland to designate the instrument which contains the charge against a person accused of a crime. Libels are of two kinds, namely, indictments and criminal letters.

2. Every libel assumes the form of what is termed in logic, a syllogism. It is first stated that some particular kind of act is criminal; as, that "theft is a crime of a heinous nature, and severely punishable." This proposition is termed the *major*. It is next stated that the person accused is guilty of the crime so named, "actor, or art and part." This, with the narrative of the manner in which, and the time when the offence was committed, is called the *minor* proposition of the libel. The *conclusion* is, that all or part of the facts being proved, or admitted by confession, the panel "ought to be punished with the pains of the law, to deter others from committing the like crime in all time coming." Burt. Man. Pub. L. 300, 301.

LIBELLANT. The party who files a libel in a chancery or admiralty case, corresponding to the plaintiff in actions in the common law courts, is called the libellant.

LIBELLE. A party against whom a libel has been filed in chancery proceedings, or in admiralty, corresponding to the defendant in a common law suit.

LIBER. A book; a principal subdivision of a literary work: thus, the *Pandects*, or *Digest of the Civil Law*, is divided into fifty books.

LIBER ASSISARUM. The book of assizes,

or pleas of the crown; being the fifth part of the Year Books. (q. v.)

LIBER FEUD RUM. A code of the feudal law, which was compiled by direction of the emperor Frederick Barbarossa, and published in Milan, in 1170. It was called the *Liber Feudorum*, and was divided into five books, of which the first, second, and some fragments of the others still exist, and are printed at the end of all the modern editions of the Corpus Juris Civilis. Giannone, B. 13, c. 3; Cruise's Dig. Prel. Diss. c. 1, § 31.

LIBER HOMO. A freeman lawfully competent to act as a juror. Raym. 417; Keb. 563.

LIBERATE, English practice. A writ which issues on lands, tenements, and chattels, being returned under an extent on a statute staple, commanding the sheriff to deliver them to the plaintiff, by the extent and appraisement mentioned in the writ of extent, and in the sheriff's return thereto. See Com. Dig. Statute Staple, D 6.

LIBERATION, civil law. This term is synonymous with payment. Dig. 50, 16, 47. It is the extinguishment of a contract by which he who was bound becomes free, or liberated. Wolff, Dr. de la Nat. § 749.

LIBERTI, LIBERTINI. These two words were, at different times, made to express among the Romans, the condition of those who, having been slaves, had been made free. 1 Brown's Civ. Law, 99. There is some distinction between these words. By *libertus*, was understood the freedman, when considered in relation to his patron, who had bestowed liberty upon him; and he was called *libertinus*, when considered in relation to the state he occupied in society since his manumission. Leg. El. Dr. Rom. § 93.

LIBERTY. Freedom from restraint. The power of acting as one thinks fit, without any restraint or control, except from the laws of nature.

2. Liberty is divided into civil, natural, personal, and political.

3. *Civil liberty* is the power to do whatever is permitted by the constitution of the state and the laws of the land. It is no other than natural liberty, so far restrained by human laws, and no further, operating equally upon all the citizens, as is necessary and expedient for the general advantage of the public. 1 Black. Com. 125; Paley's Mor. Phil. B. 6, c. 5; Swift's Syst. 12.

4. That system of laws is alone calculated to maintain civil liberty, which leaves

the citizen entirely master of his own conduct, except in those points in which the public good requires some direction and restraint. When a man is restrained in his natural liberty by no municipal laws but those which are requisite to prevent his violating the natural law, and to promote the greatest moral and physical welfare of the community, he is legally possessed of the fullest enjoyment of his civil rights of individual liberty. But it must not be inferred that individuals are to judge for themselves how far the law may justifiably restrict their individual liberty; for it is necessary to the welfare of the commonwealth, that the law should be obeyed; and thence is derived the legal maxim, that *no man may be wiser than the law*.

5. *Natural liberty* is the right which nature gives to all mankind, of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not in any way abuse it to the prejudice of other men. Burlamaqui, c. 3, s. 15; 1 Bl. Com. 125.

6. *Personal liberty* is the independence of our actions of all other will than our own. Wolff, Ins. Nat. § 77. It consists in the power of locomotion, of changing situation, or removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law. 1 Bl. Com. 134.

7. *Political liberty* may be defined to be the security by which, from the constitution, form and nature of the established government, the citizens enjoy civil liberty. No ideas or definitions are more distinguishable than those of civil and political liberty, yet they are generally confounded. 1 Bl. Com. 6, 125. The political liberty of a state is based upon those fundamental laws which establish the distribution of legislative and executive powers. The political liberty of a citizen is that tranquillity of mind, which is the effect of an opinion that he is in perfect security; and to insure this security, the government must be such that one citizen shall not fear another.

8. In the English law, by liberty is meant a privilege held by grant or prescription, by which some men enjoy greater benefits than ordinary subjects. A liberty is also a territory, with some extraordinary privilege.

9. By liberty or liberties, is also under-

stood a part of a town or city, as the Northern Liberties of the city of Philadelphia. The same as Faubourg. (q. v.)

LIBERTY OF THE PRESS. The right to print and publish the truth, from good motives, and for justifiable ends. 3 Johns. Cas. 394.

2. This right is secured by the constitution of the United States. Amendments, art. 1. The abuse of the right is punished criminally, by indictment; civilly, by action. Vide Judge Cooper's Treatise on the Law of Libel, and the Liberty of the Press, *passim*; and article *Libel*.

LIBERTY OF SPEECH. The right given by the constitution and the laws to public support in speaking facts or opinions.

2. In a republican government, like ours, liberty of speech cannot be extended too far, when its object is the public good. It is, therefore, wisely provided by the constitution of the United States, that members of congress shall not be called to account for anything said in debate; and similar provisions are contained in the constitutions of the several states in relation to the members of their respective legislatures. This right, however, does not extend beyond the mere speaking; for if a member of congress were to reduce his speech to writing and cause it to be printed, it would no longer bear a privileged character, and he might be held responsible for a libel, as any other individual. Bac. Ab. Libel, B. See *Debate*.

3. The greatest latitude is allowed by the common law to counsel; in the discharge of his professional duty he may use strong epithets, however derogatory to other persons they may be, if *pertinent* to the cause, and stated in his instructions, whether the thing were true or false. But if he were maliciously to travel out of his case for the purpose of slandering another, he would be liable to an action, and amenable to a just and often more efficacious punishment inflicted by public opinion. 3 Ohit. Pr. 887. No respectable counsel will indulge himself with unjust severity; and it is doubtless the duty of the court to prevent any such abuse.

LIBERUM TENEMENTUM, pleading. The name of a plea in an action of trespass, by which the defendant claims the *locus in quo* to be his soil and freehold, or the soil and freehold of a third person, by whose command he entered. 2 Salk. 453; 7 T. R. 355; 1 Saund. 299, b, note.

LIBERUM TENEMENTUM, estate. The same as freehold, (q. v.) or frank tenement. 2 Bouv. Inst. n. 1690.

LICENSE, contracts. A right given by some competent authority to do an act, which without such authority would be illegal. The instrument or writing which secures this right, is also called a license. Vide Ayl. Parerg. 353; 15 Vin. Ab. 92; Ang. Wat. Co. 61, 85.

2. A license is express or implied. An express license is one which in direct terms authorizes the performance of a certain act; as a license to keep a tavern given by public authority.

3. An implied license is one which though not expressly given, may be presumed from the acts of the party having a right to give it. The following are examples of such licenses: 1. When a man knocks at another's door, and it is opened, the act of opening the door licenses the former to enter the house for any lawful purpose. See Hob. 62. 2. A servant is, in consequence of his employment, licensed to admit to the house those who come on his master's business, but only such persons. Selw. N. P. 999; Cro. Eliz. 246. It may, however, be inferred from circumstances that the servant has authority to invite whom he pleases to the house, for lawful purposes. See 2 Greenl. Ev. § 427; *Entry*.

4. A license is either a bare authority, without interest, or it is coupled with an interest. 1. A bare license must be executed by the party to whom it is given in person, and cannot be made over or assigned by him to another; and, being without consideration, may be revoked at pleasure, as long as it remains executory; 89 Hen. VI. M. 12, page 7; but when carried into effect, either partially or altogether, it can only be rescinded, if in its nature it will admit of revocation, by placing the other side in the same situation in which he stood before he entered on its execution. 8 East, R. 308; Palm. 71; S. C. Poph. 151; S. C. 2 Roll. Rep. 143, 152.

5.—2. When the license is coupled with an interest, the authority conferred is not properly a mere permission but amounts to a grant, which cannot be revoked, and it may then be assigned to a third person. 5 Hen. V., M. 1, page 1; 2 Mod. 317; 7 Bing. 693; 8 East, 309; 5 B. & C. 221; 7 D. & R. 783; Crabb on R. P. § 521 to 525; 14 S. & R. 267; 4 S. & R. 241; 2 Eq. Cas. Ab. 522. When the license is coupled

with an interest, the formalities essential to confer such interest should be observed. Say. R. 3; 6 East, R. 602; 8 East, R. 310, note. See 14 S. & R. 267; 4 S. & R. 241; 2 Eq. Cas. Ab. 522; 11 Ad. & El. 34, 39; S. C. 39 Eng. C. L. R. 19.

LICENSE, international law. An authority given by one of two belligerent parties, to the citizens or subjects of the other, to carry on a specified trade.

2. The effects of the license are to suspend or relax the rules of war to the extent of the authority given. It is the assumption of a state of peace to the extent of the license. In the country which grants them, licenses to carry on a pacific commerce are *stricti juris*, as being exceptions to the general rule; though they are not to be construed with pedantic accuracy, nor will every small deviation be held to vitiate the fair effect of them. 4 Rob. Rep. 8; Chitty, Law of Nat. 1 to 5, and 260; 1 Kent, Com. 164, 85.

LICENSE, pleading. The name of a plea of justification to an action of trespass. A license must be specially pleaded, and cannot, like *liberum tenementum*, be given in evidence under the general issue. 2. T. R. 166, 168.

LICENSEE. One to whom a license has been given. 1 M. G. & S. 699 n.

LICENTIA CONCORDANDI, estates, conveyancing, practice. When an action is brought for the purpose of levying a fine, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them; but having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up; this, which is readily granted, is called the *licentia concordandi*. 5 Rep. 39; Cruise, Dig. tit. 85, c. 2, 22.

LICENTIA LOQUENDI. Impar lance. (q. v.)

LICENTIOUSNESS. The doing what one pleases without regard to the rights of others; it differs from liberty in this, that the latter is restrained by natural or positive law, and consists in doing whatever we please, not inconsistent with the rights of others, whereas the former does not respect those rights. Wolff, Inst. § 84.

LICET SÆPIUS REQUISITUS, pleading, practice. Although often requested. It is usually alleged in the declaration that

the defendant, *licet sæpius requisitus*, &c., he did not perform the contract, the violation of which is the foundation of the action. This allegation is generally sufficient when a request is not parcel of the contract. Indeed, in such cases, it is unnecessary even to lay a general request, for the bringing of the suit is itself a sufficient request. 1 Saund. 33, n. 2; 2 Saund. 118, note, 3; Plowd. 128; 1 Wils. 33; 2 H. Bl. 131; 1 John. Cas. 99, 319; 7 John. R. 462; 18 John. R. 485; 3 M. & S. 150. Vide *Demand*.

LICET. It is lawful; not forbidden by law. Id omne licitum est, quod non est legibus prohibitum; quamobrem, quod, lege permittente, fit, pœnam non meretur.

LICITATION. A sale at auction; a sale to the highest bidder.

LIDFORD LAW. Vide *Lynch Law*.

TO LIE. That which is proper, is fit; as, an action on the case *lies* for an injury committed without force; corporeal hereditaments *lie in livery*, that is, they pass by livery; incorporeal hereditaments *lie in grant*, that is, pass by the force of the grant, and without any livery. Vide *Lying in grant*.

LIEGE, from the Latin ligare, to bind. The bond subsisting between the subject and chief, or lord and vassal, *binding* the one to protection and just government, the other to tribute and due subjection. The prince or chief is called *liege lord*; the subjects *liege men*. The word is now applied as if the *liegance* or bond were only to attach the people to the prince. Stat. 8 Hen. VI. c. 10; 14 Hen. VIII. c. 2; 1 Bl. Com. 367.

LIEGE POUSTIE, Scotch law. The condition or state of a person who is in his ordinary health and capacity, and not a minor, nor cognosced as an idiot or madman, nor under interdiction. He is then said to be in *liege poustie*, or in *legitima potestati*, and he has full power of disposal of his property. 1 Bell's Com. 85, 5th ed.; 6 Clark & Fin. 540. Vide *Sui juris*.

LIEN, contracts. In its most extensive signification, this term includes every case in which real or personal property is charged with the payment of any debt or duty; every such charge being denominated a lien on the property. In a more limited sense it is defined to be a right of detaining the property of another until some claim be satisfied. 2 East, 235; 6 East, 25; 2 Campb. 579; 2 Meriv. 494; 2 Rose, 357; 1 Dall. R. 345.

2. The right of lien generally arises by operation of law, but in some cases it is created by express contract.

3. There are two kinds of lien; namely, *particular* and *general*. When a person claims a right to retain property in respect of money or labor expended on such particular property, this is a *particular lien*. Liens may arise in three ways: 1st. By express contract. 2d. From implied contract, as from general or particular usage of trade. 3d. By legal relation between the parties, which may be created in three ways; 1. When the law casts an obligation on a party to do a particular act, and in return for which, to secure him payment, it gives him such lien; 1 Esp. R. 109; 6 East, 519; 2 Ld. Raym. 866; common carriers and innkeepers are among this number. 2. When goods are delivered to a tradesman or any other, to expend his labor upon, he is entitled to detain those goods until he is remunerated for the labor which he so expends. 2 Roll. Ab. 92; 3 M. & S. 167; 14 Pick. 332; 3 Bouv. Inst. n. 2514. 3. When goods have been saved from the perils of the sea, the salvor may detain them until his claim for salvage is satisfied; but in no other case has the finder of goods, a lien. 2 Salk. 654; 5 Burr. 2732; 3 Bouv. Inst. n. 2518. *General liens* arise in three ways: 1. By the agreement of the parties. 6 T. R. 14; 3 Bos. & Pull. 42. 2. By the general usage of trade. 3. By particular usage of trade. Whitaker on Liens, 35; Prec. Ch. 580; 1 Atk. 235; 6 T. R. 19.

4. It may be proper to consider a few general principles: 1. As to the manner in which a lien may be acquired. 2. To what claims liens properly attach. 3. How they may be lost. 4. Their effect.

5.—1. *How liens may be acquired*. To create a valid lien, it is essential, 1st. That the party to whom or by whom it is acquired should have the absolute property or ownership of the thing, or, at least, a right to vest it. 2d. That the party claiming the lien should have an actual or constructive possession, with the assent of the party against whom the claim is made. 3 Chit. Com. Law, 547; Paley on Ag. by Lloyd, 137; 17 Mass. R. 197; 4 Campb. R. 291; 3 T. R. 119 and 783; 1 East, R. 4; 7 East, R. 5; 1 Stark. R. 123; 3 Rose, R. 355; 3 Price, R. 547; 5 Binn. R. 392. 3d. That the lien should arise upon an agreement, express or implied, and not be for a limited or specific purpose inconsistent with the ex-

press terms, or the clear intent of the contract; 2 Stark. R. 272; 6 T. R. 258; 7 Taunt. 278; 5 M. & S. 180; 15 Mass. 389, 397; as, for example, when goods are deposited to be delivered to a third person, or to be transported to another place. Pal. on Ag. by Lloyd, 140.

6.—2. *The debts or claims to which liens properly attach*. 1st. In general, liens properly attach on liquidated demands, and not on those which sound only in damages; 3 Chit. Com. Law, 548; though by an express contract they may attach even in such a case; as, where the goods are to be held as an indemnity against a future contingent claim or damages. Ibid. 2d. The claim for which the lien is asserted, must be due to the party claiming it in his own right, and not merely as agent of a third person. It must be a debt or demand due from the very person for whose benefit the party is acting, and not from a third person, although the goods may be claimed through him. Pal. Ag. by Lloyd, 132.

7.—3. *How a lien may be lost*. 1st. It may be waived or lost by any act or agreement between the parties, by which it is surrendered, or becomes inapplicable. 2d. It may also be lost by voluntarily parting with the possession of the goods. But to this rule there are some exceptions; for example, when a factor by lawful authority sells the goods of his principal, and parts with the possession under the sale, he is not, by this act, deemed to lose his lien, but it attaches to the proceeds of the sale in the hands of the vendee.

8.—4. *The effect of liens*. In general, the right of the holder of the lien is confined to the mere right of retainer. But when the creditor has made advances on the goods of a factor, he is generally invested with the right to sell. Holt's N. P. Rep. 383; 3 Chit. Com. Law. 551; 2 Liverm. Ag. 103; 2 Kent's Com. 642, 3d ed. In some cases where the lien would not confer a power to sell, a court of equity would decree it. 1 Story, Eq. Jur. § 506; 2 Story, Eq. Jur. § 1216; Story, Ag. § 371. And courts of admiralty will decree a sale to satisfy maritime liens. Abb. Ship. pt. 3, c. 10, § 2; Story, Ag. § 371.

9. Judgments rendered in courts of record are generally liens on the real estate of the defendants or parties against whom such judgments are given. In Alabama, Georgia, and Indiana, a judgment is a lien; in the last mentioned state, it continues for

ten years from January 1, 1826, if it was rendered from that time; if, after ten years from the rendition of the judgment, and when the proceedings are stayed by order of the court, or by an agreement recorded, the time of its suspension is not reckoned in the ten years. A judgment does not bind lands in Kentucky, the lien commences by the delivery of execution to the sheriff, or officer. 4 Pet. R. 366; 1 Dane's R. 360. The law seems to be the same in Mississippi. 2 Hill. Ab. c. 46, s. 6. In New Jersey, the judgments take priority among themselves in the order the executions on them have been issued. The lien of a judgment and the decree of a court of chancery continue a lien in New York for ten years, and bind after acquired lands. N. Y. Stat. part 3, t. 4, s. 3. It seems that a judgment is a lien in North Carolina, if an elegit has been sued out, but this is perhaps not settled. 2 Murph. R. 43. The lien of a judgment in Ohio is confined to the county, and continues only for one year, unless revived. It does not bind after acquired lands. In Pennsylvania, it commences with the rendering of judgment, and continues five years from the return day of that term. It does not, per se, bind after acquired lands. It may be revived by *scire facias*, or an agreement of the parties, and terre tenants, written and filed. In South Carolina and Tennessee, a judgment is also a lien. In the New England states, lands are attached by mesne process or on the writ, and a lien is thereby created. See 2 Hill. Ab. c. 46.

10. Liens are also divided into legal and equitable. The former are those which may be enforced in a court of law; the latter are valid only in a court of equity. The lien which the vendor of real estate has on the estate sold, for the purchase money remaining unpaid, is a familiar example of an equitable lien. Math. on Pres. 392. Vide *Purchase money*. Vide, generally, Yelv. 67, a.; 2 Kent, Com. 495; Pal. Ag. 107; Whit. on Liens; Story on Ag. ch. 14, § 351, et seq.; Hov. Fr. 35.

11. Lien of *mechanics and material men*. By virtue of express statutes in several of the states, mechanics and material men, or persons who furnish materials for the erection of houses or other buildings, are entitled to a lien or preference in the payment of debts out of the houses and buildings so erected, and to the land, to a greater or less extent, on which they are erected. A

considerable similarity exists in the laws of the different states which have legislated on this subject.

12. The lien generally attaches from the commencement of the work or the furnishing of materials, and continues for a limited period of time. In some states, a claim must be filed in the office of the clerk or prothonotary of the court, or a suit brought within a limited time. On the sale of the building these liens are to be paid pro rata. In some states no lien is created unless the work done or the goods furnished amount to a certain specified sum, while in others there is no limit to the amount. In general, none but the original contractors can claim under the law; sometimes, however, sub-contractors have the same right.

13. The remedy is various; in some states, it is by *scire facias* on the lien, in others, it is by petition to the court for an order of sale; in some, the property is subject to foreclosure, as on a mortgage; in others, by a common action. See 1 Hill. Ab. ch. 40, p. 354, where will be found an abstract of the laws of the several states, except the state of Louisiana; for the laws of that state, see Civ. Code of Louis. art. 2727 to 2748. See, generally, 5 Binn. 585; 2 Browne, R. 229, n. 275; 2 Rawle, R. 316; Id. 343; 3 Rawle, R. 492; 5 Rawle, R. 291; 2 Whart. R. 223; 2 S. & R. 138; 14 S. & R. 32; 12 S. & R. 301; 3 Watts, R. 140, 141; Id. 301; 5 Watts, R. 487; 14 Pick. R. 49; Serg. on Mech. Liens.

LIEU, place. In lieu of, instead, in the place of.

LIEUTENANT. This word has now a narrower meaning than it formerly had; its true meaning is a deputy, a substitute, from the French *lieu*, (place or post) and *tenant* (holder). Among civil officers we have *lieutenant governors*, who in certain cases perform the duties of governors; (vide the names of the several states,) *lieutenants of police*, &c. Among military men, *lieutenant general* was formerly the title of a commanding general, but now it signifies the degree above major general. *Lieutenant colonel*, is the officer between the colonel and the major. *Lieutenant*, simply, signifies the officer next below a captain. In the navy, a *lieutenant* is the second officer next in command to the captain of a ship.

LIFE. The aggregate of the animal functions which resist death. Bichat.

2. The state of animated beings, while they possess the power of feeling and motion. It commences in contemplation of law generally as soon as the infant is able to stir in the mother's womb; 1 Bl. Com. 129; 3 Inst. 50; Wood's Inst. 11; and ceases at death. Lawyers and legislators are not, however, the best physiologists, and it may be justly suspected that in fact life commences before the mother can perceive any motion of the foetus. 1 Beck's Med. Jur. 291.

3. For many purposes, however, life is considered as begun from the moment of conception *in ventre sa mere*. Vide *Fetus*. But in order to acquire and transfer civil rights the child must be born alive. Whether a child is born alive, is to be ascertained from certain signs which are always attendant upon life. The fact of the child's crying is the most certain. There may be a certain motion in a new born infant which may last even for hours, and yet there may not be complete life. It seems that in order to commence life the child must be born with the ability to breathe, and must actually have breathed. 1 Briand, Méd. Lég. 1ere partie, c. 6, art. 1.

4. Life is presumed to continue at least till one hundred years. 9 Mart. Lo. R. 257 See *Death; Survivorship*.

5. Life is considered by the law of the utmost importance, and its most anxious care is to protect it. 1 Bouv. Inst. n. 202-3.

LIFE-ANNUITY. An annual income to be paid during the continuance of a particular life.

LIFE-ASSURANCE. An insurance of a life, upon the payment of a premium; this may be for the whole life, or for a limited time. On the death of the person whose life has been insured, during the time for which it is insured, the insurer is bound to pay to the insured the money agreed upon. See 1 Bouv. Inst. n. 1231.

LIFE-ESTATE. Vide *Estate for life*, and 3 Saund. 338, h. note; 2 Kent, Com. 285; 4 Kent, Com. 23; 1 Hov. Suppl. to Ves. jr. 371, 381; 2 Id. 45, 249, 330, 340, 398, 467; 8 Com. Dig. 714.

LIFE-RENT, Scotch law. A right to use and enjoy a thing during life, the substance of it being preserved. A life-rent cannot, therefore, be constituted upon things which perish in the use; and though it may upon subjects which gradually wear out by time,

as household furniture, &c., yet it is generally applied to heritable subjects. Life-rents are divided into conventional and legal.

2.—1. The conventional are either simple or by reservation. A simple life-rent, or by a separate constitution, is that which is granted by the proprietor in favor of another. A life-rent by reservation is that which a proprietor reserves to himself, in the same writing by which he conveys the fee to another.

3.—2. Life-rents, by law, are the *terce* and the *courtesy*. See *Terce; Courtesy*.

LIGAN or **LAGAN.** Goods cast into the sea tied to a buoy, so that they may be found again by the owners, are so denominated. When goods are cast into the sea in storms or shipwrecks, and remain there without coming to land, they are distinguished by the barbarous names of *jetsam*, (q. v.) *flotsam*, (q. v.) and *ligan*. 5 Rep. 108; Harg. Tr. 48; 1 Bl. Com. 292.

LIGEANCE. The true and faithful obedience of a subject to his sovereign, of a citizen to his government. It signifies also the territory of a sovereign. See *Allegiance*.

LIGHTERMAN. The owner or manager of a lighter. A lighter is considered as a common carrier. See *Lights*.

LIGHTERS, commerce. Small vessels employed in loading and unloading larger vessels.

2. The owners of lighters are liable, like other common carriers for hire; it is a term of the contract on the part of the carrier or lighter, implied by law, that his vessel is tight and fit for the purpose or employments for which he offers and holds it forth to the public; it is the immediate foundation and substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without actual proof, and every principle of sound policy and public convenience requires it should be so. 5 East, 428; Abbott on Sh. 225; 1 Marsh. on Ins. 254; Park on Ins. 23; Week. on Ins. 328.

LIGHTS. Those openings in a wall which are made rather for the admission of light, than to look out of. 6 Moore, C. B. 47; 9 Bingh. R. 805; 1 Lev. 122; Civ. Code of Lo. art. 711. See *Ancient Lights; Windows*.

LIMBS. Those members of a man which may be useful to him in fight, and the unlawful deprivation of which by another amounts to a mayhem at common law.

1 Bl. Com. 130. If a man, *se defendendo*, commit homicide, he will be excused; and if he enter into an apparent contract, under a well-grounded apprehension of losing his life or limbs, he may afterwards avoid it. 1 Bl. 130.

LIMITATION, estates. When an estate is so expressly confined and limited by the words of its creation, that it cannot endure for a longer time than till the contingency shall happen, upon which the estate is to fail, this is denominated a *limitation*; as, when land is granted to a man *while* he continues unmarried, or *until* the rents and profits shall have made a certain sum, and the like; in these cases the estate is limited, that is, it does not go beyond the happening of the contingency. 2 Bl. Com. 155; 10 Co. 41; Bac. Ab. Conditions, H; Co. Litt. 236 b; 4 Kent. Com. 121; Tho. Co. Litt. Index, h. t.; 10 Vin. Ab. 218; 1 Vern. 483, n.; 4 Ves. Jr. 718.

2. There is a difference between a limitation and a condition. When a thing is given until an event shall arrive, this is called a limitation; but when it is given generally, and the gift is to be defeated upon the happening of an uncertain event, then the gift is conditional. For example, when a man gives a legacy to his wife, *while*, or *as long as*, she shall remain his widow, or *until* she shall marry, the estate is given to her only for the time of her widowhood, and, on her marriage, her right to it determines. Bac. Ab. Conditions, H. But if, instead of giving the legacy to the wife, as above mentioned, the gift had been to her generally with a *proviso*, or *on condition* that she should not marry, or that if she married she should forfeit her legacy, this would be a condition, and such condition being in restraint of marriage, would be void.

LIMITATION, remedies. A bar to the alleged right of a plaintiff to recover in an action, caused by the lapse of a certain time appointed by law; or, it is the end of the time appointed by law, during which a party may sue for and recover a right. It is a maxim of the common law, that a right never dies, and, as far as contracts were concerned, there was no time of limitation to actions on such contracts. The only limit there was to the recovery in cases of torts, was the death of one of the parties; for it was a maxim *actio personalis moritur cum persona*. This unrestrained power of commencing actions at any period, however remote from the original cause of action, was found to encourage

fraud and injustice; to prevent which, to assure the titles to land, to quiet the possession of the owner, and to prevent litigation, statutes of limitation were passed. This was effected by the statutes of 32 Hen. VIII. c. 2, and 21 Jac. I. c. 16. These statutes were adopted and practiced upon in this country, in several of the states, though they are now in many of the states in most respects superseded by the enactments of other acts of limitation.

2. Before proceeding to notice the enactments on this subject in the several states, it is proper to call the attention of the reader to the rights of the government to sue untrammelled by any statute of limitation, unless expressly restricted, or by necessary implication included. It has therefore been decided that the general words of a statute ought not to include the government, or affect its rights, unless the construction be clear and indisputable upon the text of the act; 2 Mason's R. 314; for no laches can be imputed to the government. 4 Mass. R. 528; 2 Overt. R. 352; 1 Const. Rep. 125; 4 Henn. & M. 53; 3 Serg. & Rawle, 291; 1 Bay's R. 26. The acts of limitation passed by the several states are not binding upon the government of the United States, in a suit in the courts of the United States. 2 Mason's R. 311.

3. For the following abstract of the laws of the United States and of the several states, regulating the limitations of actions, the author has been much assisted by the appendix of Mr. Angell's excellent treatise on the Limitation of Actions.

4. *United States.* 1. *On contracts.* All suits on marshals' bonds shall be commenced and prosecuted within six years after the right of action shall have accrued, and not after; saving the rights of infants, *femes covert*, and persons non compos mentis, so that they may sue within three years after disability removed. Act of April 10, 1806, s. 1.

5.—2. *On legal proceedings.* Writs of error must be brought within five years after judgment or decree complained of; saving in cases of disability the right to bring them five years after its removal. Act of September 24, 1789, s. 22. And the like limitation is applied to bills of review. 10 Wheat. 146.

6.—3. *Penalties.* Prosecutions under the revenue laws, must be commenced within three years. Act of March 2, 1799, s. 89; Act of March 1, 1823. Suits for penalties respecting copyrights, within two years.

Act of April 29, 1802, s. 3. Suits in violation of the provisions of the act of 1818, respecting the slave trade, must be commenced within five years. Act of April 20, 1818, s. 9.

7.—4. *Crimes.* Offences punishable by a court martial must be proceeded against within two years unless the person by reason of having absented himself, or some other manifest impediment, has not been amenable to justice within that period. The act of April 30, 1790, s. 31, limits the prosecution and trial of treason or other capital offence, wilful murder or forgery excepted, to three years next after their commission; and for offences not capital to two years, unless the party has fled from justice. 2 Cranch, 336.

8. *Alabama.* 1. *As to real estate.* 1. After twenty years after title accrued, no entry can be made into lands. 2. No action for the recovery of land can be maintained, if commenced after thirty years after title accrued. 3. Actions on claims by virtue of any title which has not been confirmed by either of the boards of commissioners of the United States, for adjusting land claims &c., and not recognized or confirmed by any act of congress, are barred after three years; there is a proviso as to lands formerly in West Florida, and in favor of persons under disabilities.

9.—2. *As to personal actions.* 1. Actions of trespass, *quare clausum fregit*; trespass; detainue; trover; replevin for taking away of goods and chattels; of debt, founded on any lending or contract, without specialty, or for arrearages of rent on a parol demise; of account and upon the case, (except actions for slander, and such as concern the trade of merchandise between merchant and merchant, their factors or agents,) are to be commenced within six years next after the cause of action accrued, and not after.

10.—2. Actions of trespass for assaults, menace, battery, wounding and imprisonment, or any of them, are limited to two years.

11.—3. Actions for words to one year.

12.—4. Actions of debt or covenant for rent or arrearages of rent, founded upon any lease under seal, or upon any single or penal bill for the payment of money only, or on any obligation with condition for the payment of money only, or upon any award under the hands and seals of arbitrators, are to be commenced within sixteen years after the cause of action accrued, and not after;

but if any payment has been made on the same at any time, then sixteen years from the time of such payment.

13.—5. Judgments cannot be revived after twenty years.

14.—6. A new action must be brought within one year, when the former has been reversed on error, or the judgment has been arrested.

15.—7. Actions on book accounts must be commenced within three years, except in the case of trade or merchandise between merchant and merchant, their factors or agents.

16.—8. Writs of error must be sued out within three years after final judgment.

17. *Arkansas.* 1. *As to lands.* No action for the recovery of any lands or tenements, or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of such suit. Act of March 3, 1838, s. 1. Rev. Stat. 527. No entry upon lands or tenements shall be deemed sufficient or valid as a claim, unless an action be commenced thereon within one year after such entry, and within ten years from the time when the right to make such entry descended and accrued. Id. s. 2. The right of any person to the possession of any lands or tenements, shall not be impaired or affected by a descent cast in consequence of the death of any person in possession of such estate. Id. s. 3.

18. The *savings* are as follows: If any person entitled to commence any action in the preceding sections specified, or to make an entry, be, at the time such title shall first descend or accrue; first, within the age of twenty-one years; second, insane; third, beyond the limits of the state; or, fourth, a married woman; the time during which such disabilities shall continue, shall not be deemed any portion of the time in this act limited for the commencement of such suit, or the making of such entry; but such person may bring such action, or make such entry, after the time so limited, and within five years after such disability is removed, but not after that period. Id. s. 4. If any person entitled to commence any such action, or make such entry, die during the continuance of such disability specified in the preceding section, and no determination or judgment be had of the title, right, or action to him accrued, his heirs may commence such action, or make such entry, after

the time in this act limited for that purpose, and within five years after his death, and not after that period. Id. s. 5, Rev. Stat. 527.

19.—2. *As to personal actions.* 1. The following actions shall be commenced within three years after the cause of action shall accrue: first, all actions founded upon any contract, obligation, or liability, (not under seal,) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other state; second, all actions upon judgments rendered in any court not being a court of record; third, all actions for arrearages of rent, (not reserved by some instrument under seal); fourth, all actions of account, assumpsit, or on the case, founded on any contract or liability, expressed or implied; fifth, all actions of trespass on lands, or for libels; sixth, all actions for taking or injuring any goods or chattels. Id. s. 6, Rev. Stat. 527, 528.

20.—2. The following actions shall be commenced within one year after the cause of action shall accrue, and not after: first, all special actions on the case for criminal conversation, assault and battery and false imprisonment; second, all actions for words spoken, slandering the character of another; third, all words spoken whereby special damages are sustained. Id. s. 7.

21.—3. All actions against sheriffs or other officers, for the escape of any person imprisoned on civil process, shall be commenced within one year from the time of such escape, and not after. Id. s. 8.

22.—4. All actions against sheriffs and coroners, upon any liability incurred by them, by the doing any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within two years after the cause of action shall have accrued, and not thereafter. Id. s. 9.

23.—5. All actions upon penal statutes, where the penalty or any part thereof, goes to the state, or any county, or person suing for the same, shall be commenced within two years after the offence shall have been committed, or the cause of action shall have accrued. Id. s. 10.

24.—6. All actions not included in the foregoing provisions, shall be commenced within five years after the cause of action shall have accrued. Id. s. 11.

25.—7. In all actions of debt, account or assumpsit, brought to recover any balance due upon a mutual, open account current, the cause of action shall be deemed to have

accrued from the time of the last item proved in such account. Id. s. 12.

26. The *savings* are as follows: 1. If any person entitled to bring any action in the preceding seven sections mentioned, except in actions against sheriffs for escapes, and actions of slander, shall, at the time of action accrued, be either within the age of twenty-one years, or insane, or beyond the limits of this state, or a married woman, such person shall be at liberty to bring such action within the time specified in this act, after such disability is removed. Id. s. 13.

27.—2. If any person entitled to bring an action in the preceding provisions of this act specified, die before the expiration of the time limited for the commencement of such suit, and such cause of action shall survive to his representatives, his executors or administrators may, after the expiration of such time, and within one year after such death, commence such suit, but not after that period. Id. s. 19.

28.—3. If at any time when any cause of action specified in this act accrues against any person, he be out of the state, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person depart from, and reside out of the state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action. Id. s. 20. If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented. Id. s. 26.

29.—4. None of the provisions of this act shall apply to suits brought to enforce payment on bills, notes, or evidences of debt issued by any bank, or moneyed corporation. Id. s. 18.

30. *Connecticut.* 1. *As to lands.* No person can make an entry into lands after fifteen years next after his right or title first accrued to the same; and no such entry is valid unless an action is afterwards commenced thereupon, and is prosecuted with effect within one year next after the making thereof; there is a proviso in favor of disabled persons, who may sue within five years after the disability has been removed.

31.—2. *As to personal actions.* 1. In

actions on specialties and promissory notes, not negotiable, the limitation is seventeen years, with a saving that "persons legally incapable to bring an action on such bond or writing at the accruing of the right of action, may bring the same within four years after becoming legally capable."

32.—2. Actions of account, of debt on book, on simple contract, or assumpsit, founded on an implied contract, or upon any contract in writing, not under seal, (except promissory notes not negotiable,) within six years, saving as above three years.

33.—3. In trespass on the case, six years, but no savings.

34.—4. Actions founded upon express contracts not reduced to writing; upon trespass; or upon the case for words; three years and no savings.

35.—5. Actions founded on penal statutes one year after the commission of the offence.

36.—6. A new suit must be commenced within one year after reversal of the former, or when it was arrested.

37. *Delaware*. 1. *As to lands*. Twenty years of adverse possession of land is a bar. The general principles of the English law on this subject, have been adopted in this state.

38.—2. *As to personal actions*. All actions of trespass quare clausum fregit; of detinue; trover and replevin, for taking away goods or chattels; upon account and upon the case; (other than actions between merchant and merchant, their factors and servants, relating to merchandise;) upon the case for words; of debt grounded upon any lending or contract without specialty; of debt for arrearages of rent; and all actions of trespass, assault, battery, menace, wounding or imprisonment, shall be commenced and sued within three years next after the cause of such action or suit accrues, and not after.

39. The 2d section of the same act contains a saving, in favor of persons who, at the time of the cause of action accrued, are within the age of twenty-one years; femes covert; persons of insane memory, or imprisoned. Such persons must bring their actions within one year next after the removal of such disability as aforesaid.

40. In the 3d section of the same act, provision is made, that no person not keeping a day book, or regular book of accounts, shall be admitted to prove or require payment of any account of longer standing than one year against the estate of any person

dying within the state, or if it consist of many particulars, unless every charge therein shall have accrued within three years next before the death of the deceased, and unless the truth and justice thereof shall be made to appear by one sufficient witness; and in case of a regular book of accounts, unless such account shall have accrued or arisen within three years before the death of the deceased person.

41. In section 6th, there is a saving of the rights or demands of infants, femes covert, persons of insane memory, or imprisoned, so their accounts be proved and their claims prosecuted within one year after the removal of such disability.

42. By a supplementary act, it is declared, that nothing contained in this act, shall extend to any intercourse between merchant and merchant, according to the usual course of mercantile business, nor to any demands founded on mortgages, bonds, bills, promissory notes, or settlements under the hands of the parties concerned.

43. All actions upon administration, guardian and testamentary bonds, must be commenced within six years after passing the said bonds; and actions on sheriff's recognizances, within seven years after the entering into such recognizances, and not after; saving in all these cases, the rights of infants, femes covert, persons of insane memory, or imprisoned, of bringing such actions on administration, guardian or testamentary bonds, within three years after the removal of the disability, and on sheriff's recognizances within one year after such disability removed.

44. No appeal can be taken from any interlocutory order, or final decrees of the chancellor, but within one year next after making and signing the final decree, unless the person entitled to such appeal be an infant, feme covert, non compos mentis, or a prisoner.

45. No writ of error, can be brought upon any judgment, but within five years after the confessing, entering or rendering thereof, unless the person entitled to such writ, be an infant, feme covert, non compos mentis, or a prisoner, and then within five years exclusive of the time of such disability. Constitution, article 5, s. 13.

46. There is no saving in favor of foreigners or citizens of other states. The courts of this state have adopted the general principles of the English law.

47. *Florida*. 1. *As to lands*. Write

of formedon in descender, remainder, or reverter, must be brought within twenty years. Act of Nov. 10, 1828, sec. 1, Duval, 154. Infants, femmes covert, persons *non compos mentis*, or prisoners, may sue within ten years after disability is removed. Id. s. 2. A writ of right on seisin of ancestor or predecessor within fifty years; other possessory action on seisin of ancestor or predecessor, within forty years; real action on plaintiff's possession or seisin within thirty years. Id. sec. 3.

48.—2. *As to personal actions.* All actions upon the case, other than for slander, actions for accounts, for trespass, debt, detinue, and replevin for goods and chattels, and actions of trespass *quare clausum fregit*, within five years. Actions of trespass, assault, battery, wounding and imprisonment, or any of them, within three years; and actions for words within one year. Id. s. 4. There is a saving in favor of infants, *femes covert*, persons *non compos mentis*, imprisoned, or beyond seas, or out of the country, who may bring suit within the same time after the disability has been removed. All actions on book accounts shall be brought within two years.

49.—3. *As to crimes.* All offences not punishable with death, shall be prosecuted within two years. Act of Feb. 10, 1832, s. 78. All actions, suits and presentments upon penal acts of the general assembly, shall be prosecuted within one year. Act of Nov. 19, 1828, s. 18.

50. *Georgia.* 1. *As to lands.* Seven years' adverse possession of lands is a bar; with a saving in favor of infants, femmes covert, persons *non compos mentis*, imprisoned or beyond seas.

51.—2. *As to personal actions.* Twenty years is a bar in personal actions, on bonds under seal; other obligations not under seal, six years; trespass *quare clausum fregit*, three years; trespass, assault and battery, two years; slander and *qui tam* actions, six months. There are savings in favor of infants, femmes covert, persons *non compos mentis*, imprisoned and beyond seas.

52. No other savings in favor of citizens of other states or foreigners.

53. *As to crimes.* In cases of murder there is no limitation. In all other criminal cases where the punishment is death or perpetual imprisonment, seven years; other felonies, four years; cases punishable by fine and imprisonment, two years. Prince's Dig. 578-579. Acts of 1767, 1813, and

1833. See 1 Laws of Geo. 33; 2 Id. 344; 3 Id. 30; Pamphlet Laws, 1833, p. 143.

54. *Illinois.* 1. *As to lands.* No statute on this subject.

55.—2. *As to personal actions.* All actions of trespass *quare clausum fregit*; all actions of trespass, detinue, actions sur trover, and replevin for taking away goods and chattels, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; all actions of debt, grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought, shall be commenced within the following times, and not after—actions upon the case, other than for slander; actions of account, and actions of trespass, debt, detinue and replevin for goods and chattels, and actions of trespass *quare clausum fregit*, within five years next after the cause of action or suit, and not after; and the actions of trespass for assault, battery, wounding, imprisonment, or any of them, within three years next after cause of action or suit, and not after; and actions for slander, within one year next after the words spoken.

There are no savings, by the statute, in favor of citizens of other states, or foreigners.

56. *Indiana.* 1. *As to lands.* "No action of ejectment shall be commenced for the recovery of lands or tenements against any person or persons who may have been in the quiet and peaceable possession of the same under an adverse title for twenty years, either in his own right, or the right of any other person or persons under whom he claims; and any action of ejectment commenced against the provisions of this act shall be dismissed at the cost of the party commencing the same. Provided, however, that this act shall not be so construed as to affect any person who may be a feme covert, non compos mentis, a minor, or any person beyond the seas, within five years after such disability is removed." Rev. Code, c. 36, sec. 3, January 18, 1831.

57.—2. *As to personal actions.* "All actions of debt on simple contract, and for rent in arrear, action on the case, (other than slander,) actions of account, trespass *quare clausum fregit*, detinue, and replevin for goods and chattels, shall be commenced within five years after the cause of

action accrued, and not after. All actions of trespass, for assault and battery, and for wounding and imprisonment, shall be commenced within three years, and not after." Rev. Code, c. 81, sec. 12, January 29, 1831.

58.—3. *Crimes*. "All criminal prosecutions for offences, the affixed penalty of which is three dollars, or less, shall be commenced within thirty days," &c. "All prosecutions for offences, except those the fixed penalties of which do not exceed three dollars, and except treason, murder, arson, burglary, man stealing, horse stealing, and forgery, shall be instituted within two years, &c." Revised Code, c. 26, Feb. 10, 1831.

59.—4. *Penal actions*. "All actions upon any act of assembly, now or hereafter to be made, when the right is limited to the party aggrieved, shall be commenced within two years, &c., and all actions of slander shall be commenced within one year, &c., saving the right of infants, femes covert, persons non compos mentis, or without the jurisdiction of the United States, until one year after their several disabilities are removed." Sec. 12.

60.—5. *Savings*. Provided, that no statute of limitation shall ever be pleaded as a bar, or operate as such on an instrument or contract in writing, whether the same be sealed or unsealed, nor to running accounts between merchant and merchant. Rev. Code, ch. 81, s. 12.

61. And provided further, that on all contracts made in this state, if the defendant shall be without the same when the cause of action accrued, said action shall not be barred until the times above limited shall have expired, after the defendant shall have come within the jurisdiction thereof, and on all contracts made without the state, if the defendant shall have left the state or territory when the same was made, and come within the jurisdiction of this state before the cause of action accrued thereon, the plaintiff shall not be barred his right of action, until the time above limited after the said demand shall have been brought within the jurisdiction of this state. Rev. Code, ch. 81, s. 12.

62. *Kentucky*. 1. *As to lands*. The act of limitation takes effect in a writ of right or other possessory action, in thirty years from the seisin of the demandant or his ancestors. In ejectment, in twenty years. See 1 Litt. 380, and Sessions Acts

1838-9, page 380. In the action of ejectment, there is a saving in favor of infants; persons insane or imprisoned; femes covert, to whom lands have descended during the coverture, when their cause of action accrued. These persons may sue within three years after the removal of the disability. 5 Litt. 90; Id. 97. There is no saving in favor of non-residents or absent persons. 5 Litt. 90; 4 Bibb, 561. But when the possession has been held for seven years under a connected title in law or equity deducible of record from the commonwealth, claiming title under an adverse entry, survey or patent, no writ of ejectment or other possessory action can be commenced. In this case there is a saving in favor of infants, &c., as above, and of persons out of the United States, in the service of the United States, or of this state, who may bring actions seven years after the removal of the disability. 4 Litt. 55.

63.—2. *As to personal actions*. The act of limitation operates on simple contracts (except store accounts) in five years. Torts to the person, three years. Torts, except torts to the person, five years. Slander, one year. Store accounts, one year from the delivery of each article; except in cases of the death of the creditor or debtor before the expiration of one year, when the further time of one year is allowed after such death.

64. *Savings* in such actions of simple contracts, tort, slander, and upon store accounts, in favor of infants, femes covert, persons imprisoned or insane at the time such action accrued, who have the full time aforesaid after the removal of their respective disabilities to commence their suit. But if the defendant, in any of said personal actions, absconds, or conceals himself by removal out of the country or county where he resides when the cause of action accrues, or by any other indirect ways or means defeats or obstructs the bringing of such suit or action, such defendant shall not be permitted to plead the act of limitations. 1 Litt. 380. There is no saving in favor of non-residents or persons absent. Act of 1823, s. 3, Session Acts, p. 287.

65. *Louisiana*. The Civil Code, book 3, title 28, chapter 1, section 3, provides as follows:

66.—§ I. *Of the prescription of one year*. Art. 3499. The action of justices of the peace and notaries, and persons performing their duties, as well as constables,

for the fees and emoluments which are due to them in their official capacity; that of masters and instructors in the arts and sciences, for lessons which they give by the month; that of innkeepers and such others, on account of lodging and board which they furnish; that of retailers of provisions and liquors; that of workmen, laborers, and servants, for the payment of their wages; that for the payment of the freight of ships and other vessels, the wages of the officers, sailors, and others of the crew; that for the supply of wood and other things necessary for the construction, equipment, and provisioning of ships and other vessels, are prescribed by one year.

67.—3500. In the cases mentioned in the preceding article, the prescription takes place, although there may have been a regular continuance of supplies, or of labor, or other service. It only ceases, from the time when there has been an account acknowledged, a note or bond, or a suit instituted. However, with respect to the wages of officers, sailors, and others of the crew of a ship, this prescription runs only from the day when the voyage is completed.

68.—3501. The actions for injurious words, whether verbal or written, and that for damages caused by slaves or animals, or resulting from offences or quasi offences; that which a possessor may institute, to have himself maintained or restored to his possession, when he has been disturbed or evicted; that for the delivery of merchandise or other effects, shipped on board any kind of vessels; that for damage sustained by merchandise on board ships, or which may have happened by ships running foul of each other, are prescribed by one year.

69.—3502. The prescription mentioned in the preceding article, runs, with respect to the merchandise injured or not delivered, from the day of the arrival of the vessel, or that on which she ought to have arrived; and in the other cases, from that on which the injurious words, disturbance, or damage were sustained.

70.—§ II. *Of the prescription of three years.* Art. 3503. The action for arrearages of rent charge, annuities and alimony, or of the hire of movables or immovables; that for the payment of money lent; for the salaries of overseers, clerks, secretaries, and of teachers of the sciences, for lessons by the year or quarter; that of physicians, surgeons, and apothecaries, for visits, operations, and medicines; that of parish judges,

sheriffs, clerks, and attorneys, for their fees and emoluments, are prescribed by three years, unless there be an account acknowledged, a note or bond given, or an action commenced before that time.

71.—3504. The action of parties against their attorneys for the return of papers delivered to them for the interest of their suits, is prescribed also by three years, reckoning from the day when judgment was rendered in the suit, or from the revocation of the powers of the attorneys.

72.—§ III. *Of the prescription of five years.* Art. 3505. Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by endorsement or delivery, are prescribed by five years, reckoning from the day when these engagements were payable.

73.—3506. The prescription mentioned in the preceding article, and those described above in the paragraphs I. and II., run against minors and interdicted persons, reserving, however, to them their recourse against their tutors or curators. They run also against persons residing out of the state.

74.—3507. The action of nullity or rescission of contracts, testaments, or other acts; that for the reduction of excessive donations; that for the rescission of partitions and guaranty of the portions, are prescribed by five years, when the person entitled to exercise them is in the state, and ten years if he be out of it. This prescription only commences against minors after their majority.

75.—§ IV. *Of the prescription of ten years.* Art. 3508. In general, all personal actions, except those above enumerated, are prescribed by ten years, if the creditor be present, and by twenty years, if he be absent.

76.—3509. The action against an undertaker or architect, for defect of construction of buildings of brick or stone, is prescribed by ten years.

77.—3510. If a master suffer a slave to enjoy his liberty for ten years, during his residence in the state, or for twenty years while out of it, he shall lose all right of action to recover possession of the slave, unless the slave be a runaway or fugitive.

78.—3511. The rights of usufruct, use and habitation, and services, are lost, by non-use for ten years, if the person having a right to enjoy them, be in the state, and by twenty years, if he be absent.

79.—§ V. *Of the prescription of thirty years.* Art. 3512. All actions for immovable property, or for an entire estate, as a succession, are prescribed by thirty years, whether the parties be present, or absent from the state.

80.—3513. Actions for the revindication of slaves are prescribed by fifteen years, in the same manner as in the preceding article.

81.—§ VI. *Of the rules relative to the prescription operating a discharge from debts.* Art. 3514. In cases of prescription releasing debts, one may prescribe against a title created by himself, that is, against an obligation which he has contracted.

82.—3515. Good faith not being required on the part of the person pleading this prescription, the creditor cannot compel him or his heirs to swear whether the debt has or has not been paid, but can only blame himself for not having taken his measures within the time directed by law; and it may be that the debtor may not be able to take any positive oath on the subject.

83.—3516. The prescription releasing debts is interrupted by all such causes as interrupt the prescription, by which property is acquired, and which have been explained in the first section of this chapter. It is also interrupted by the causes explained in the following articles.

84.—3517. A citation served upon one joint debtor, or his acknowledgment of the debt, interrupts the prescription with regard to all the others and even their heirs. A citation served on one of the heirs of a joint debtor, or the acknowledgment of such heir, does not interrupt the prescription, with regard to the other heirs, even if the debt was by mortgage, if the obligation be not indivisible. This citation or acknowledgment does not interrupt the prescription, with regard to the other co-debtors, except for that portion for which such heir is bound. To interrupt this prescription for the whole, with regard to the other co-debtors, it is necessary, either that the citations be served on all, or the acknowledgment be made by all the heirs.

85.—3518. A citation served on the principal debtor, or his acknowledgment, interrupts the prescription on the part of the surety.

86.—3519. Prescription does not run against minors and persons under interdiction, except in the cases specified above.

87.—3520. Prescription runs against

the wife, even although she be not separated of property by marriage contract or by authority of law; for all such credits as she brought in marriage to her husband, or for whatever has been promised to her in dower; but the husband continues responsible to her.

88. *Maine.* 1. *As to real actions.* The writ of right is limited to thirty years; writ of ancestral seisin, twenty-five years; writ of entry on party's own seisin, twenty years. Stat. of Maine, ch. 62, § 1, 2, 3. But by the revised statutes, all real actions are limited to twenty years, from the time the right accrues. They took effect on the first day of April, 1843. Rev. Stat. T. 10, ch. 140, § 1. And writs of right and of formedon are abolished after that time. Rev. Stat. ch. 145, § 1.

89.—2. *As to personal actions.* When founded on simple contract, they are limited after six years; Rev. Stat. T. 10, ch. 146, § 1; on specialties, twenty years. Id. § 11. Personal actions founded on torts are limited to six years, except trespass for assault and battery, false imprisonment, slanderous words and libels, which are limited to two years. Id. § 1.

90.—3. *As to penal actions.* When brought by individuals having an interest in the penalty or forfeiture, they are limited to one year; Rev. Stat. T. 10, c. 146, § 15; when prosecuted by the state, two years. Id. § 16.

91.—4. *As to crimes.* Prosecutions for crimes must be commenced within six years, when the party charged has publicly resided within the state, except in cases of treason, murder, arson and manslaughter. Rev. Stat. T. 12, c. 167, § 15.

92. *Maryland.* 1. *As to lands.* The statute of 21 Jac. I. c. 16, is in force in this state.

93.—2. *As to personal actions.* By the Act of Assembly, 1715, c. 23, actions of account; upon the case; or simple contract; or book debt or account; and of debt not of specialty; detinue and replevin for taking away goods and chattels; and trespass quare clausum fregit; must be brought within three years ensuing the cause of action, and not after; other actions of trespass, of assault, battery, wounding and imprisonment, within one year from the time of the cause of action accruing; from these provisions are excepted, however, such accounts as concern the trade of merchandise between merchant and merchant, their factors and

servants which are not resident within this [province] state. This statute also enacts, that no bill, bond, judgment, or recognition, statute merchant or of the staple, or other specialty whatsoever, (except such as shall be taken in the name or for the use of our sovereign the king, &c.) shall be "good and pleadable, or admitted in evidence" against any person of this [province] state, after the principal debtor and creditor have both been dead twelve years, or the debt or thing in action above twelve years standing.

94. Persons laboring under the impediments of infancy, coverture, insanity or imprisonment, are not barred until five years after the disability has been removed. And when a personal action abates by the death of the defendant, the plaintiff may at any time renew his suit, provided it be commenced *without delay* after letters testamentary have been granted.

95. Defendants, when absent from the state at the time the cause of action accrued, cannot compute the time of their absence in order to bar the plaintiff, but the latter may prosecute the same after the presence in the state of the persons liable thereto, within the time or times limited by the acts of limitation in such actions.

96. *Massachusetts*. By the Revised Statutes, ch. 120, it is provided as follows, to wit:

97.—§ 1. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards:

98. First, all actions of debt, founded upon any contract, or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the U. States:

99. Secondly, all actions upon judgments rendered in any court, not being a court of record:

100. Thirdly, all actions for arrears of rent:

101. Fourthly, all actions of assumpsit, or upon the case, founded on any contract or liability, express or implied:

102. Fifthly, all actions for waste and for trespass upon land:

103. Sixthly, all actions of replevin, and all other actions for taking, detaining or injuring goods or chattels:

104. Seventhly, all other actions on the case, except actions for slanderous words and for libels.

105.—§ 2. All actions for assault and battery, and for false imprisonment, and all actions for slanderous words and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

106.—§ 3. All actions against sheriffs, for the misconduct or negligence of their deputies, shall be commenced within four years next after the cause of action shall accrue, and not afterwards.

107.—§ 4. None of the foregoing provisions shall apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator, nor to an action brought upon any bills, notes, or other evidences of debt, issued by any bank.

108.—§ 5. In all actions of debt or assumpsit, brought to recover the balance, due upon a mutual and open account current, the cause of action shall be deemed to have accrued, at the time of the last item proved in such account.

109.—§ 6. If any person, entitled to bring any of the actions, before mentioned in this chapter, shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person may bring the said actions, within the times in this chapter respectively limited, after the disability shall be removed, or within six years after the disability mentioned in the preceding section.

110.—§ 7. All personal actions on any contract, not limited by the foregoing sections, or by any other law of this commonwealth, shall be brought within twenty years after the accruing of the cause of action.

111.—§ 8. When any person shall be disabled to prosecute an action in the courts of this commonwealth, by reason of his being an alien subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods, herein limited for the commencement of any of the actions before mentioned.

112.—§ 9. If, at the time when any cause of action, mentioned in this chapter, shall accrue against any person, he shall be out of the state, the action may be commenced, within the time herein limited

therefor, after such person shall come into the state; and if after any cause of action shall have accrued, the person against whom it has accrued shall be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.

113.—§ 10. If any person, entitled to bring any of the actions, before mentioned in this chapter, or liable to any such action, shall die before the expiration of the time herein limited therefor, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within two years after the grant of letters testamentary or of administration, and not afterwards, if barred by the provisions of this chapter.

114.—§ 11. If, in any action, duly commenced within the time in this chapter limited and allowed therefor, the writ shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year.

115.—§ 12. If any person, who is liable to any of the actions mentioned in this chapter, shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced, at any time within six years after the person, who is entitled to bring the same, shall discover that he has such cause of action, and not afterwards.

116. *Michigan.* 1. *As to lands.* Sec. 1. In all real actions the statute of limitation takes effect as follows, to wit: In all actions for the recovery of land the statute runs after twenty years from the time the cause of action accrued, or within twenty-

five years after the plaintiff or those from, by or under whom he claims, shall have been seised or possessed of the premises, except as specified below.

117.—Sec. 2. If the right or title accrued to an ancestor or predecessor of the person who brings the action or makes the entry upon the land, or to any other person from, by or under whom he claims, the said twenty-five years shall be computed from the time when the right or title so first accrued to such ancestor, predecessor or other person.

118.—Sec. 3. The right to bring an action for the recovery of land or to make an entry thereon shall be deemed first to accrue when any person is disseised, at the time of such disseisin.

119. When any person claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy or other estate, intervening after the death of such ancestor or devisor, in which case the right shall be deemed to accrue when such intermediate estate shall expire, or when it would have expired by its own limitation.

120. When there is such an intermediate estate, and in all other cases when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time; but if the person claims by reason of any forfeiture or breach of the condition, the statute runs from the time when the forfeiture was incurred or the condition was broken.

121. In all other cases not otherwise provided for, the right shall be deemed to accrue when the claimant or the person under whom he claims first became entitled to the possession of the premises, under the title upon which the entry or action is founded.

122.—Sec. 4. If any minister or other sole corporation shall be disseised, any of his successors may enter upon the premises, or bring an action for the recovery thereof at any time within five years after death, resignation or removal of the person so disseised, notwithstanding the twenty-five years after such disseisin shall have expired.

123.—Sec. 5. If the person first enti-

tled to make such entry or bring such action shall die within the age of twenty-one years, or be a married woman, insane, imprisoned in the state prison, or absent from the United States, and no determination or judgment shall have been had of or upon the title, right or action which accrued to him, the entry may be made or the action brought by his heirs, or any other person claiming from, by or under him, at any time within ten years after his death, notwithstanding the said twenty-five years shall have expired.

124.—Sec. 6. No person shall be deemed to have been in possession of any lands within the meaning of the foregoing provisions merely by reason of having made an entry thereon, unless he shall have continued in open and peaceable possession of the premises for the space of one year next after such entry, or unless an action shall be commenced upon such entry and seisin within one year after he shall be ousted or dispossessed of the premises. R. S., p. 573 and 574.

125. No actions for the recovery of an estate sold by an executor or administrator shall be maintained by the heir or other person claiming under the deceased testator or intestate, unless it be commenced within five years next after the sale. And no actions for any estate sold by a guardian shall be maintained by the ward or any other person claiming under him, unless it be commenced within five years after the termination of the guardianship. Except that persons out of the state and minors and others under any legal disability to sue at the time when the right of action shall first accrue, may commence such action at any time within five years after the disability is removed, or after their return to the state. R. S., p. 317, sec. 35.

126.—2. *As to personal actions.* The following actions shall be commenced within six years next after the cause of action shall accrue and not afterwards, to wit:

127.—1st. All actions of debt founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record, or of general equity jurisdiction of the United States, or of this or some other of the United States.

128.—2d. All actions upon judgments rendered in any court other than those above excepted.

129.—3d. All actions for arrears of rent.

130.—4th. All actions of assumpsit or upon the case founded on any contract or liability express or implied.

131.—5th. All actions for waste.

132.—6th. All actions of replevin and trover and all other actions for taking, detaining, or injuring goods and chattels.

133.—7th. All other actions on the case, except actions for slanderous words or for libels.

134.—Sec. 2. All actions for trespass upon land or for assault and battery, and for false imprisonment, and all actions for slanderous words and for libels, shall be commenced within two years next after the cause of action shall accrue and not afterwards.

135.—Sec. 3. All actions against sheriffs for the misconduct or neglect of their deputies shall be commenced within four years next after the cause of action shall accrue and not afterwards.

136.—Sec. 4. None of the foregoing provisions shall apply to any action brought upon any bills, notes or other evidence of debt issued by any bank.

137.—Sec. 5. In all actions of debt or assumpsit brought to recover the balance due upon mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

138.—Sec. 6. If any person entitled to bring any of the actions before mentioned in this chapter shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned in the state prison, or absent from the United States, such person may bring the said actions within the times in this chapter respectively limited after the disability shall be removed.

139.—Sec. 7. All personal actions on any contract not limited by the foregoing sections or by any other laws of this state, shall be brought within twenty years after the accruing of the cause of action.

140.—Sec. 8. When any person shall be disabled to prosecute an action in the courts of this state by reason of his being an alien subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods herein limited for the commencement of any of the actions before mentioned.

141.—Sec. 9. If at the time when any cause of action mentioned in this chapter

shall accrue against any person, he shall be out of the state, the action may be commenced within the time herein limited therefor after such person shall come into this state. And if, after any cause of action shall have accrued, the person against whom it has accrued shall be absent from, and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.

142.—Sec. 10. If any person entitled to bring any of the actions before mentioned in this chapter, or liable to any such actions, shall die before the expiration of the time herein limited or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person as the case may be, at any time within two years after the granting of the letters testamentary or of administration, and not afterwards, if barred by the provisions of this chapter.

143.—Sec. 11. If in any action, duly commenced within the time limited in this chapter and, allowed therefor, the writ shall fail of a sufficient service or return, by an unavoidable accident or by any default or neglect of the officer to whom it is committed, or if the suit shall be abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any other matter of form, or if after a verdict for the plaintiff the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit or after the reversal of the judgment therein. And if the cause of action does by law survive, the executor or administrator may in case of his death commence such action within said one year.

144.—Sec. 12. In case of the fraudulent concealment of the right of action, such action may be commenced at any time within six years after the person entitled to the same shall discover that he has such cause of action. R. S., p. 576, 577 and 578.

145.—Sec. 21. All actions and suits for any penalty or forfeiture on any penal statute brought by any person to whom the penalty or forfeiture is given in the whole or in part, shall be commenced within one year

next after the offence was committed, and not afterwards.

146.—Sec. 22. If the penalty or forfeiture is given in whole or in part to the state, a suit therefor may be commenced by or in behalf of the state at any time within two years after the offence was committed and not afterwards. Rev. Stat., p. 579.

147.—3. *As to crimes.* The statute of limitations in criminal cases takes effect after six years from the time the offence was committed; but any period during which the party charged was not usually and publicly resident within this state shall not be reckoned as a part of the six years. In case of murder, however, there is no limitation. Rev. Stat., p. 666, sec. 15.

148. *Mississippi.* 1. *As to lands.* Real, possessory, ancestral and mixed actions for lands, tenements, or hereditaments must be instituted within twenty years next after the right or title thereto, or cause of action accrued. How. & Hutch. page 568, ch. 43, sec. 88, L. 1822. Right or title of entry is barred after twenty years. Id. sec. 89, L. 1822. Fifty years' actual possession, uninterruptedly continued by occupancy, descent, conveyance or otherwise, vests a complete title in the occupier. Id. sec. 90, L. 1822. Real estate, which may have escheated to the state, must be claimed within two years next after the inquisition, or it will be sold. How. & Hutch. page 363, ch. 34, sec. 84, L. 1822. If real estate escheat to the state and be sold, the moneys arising from such sale may be claimed within twelve years next from the day of such sale; Id. sec. 87, L. 1822; and moneys arising from sale of personal estate, escheated, may be claimed within six years next after the sale thereof. Ib. All persons claiming real estate escheated, either by descent or otherwise, must appear and traverse the office of inquest within twelve years from the date thereof, and in case of personal estate, within six years, or they will be forever barred of their claim. Id. sec. 88, L. 1822.

149.—2. *As to personal actions.* 1st. On contracts. These are, 1. Actions on simple contracts must be commenced and sued within six years next after the cause of action accrued. Except such actions as concern the trade or merchandise between merchant and merchant, their factors, agents and servants—where there are mutual dealings and mutual credits. How. & Hutch.

page 569, ch. 43, sec. 91, L. 1822; How. Rep. 2, 786.

150. Actions founded upon any account for goods, wares or merchandise, sold and delivered, or for any articles charged in any store account, must be commenced and sued within three years next after cause of action accrued. Post-dating any article in such account is highly penal. How. & Hutch. page 570, ch. 43, sec. 98, L. 1822.

151.—2. Actions on specialties must be commenced and sued within sixteen years next after cause of action accrued. How. & Hutch. page 569, ch. 43, sec. 95, L. 1822.

152. Judgments recovered in any court of record as well *without as within* this state, may be revived by scire facias, or an action of debt brought thereon within twenty years next after the date of such judgment. How. & Hutch. pages 570 and 574, ch. 43, sec. 96 and 111, Laws 1822 and 1830. This extends to decrees of the chancery court. How. Rep. 4, 81.

153.—3. Suits on bonds, or recognizances against sureties for public officers, must be commenced and sued within five years next after cause of action accrued. Id. sec. 97, page 570, L. 1822.

154.—2d. On torts. Actions for torts affecting the person must be sued within two years next after cause accrued. How. & Hutch. page 569, ch. 43, sec. 92, L. 1822. Actions of slander for words spoken or written must be sued within one year. Id. sec. 93, L. 1822; How. Rep. 2, 698. Actions of trespass quare clausum fregit; trespass; detinue; trover; replevin, for taking away goods and chattels, actions on the case, must be sued within six years next after cause of action accrued. Id. How. & Hutch. page 569, ch. 43, sec. 91, L. 1822.

155.—3. *As to penal actions.* Penal actions are limited to twelve months from the time of incurring the fine or forfeiture. (Persons absconding or fleeing from justice are excepted.) How. & Hutch. p. 668, ch. 49, sec. 19, L. 1822.

156.—4. *As to crimes.* Indictments, presentments or informations for offences (crimes) must be found or exhibited within one year next after the offence committed, (except for wilful murder, arson, forgery, counterfeiting and larceny; as to which there is no limitation.) How. & Hutch. p. 668, ch. 49; sec. 19, L. 1822.

157. *Missouri.* 1. *As to lands.* That from henceforth no person or persons whatsoever shall make entry into any lands, to-

nements or hereditaments, after the expiration of twenty years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action for any lands, tenements, or hereditaments of the seisin or possession of him, her or them, his, her or their ancestors or predecessors, nor declare or allege any other seisin or possession of him, her or them, his, her or their ancestors or predecessors, than within twenty years next before such writ, action, or suit, so hereafter to be sued, commenced or brought. Act of 1848. Infants, femes covert, persons of unsound memory, imprisoned, beyond seas, or without the jurisdiction of the United States, may sustain such actions commenced within twenty years after the disability has been removed.

158.—2. *As to personal actions.* In all actions upon the case (other than for slander;) actions for accounts, (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants;) actions for debt, grounded upon any lending or contract without specialty, or of debt for arrearages of rent; and actions of trespass quare clausum fregit, shall be brought within five years after the cause of action shall accrue.

159. All actions upon accounts, for goods, wares and merchandise sold and delivered, or for any article in any store account; all actions of trespass vi et armis, assault and battery, and imprisonment, shall be brought within two years after the cause of action shall accrue.

160. Actions on the case for words, one year after the words spoken; and writs of error shall be brought within five years after the judgment or order of complaint shall be rendered and not after. Act of July 4, 1807.

161. The plaintiff may within one year commence a new suit when a former judgment has been reversed, or the plaintiff has suffered a nonsuit.

162.—3. *As to criminal actions.* Actions, suits, indictments, or informations, (if the punishment be fine and imprisonment,) must be brought within two years after the offence has been committed, and not after.

163. *New Hampshire.* 1. *As to lands.* No action can be maintained for the recovery of lands, unless upon a seisin within

twenty years, except by persons under disability, that is, by those under twenty-one years of age, *femes covert*, *non compos mentis*, imprisoned, or without the limits of the United States, who may sue within five years after the disability has been removed.

164.—2. *As to personal actions.* Actions in general are limited to be brought within six years after they have accrued; but actions of trespass, assault and battery, are limited to three years; and actions of slander to two. Infants, *femes covert*, persons imprisoned, or beyond sea, without the limits of the United States, or *non compos mentis*, may bring an action within the same time, after the disability has been removed. When the defendant has left the state before the action accrued, and left no property there which could have been attached, then the whole time is allowed after his return.

165. *New Jersey.* 1. *As to lands.* By the act of June 5, 1787, it was enacted,

166.—§ 1. At the aforesaid date, that sixty years' actual possession of lands, tenements or other real estate uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced or been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements or other real estate, and shall be a good and sufficient bar to all claims that may be made or actions commenced, by any person or persons whatsoever for the recovery of such lands, &c.

167.—§ 2. And that thirty years' actual possession of lands, &c. uninterruptedly continued as aforesaid, wherever such possession commenced or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor general's office of the division in which such location was made, or in the secretary's office, agreeably to law; or, wherever such possession was obtained by a fair bona fide purchase of such land, &c. of any person in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor or occupier of all such lands, &c.

168. Provided, That if any person or

persons having a right or title to lands, &c. shall, at the time of the said right or title first descended or accrued, be within twenty-one years of age, *feme covert*, *non compos*, imprisoned, or without the United States, then such person or persons, and his heir or heirs may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons, or his or their heirs, commence or sue forth his or their actions within five years, after his or their full age, discovery, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no other time.

169. And provided that any citizens of this, or any of the United States, and his or their heirs, having such right, &c. may, notwithstanding the aforesaid times expired, commence his or their action for such lands, &c., at any time within five years next after the passing of this act, and not afterwards.

170. By the act of February 7, 1799, s. 9, it is enacted, that no person who now hath, or hereafter may have, any right or title of entry into lands, tenements or hereditaments, shall make entry therein, but within twenty years next after such right or title shall accrue, and such person shall be barred from any entry afterwards.

171. Provided, That the time during which the person who hath or shall have such right or title of entry shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be computed as part of the said limited period of twenty years.

172. By section 10, of the same act, from and after the first day of January, 1803, every real, possessory, ancestral, mixed or other action for any lands, tenements or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto or cause of such action shall accrue, and not after.

173. Provided, That the time during which the person who hath or shall have such right or title or cause of action, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be computed as part of the said twenty years.

174.—Section 11. That if a mortgagee, and those under him, be in possession of lands, &c. contained in the mortgage or any part thereof, for twenty years after default of payment, then the right or equity of redemption therein, shall be barred forever.

175.—Section 13. That no person or persons, bodies politic or corporate, shall

be sued or impleaded by the state of New Jersey, for any land, &c. or any rents, revenues, or profits thereof, but within twenty years after the right, title or cause of action to the same shall accrue and not after.

176.—2. *As to personal actions.* It is enacted that all actions of trespass *quare clausum fregit*; trespass; detinue; trover; replevin; debt, founded on any lending or contract without specialty, or for arrearages of rent due on a parol demise; of account, (except such actions as concern the trade of merchandise between merchant and merchant, their factors, agents and servants;) and on the case, (except actions for slander,) shall be commenced and sued within six years next after the cause of such actions shall have accrued, and not after. That all actions of trespass for assault, menace, battery, wounding and imprisonment, or any of them, shall be commenced and sued within four years next after the cause of such actions shall have accrued and not after. That every action upon the case for words, shall be commenced and sued within two years next after the words spoken, and not after. Persons within the age of twenty-one years, femes covert or insane, may institute such actions within such time as is before limited after his or her coming to or being of full age, discovery, or sane memory.

177. The act of February 7, 1799, s. 6, provides that every action of debt, or covenant for rent, or arrearages of rent, founded upon lease under seal; debt on any bill or obligation for the payment of money only, or upon any award, under the hands and seals of arbitrators, for the payment of money only, shall be commenced and sued within sixteen years next after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, specialty or award, within or after the said period of sixteen years, then an action, instituted on such lease, specialty or award, within sixteen years after such payment, shall be effectual in law, and not after. Provided, That the time during which the person, who is or shall be entitled to any of the actions specified in this section, shall have been within the age of twenty-one years, feme covert, or insane, shall not be taken or computed as part of the said limited period of sixteen years.

178.—3. *As to crimes.* By the statute

passed February 17, 1829, Harr. Comp. 243, all indictments for offences punishable with death, (except murder,) must be found within three years, and all offences not punishable with death, must be brought within two years; except, as to both, where the offender flies.

179.—4. *As to penal actions.* By the statute of February 7, 1799, Rev. Laws, 410, all popular and *qui tam* actions, and also all actions on penal statutes by the party grieved, must be brought within two years.

180. *New York.* The provisions limiting the time of commencing actions, are contained in the Revised Statutes, part 3, chapter 4, tit. 2, and are substantially as follows:

181.—1. *As to lands.* The people of this state will not sue or implead any person for, or in respect to any lands, tenements, or hereditaments, or for the issues or the profits thereof, by reason of any right or title of the said people to the same, unless, 1. Such right shall have accrued within twenty years before any suit, or other proceeding for the same shall have been commenced; or unless, 2. The said people or those from whom they claim, shall have received the rents and profits of such real estate, or some part thereof, within the said space of twenty years. Grantees of the state cannot recover, if the state could not; and when patents granted by the state are declared void for fraud, a suit may be brought at any time within twenty years thereafter.

182. No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear, that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action.

183. No avowry or cognizance of title of real estate, or to any rents or services, shall be valid, unless it appear that the person making the avowry, or the person in whose right the cognizance is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question, within twenty years before committing the act, in defence of which the avowry or cognizance is made.

184. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and

within twenty years from the time when the right of making such entry accrued.

185. All writs of *scire facias* upon fines, heretofore levied, of any manors, lands, tenements, or hereditaments, shall be sued out within twenty years next after the title or cause of action first descended or fallen, and not after that period.

186. If any person entitled to commence any action as above specified, or to make any entry, avowry, or cognizance, be at the time such title shall first descend or accrue, either, 1. Within the age of twenty-one years; or, 2. Insane; or, 3. Imprisoned on any criminal charge or in execution upon some conviction of a criminal offence for any term less than for life; or, 4. A married woman; the time during which such disability shall continue shall not be deemed any portion of the time above limited, for the commencement of such suit, or the making such entry, avowry, or cognizance; but such person may bring such action, or make such entry, avowry, or cognizance, after the said time so limited, and within ten years after such disability removed and not after. In case of the death of the person entitled to such action, &c., before any determination or judgment in the case, his heirs may institute the same within ten years after his death, but not after. Rev. Statutes, part 3, c. 4, tit. 2, article 1.

187. The 68th section of the act "to simplify and abridge the practice, pleadings and proceedings of the courts of this state," (New York,) passed the 12th of April 1848, known as the Code of Procedure, enacts that the provisions of the Revised Statutes, contained in the article entitled, "Of the time of commencing actions relating to real property," shall, until otherwise provided by statute, continue in force, and be applicable to actions for the recovery of real property.

188.—2. Other actions than for the recovery of real property, and actions already commenced, or cases where the right of action has accrued, to which the statutes in force when the said act was passed shall be applicable, according to the subject of the action, and without regard to the form, must be commenced within the times as provided for in part 2, t. 2, c. 3 and 4, of the code of procedure in the following sections, namely:

§ 70. Within twenty years:

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

2. An action upon a sealed instrument.

§ 71. Within six years:

1. An action upon a contract, obligation or liability, express or implied; excepting those mentioned in section seventy.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for trespass upon real property.

4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief, on the ground of fraud; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party, of the facts constituting the fraud.

§ 72. Within three years:

1. An action against a sheriff or coroner, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this state, except where the statute imposing it prescribes a different limitation.

§ 73. Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of this state.

§ 74. Within one year:

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

§ 75. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account, on the adverse side.

§ 76. An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year, by a private party, it may be commenced within two years thereafter, in behalf

of the people of this state, by the attorney-general, or the district attorney of the county where the offence was committed.

§ 77. An action for relief, not herein-before provided for, must be commenced within ten years after the cause of action shall have accrued.

§ 78. The limitations prescribed in this title shall apply to actions brought in the name of the people of this state or for their benefit, in the same manner as to actions by private parties.

§ 79. An action shall not be deemed commenced, within the meaning of this title, unless it appear :

1. That the summons or other process therein was duly served upon the defendants, or one of them ; or

2. That the summons was delivered, with the intent that it should be actually served, to the sheriff of the county in which the defendants, or one of them, usually or last resided ; or, if a corporation be defendant, to the sheriff of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

§ 80. If, when the cause of action shall accrue against a person, he be out of the state, the action may be commenced within the term herein limited, after his return to the state ; and if, after the cause of action shall have accrued, he depart from and reside out of the state, the time of his absence shall not be part of the time limited for the commencement of the action.

§ 81. If a person entitled to bring an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either :

1. Within the age of twenty-one years ; or

2. Insane ; or

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life ; or

4. A married woman :

The time of such disability shall not be part of the time limited for the commencement of the action.

§ 82. If a person entitled to bring an action, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, his representatives may commence the action, after the

expiration of that time, and within one year from his death.

§ 83. When a person shall be an alien, subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

§ 84. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed, on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.

§ 85. When the commencement of an action shall be stayed by injunction, the time of the continuance of the injunction shall not be part of the time limited for the commencement of the action.

§ 86. No person shall avail himself of a disability, unless it existed when his right of action accrued.

§ 87. When two or more disabilities shall exist, the limitation shall not attach until they all be removed.

§ 88. This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt issued by moneyed corporations, or issued or put in circulation as money.

§ 89. This title shall not affect actions against directors or stockholders of a moneyed corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created, by the second title of the chapter of the Revised Statutes, entitled "Of Incorporations ;" but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

§ 90. Where the time for commencing an action arising on contract shall have expired, the cause of action shall not be deemed revived by an acknowledgment or new promise, unless the same be in writing, subscribed by the party to be charged thereby.

189. *North Carolina.* By the Revised Statutes, chapter 65, it is provided as follows, to wit :

190. 1. *As to lands.* § 1. That no person or persons, nor their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make any claim, but within seven years next after his, her,

or their right or title descended or accrued, and in default thereof, such person or persons, so not entering or making claim, shall be utterly excluded and disabled from any entry or claim thereafter to be made: Provided, nevertheless, that if any person or persons, that is or hereafter shall be entitled to any right or claim of lands, tenements or hereditaments, shall be, at the time the said right or title first descended, accrued, come or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond seas, that then such person or persons shall and may, notwithstanding the said seven years be expired, commence his, her or their suit, or make his, her, or their entry, as he, she, or they might have done before this act, so as such person or persons shall, within three years next after full age, discovery, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times or limitations herein specified; but that all possessions, held without suing such claim as aforesaid, shall be a perpetual bar against all, and all manner of persons whatsoever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed, that no man will know of whom to take or buy land. Provided also, that if in any action of ejectment for the recovery of any lands, tenements or hereditaments, judgment be given for the plaintiff, and the same be reversed for error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ or bill, or a verdict be given against the plaintiff, in all such cases the party plaintiff, his heirs or executors, as the case shall require, may commence a new action or suit from time to time, within one year after such judgment reversed, or judgment given against the plaintiff.

191.—§ 2. Where any person or persons, or the person or persons under whom he, she, or they claim, shall have been, or shall continue to be, in possession of any lands, tenements or hereditaments whatsoever, under titles derived from sales, made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by endorsement of patents or other colorable title, for the space of

twenty-one years, all such possessions of lands, tenements or hereditaments, under such title, shall be and are hereby ratified, confirmed and declared to be a good and legal bar, against the entry of any person or persons, under the right or claim of the state, to all intents and purposes whatsoever; Provided, nevertheless, that the possession so set up shall have been ascertained and identified under known and visible lines or boundaries.

192.—2. *As to personal actions.* § 3.

All actions of trespass, detinue, actions sur trover and replevin for taking away of goods and chattels, all actions of account and upon the case, all actions of debt for arrearages of rent, all actions of debt grounded upon any lending or contract without specialty, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought, shall be commenced or brought within the time and limitation in this act expressed, and not after; that is to say, actions of account render, actions upon the case, actions of debt for arrearages of rent, actions of debt upon simple contract, actions of detinue, replevin, and trespass either for goods and chattels or *quare clausum fregit*, within three years next after the cause of such action or suit, and not after; except such accounts as concern the trade of merchandise, between merchant and merchant, and their factors, or servants; and the said actions of trespass, of assault and battery, wounding, imprisonment, or any of them, within one year after the cause of such action or suit, and not after; and the said actions upon the case for words, within six months after the words spoken, and not after.

193.—§ 4. Provided, nevertheless, that if, on any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill; or if any of the said actions shall be brought by original writ, and the defendant cannot be attached or legally served with process, in all such cases, the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or till the defendant can be attached or served with the process,

so as to compel him to appear and answer. And provided further, that if any person or persons, that is or shall be entitled to any such action or trespass, detinue, action sur trover, replevin, actions of accout and upon the case, actions of debt for arrearages of rent, actions of debt grounded upon any lending or contract without specialty, actions of assault, menace, battery, wounding, and imprisonment, actions of trespass *quare clausum fregit*, actions upon the case for slanderous words, be, or shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they bring the same within such times as are before limited, after their coming to or being of full age, discover, of sound memory, at large or returned from beyond seas, as other persons having no such impediment might have done. And provided further, that when any person or persons, against whom there is cause of action, shall be beyond sea at the time of such cause of action given or accrued, fallen or come, the person, who shall have such cause of action, may bring his action against them within such time or times as are hereinbefore limited, for bringing such actions after their return.

194.—§ 5. The limitation of actions shall apply to all bonds, bills, and other securities made transferable by law, after the assignment or endorsement thereof, in the same manner as it operates against promissory notes.

195.—3. *As to penal actions.* § 6. All actions and suits to be brought on any penal act of the general assembly, for the recovery of the penalty therein set forth, shall be brought within three years after the cause of such action or suit shall or may have accrued, and not after: Provided, that this act shall not affect the time of bringing suit on any penal act of the general assembly, which hath a time limited therein for bringing the same.

196. *Ohio.* 1. *As to lands.* Twenty-one years' adverse possession of lands operates a bar, with a saving in favor of infants, *femes covert*, persons insane, imprisoned or beyond the sea, when the right of action accrues. And if a person shall have left the state, and remain out of the same at the time the cause of action accrued; or shall have left the state or county

at any time during the period of limitation, (that is, after the right of action has accrued,) and remain out of the same in a place unknown to the person having the right of action, suit may be brought at any time within the period of limitation, after the return of such person to the state or county.

197.—2. *As to personal actions.* 1st. Actions upon the case, covenant and debt founded upon a specialty, or any agreement, contract or promise in writing, may be brought within fifteen years after the cause of action shall have accrued.

198.—2d. Actions upon the case and debt founded upon any simple contract, not in writing, and actions on the case for consequential damages, within six years.

199.—3d. Actions of trespass upon property, real or personal, detinue, trover and replevin, within four years.

200.—4th. Actions of trespass for any injury done to the person, actions of slander for words spoken, or for a libel, actions for malicious prosecution, and for false imprisonment; actions against officers for malfeasance or nonfeasance in office, and actions of debt *qui tam*, within one year.

201.—5th. Actions for forcible entry and detainer, or forcible detainer only, within two years.

202.—6th. All other actions within four years; and all penalties and forfeitures given by statute and limited by the statute, within the times so limited.

203.—7th. Infants, *femes covert*, persons insane or imprisoned, entitled to an action of ejectment, may, after the twenty-one years have elapsed, bring their actions within ten years after such disability removed. They may bring all other actions, within the respective times limited for bringing such actions, after the disability removed.

204.—8th. Actions, founded on contracts between persons resident at the time of the contract without this state, which are barred by the laws of the country where the contract was made, are barred in the courts of this state.

205.—9th. In all actions on contracts express or implied, in case of payment of any part, principal or interest, acknowledgment of an existing liability, debt or claim, or any promise to pay the same, within the time herein limited, the action may be commenced within the time limited after such payment, acknowledgment or promise.

206.—10th. If judgment be arrested or reversed, the suit abate or the plaintiff become nonsuit, and the time limited shall have expired, the plaintiff may bring a new action within one year after such arrest, reversal, abatement or nonsuit.

207.—11th. A person who has left the state, or resides out of it, or whose place of residence is unknown although in the state, at the time the cause of action accrues, may be sued within the time limited by the act, after his return or removal to the state, or his place of residence, if in the state, becomes known. O. Stat. vol. 29, 214; Act of Feb. 18, 1831. Took effect, June 1, 1831. Swan's Col. Laws, 558, 4, 5, 6.

208. This act only operates upon causes of action accruing after the act took effect, and all causes of action previously subsisting are governed by the statutes (and there have been several) in force when the respective causes of action accrued, none of the statutes being retrospective in their operation. 7 O. R. p. 2, 285, West's Adm'r. v. Hymer; Id. 153, Hazlett et al. v. Critchfield et al.; 6 Id. 96, Bigelow's Ex'r. v. Bigelow's Adm'r.

209.—3. *As to penal actions.* Prosecutions for any forfeitures under a penal statute, must be instituted within two years, unless otherwise specially provided for.

210. *Pennsylvania.* 1. *As to lands.* From henceforth no person or persons whatsoever, shall make entry into any manors, lands, tenements or hereditaments, after the expiration of twenty-one years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action, for any manor, lands, tenements or hereditaments, of the seisin or possession of him, her or themselves, his, her, or their ancestors, or predecessors, nor declare or allege any other seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action, or suit so hereafter to be sued, commenced or brought. Act of March 26, 1785, s. 2, 2 Smith's Laws Pa. 299.

211. Section 4, provides, that if any person or persons having such right or title be, or shall be at the time such right or title first descended or accrued, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the

seas, or from and without the United States of America, then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, as he, she or they might have done, before the passing of this act, so as such person or persons, or the heir or heirs of such person or persons, shall within ten years next after attaining full age, discovery, soundness of mind, enlargement out of prison, or coming into the said United States, take benefit of or sue for the same, and no time after the said ten years; and in case such person or persons shall die within the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit, that such person or persons could or might have had, by living until the disabilities should have ceased or been removed; and if any abatement happen in any proceeding or proceedings upon such right or title, such proceeding or proceedings may be renewed and continued, within three years from the time of such abatement, but not afterward.

212. By the act of March 11, 1815, the provision above contained, so far as the same relates to persons beyond the seas, and from and without the United States of America, is repealed.

213.—2. *As to personal actions.* All actions of trespass *quare clausum fregit*, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account, and upon the case, (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants,) all actions of debt, grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or chattels, and the said actions

of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within two years next after the cause of such actions or suit, and not after. And the said actions upon the case for words, within one year next after the words spoken, and not after. Act of March 27, 1713, s. 1.

214. If in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict passed for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, then and in every such case, the party plaintiff, his heirs, executors, or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or given against the plaintiff, as aforesaid, and not after. Id. s. 2.

215. In all actions upon the case, for slanderous words, to be sued or prosecuted by any person or persons, in any court within this province, after the said twenty-fifth day of April next, if the jury upon trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed, do amount unto, without any further increase of the same. Id. s. 4.

216. Provided nevertheless, that if any person or persons who is or shall be entitled to any such action or trespass, detinue, trover, replevin, actions of account, debt, actions for trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be, or, at the time of any cause of such action given or accrued, fallen, or come, shall be within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the sea, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their coming to or being of full age, discovery, of sound memory, at large, or returning into this province as other persons. Id. s. 5.

217.—3. *As to penal actions.* All actions, suits, bills, indictments, or informa-

tion, which shall be brought for any forfeiture upon any penal act of assembly made or to be made, whereby the forfeiture is or shall be limited to the commonwealth only, shall hereafter be brought within two years after the offence was committed, and at no time afterwards, and all actions, suits, bills, or informations which shall be brought for any forfeiture upon any penal act of assembly made or to be made, the benefit and suit whereof is or shall be by the said act limited to the commonwealth, and to any person or persons that shall prosecute in that behalf, shall be brought by any person or persons that may lawfully sue for the same, within one year next after the offence was committed; and in default of such pursuit, then the same shall be brought for the commonwealth, any time within one year after that year ended; and if any action, suit, bill, indictment or information shall be brought after the time so limited, the same shall be void, and where a shorter time is limited by any act of assembly, the prosecution shall be within that time. Act of March 26, 1785, s. 6.

218. *Rhode Island. 1. As to lands.* It is enacted that where any person or persons, or others from whom he or they derive their titles, either by themselves, tenants or leasees, shall have been, for the space of twenty years, in the uninterrupted, quiet, peaceable and actual seisin and possession of any lands, tenements or hereditaments in the state, during the said time, claiming the same as his, her or their proper, sole and rightful estate in fee-simple, such actual seisin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs and assigns, forever; saving and excepting however, the rights and claims of persons under age, *non compos mentis*, *feme covert*, and persons imprisoned, or beyond seas, they bringing their suits for the recovery of such lands, &c., within the space of ten years next after the removal of such impediment; saving also, the rights and claims of any person or persons, having any estate in reversion or remainder, expectant or dependent on any lands, &c., after the determination of the estate for years, life, &c.; such person or persons pursuing his or their title by due course of law, within ten years after his or their right of action shall accrue.

219.—2. *As to personal actions.* It provides, that all actions upon the case, (except actions for slander,) all actions of

account, (except such as concern trade and merchandise between merchant and merchant, their factors or servants,) all actions of detinue, replevin and trover, all actions of debt founded upon any contract without specialty, and all actions of debt for arrearages of rents, must be commenced within six years next after the accruing of the cause of said actions, and not after. That all actions of trespass for breaking enclosures, and all other actions of trespass for any assault, battery, wounding and imprisonment, must be commenced within four years next after the accruing of such cause of action, and not after. And that actions upon the case for words spoken, must be commenced within two years next after the words spoken, and not after. If the person against whom there is any such cause of action, at the time the same accrued, was without the limits of the state, and did not leave property or estate therein, that could, by common and ordinary process of law be attached, in that case, the person who is entitled to such action, may commence the same, within the respective periods limited in the preceding clause, after such person's return into the state. If a person, entitled to any of the before described actions, is at the time any such cause of action accrues, within the age of twenty-one, feme covert, *non compos mentis*, imprisoned, or beyond seas, such person may commence the same within the times respectively, limited as above, after being of full age, discoverd, of sane memory, at large, or returned from beyond sea.

220. *South Carolina.* 1. *As to lands.* By the act of 1712, s. 2, it is enacted, that if any person or persons to whom any right or title to lands, tenements or hereditaments within this province, shall hereafter descend or come, do not prosecute the same within five years after such right or title accrued, that then he or they, and all claiming under him or them, shall be forever barred to recover the same.

221. By section 5, that not only the persons who have not made claim within the time limited shall be barred, but also, all persons that shall come under such as have lost their claim.

222. And by section 2, that any person or persons beyond the seas, or out of the limits of this province, feme covert, or imprisoned, shall be allowed the space of seven years to prosecute their right or title, or claim to any lands, tenements, or heredita-

ments in this province, after such right and title accrued to them or any of them, and at no time after the said seven years; and also, any person or persons that are under the age of twenty-one years, shall be allowed to prosecute their claims at any time within two years after they come of age, and if beyond the seas, three years." But a subsequent act, in 1778; Pub. L. 455, s. 2; as to persons under twenty-one, allows five years to prosecute their right to lands, after coming to twenty-one.

223.—2. *As to personal actions.* By the act of 1712, s. 6, actions of account, and upon the case, (other than case for slander, and upon such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants;) of debt grounded upon any lending or contract without specialty, or for arrearages of rent reserved by indenture; of covenant; of trespass, and trespass *quare clausum fregit*; of detinue, and of replevin for taking away of goods and chattels; must be commenced within four years next after the cause of such action or suits, and not after. Actions of trespass, of assault and battery, wounding, imprisonment, or any of them, within one year next after the cause of action; and actions on the case for words, within six months next after the words spoken, and not after.

224. There are various minute provisions in the savings, in favor of persons under age, insane, beyond seas, imprisoned, and of femes covert.

225. When the defendant is beyond seas at the time any personal action accrues, the plaintiff may sue, after his return, within such times as is limited for bringing such action. Act of 1712, s. 6.

226. *Tennessee.* 1. *As to lands.* The act of Nov. 16, 1819, c. 28, 2 Scott, 482, enacts in substance: § 1. That any persons, their heirs or assigns, who shall, at the passing of the act, or at any time after, have had seven years' possession of any lands, tenements, or hereditaments, which have been granted by this state, or the state of North Carolina, holding or claiming the same under a deed or deeds of conveyance, devise, grant, or other assurance, purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up, or made to said land, &c., within the aforesaid time, in that case, the persons, or their heirs or assigns, so holding possession, shall be en-

titled to keep and hold in possession, such quantity of land as shall be specified and described in his or their deed of conveyance, devise, grant, or other assurance, as aforesaid, in preference to and against all and all manner of persons whatsoever; and any persons or their heirs, who shall neglect or have neglected, for the said term of seven years, to avail themselves of any title legal or equitable which they may have had to any lands, &c., by suit in law or equity, effectually prosecuted against the persons in possession, shall be for ever barred; and the persons so holding, their heirs or assigns, for the term aforesaid, shall have an indefeasible title in fee simple to such lands. See 3 Am. Jur. 255.

227.—§ 2. That no persons, or their heirs, shall maintain any action in law or equity for any lands, &c., but within seven years next after his, her, or their right to commence, have, or maintain such suit, shall have come, fallen, or accrued; and that all suits in law or equity shall be commenced and sued within seven years next after the title or cause of action accrued or fallen, and at no time after the said seven years shall have passed.

228. Persons who, when title first accrued, were within twenty-one years of age, femes covert, non compos mentis, imprisoned, or beyond the limits of the United States, or the territories thereof, may bring their action at any time, so as such suit is commenced within three years next after his, her, or their respective disabilities or death, and not after; and it is further provided, that in the construction of the savings, no cumulative disability shall prevent the bar.

229.—§ 3. That if, in any of the said actions or suits, judgment is given for the plaintiff and is reversed for error, or verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing, &c.; or, if the action be commenced by original writ, and the defendant cannot be legally attached, or served with process, in such case the plaintiff, his heirs, executors, or administrators, as the case is, may commence a new action, from time to time, within a year after such judgment reversed or given against the plaintiff, or until the defendant can be attached, or served with process, so as to compel him, her, or them to appear and answer.

230.—§ 4. Provided, that this act shall

have no bearing on the lands reserved for the use of schools.

231.—2. *As to personal actions.* Actions of account render; upon the case; debt for arrearages of rent; detinue; replevin; and trespass quare clausum fregit; must be brought within three years next after the cause of such action, and not after: except such accounts as concern the trade of merchandise, between merchant and merchant, and their factors or servants. Actions of trespass, assault, and battery, wounding, and imprisonment, or any of them, within one year after the cause of such action, and not after: and actions of the case for words, within six months after the words spoken, and not after. Act of 1715, c. 27, s. 5. Persons who, at the time the cause of action accrued, are within the age of twenty-one years, femes covert, non compos mentis, imprisoned, or beyond seas, may bring their actions within the time above limited, after the removal of the disability. Id. s. 9.

232. The act of 1756, c. 4, 1 Scott, 89, contains the following enactment: 1. Where the plaintiff founds his demand upon a book account for goods, wares, and merchandise, sold and delivered, or work done, and solely relies for proof of delivery of the articles upon his oath, such oath shall not be admitted to prove the delivery of any articles in the book, of longer standing than two years.

233.—2. And no such book of accounts, although proved by witnesses, shall be received in evidence for goods, &c., sold, or work done, above five years before action brought, except of persons being out of the government, or where the account shall be settled and signed by the parties.

234.—3. Creditors of any deceased person, residing in the state, shall, within two years, and out of the state, within three years, from the qualification of the executors or administrators, make demand of their respective accounts, debts, and demands, of every kind whatsoever, to such executors, and administrators, and on failure to make the demand, and bring suit within those times, shall be for ever barred; saving to infants, non compos, and femes covert, one year to sue, after the disability removed. But if any creditor, after making demand of his debt, &c., of the executor or administrator, shall delay his suit at their special request, then the demand shall not be barred during the time of indulgence.

235. *Vermont.* 1. *Criminal cases.* Sect. 1.

All actions, suits, bills, complaints, informations, or indictments, for any crime or misdemeanor, other than theft, robbery, burglary, forgery, arson, and murder, shall be brought, had, commenced, or prosecuted within three years next after the offence was committed, and not after.

236.—Sect. 2. All complaints and prosecutions for theft, robbery, burglary, and forgery, shall be commenced and prosecuted within six years next after the commission of the offence, and not after.

237.—Sect. 3. If any action, suit, bill, complaint, information, or indictment, for any crime or misdemeanor, other than arson and murder, shall be brought, had, commenced, or prosecuted, after the time limited by the two preceding sections, such proceedings shall be void, and of no effect.

238.—Sect. 4. All actions and suits, upon any statute, for any penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the offence was committed, and not after.

239.—Sect. 5. If the penalty is given in whole or in part to the state, or to any county or town, or to the treasury thereof, a suit therefor may be commenced by or in behalf of the state, county, town or treasury, at any time within two years after the offence was committed, and not afterwards.

240.—Sect. 6. All actions, upon any statute, for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within four years after the offence was committed, and not after.

241.—Sect. 7. The six preceding sections shall not apply to any bill, complaint, information, indictment or action, which is or shall be limited by any statute, to be brought, had, commenced or prosecuted within a shorter or longer time than is prescribed in these six sections; but such bill, complaint, information, indictment or other suit, shall be brought and prosecuted within the time that may be limited by such statute.

242.—Sect. 8. When any bill, complaint, information or indictment shall be exhibited in any of the cases mentioned in this chapter, the clerk of the court, or magistrate, to whom it shall be exhibited, shall, at the time of exhibiting, make a minute thereon, in writing, under his official signature, of the true day, month and year, when the same was exhibited.

243.—Sect. 9. When any action shall

be commenced, in any of the cases mentioned in this chapter, the clerk or magistrate, signing the writ, shall enter upon it a true minute of the day, month and year, when the same was signed.

244.—Sect. 10. Every bill, complaint, information, indictment or writ, on which a minute of the day, month and year, shall not be made, as provided by the two preceding sections, shall, on motion, be dismissed.

245.—Sect. 11. None of the provisions of this chapter shall apply to suits against moneyed corporations, or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created.

246.—2. *Real and personal actions and rights of entry.* Sec. 1. No action for the recovery of any lands, or for the recovery of the possession thereof, shall be maintained, unless such action is commenced within fifteen years next after the cause of action first accrued to the plaintiff, or those under whom he claims.

247.—Sect. 2. No person, having right or title of entry into houses or lands, shall thereinto enter, but within fifteen years next after such right of entry shall accrue.

248.—Sect. 3. The right of any person to the possession of any real estate shall not be impaired or affected, by a descent being hereafter cast in consequence of the death of any person in possession of such estate.

249.—Sect. 4. The first two sections of this chapter, so far as they relate to or affect lands granted, given, sequestered or appropriated to any public, pious or charitable use, shall take effect from and after the first day of January, in the year of our Lord eighteen hundred and forty-two, and, until that day, the laws now in force relating to such lands, shall continue in operation.

250.—Sect. 5. The following actions shall be commenced within six years next after the cause of action accrued, and not after:

First. All actions of debt founded upon any contract, obligation or liability, not under seal, excepting such as are brought upon the judgment or decree of some court

of record of the United States, or of this or some other state:

Second. All actions upon judgments rendered in any court not being a court of record:

Third. All actions of debt for arrearages of rent:

Fourth. All actions of account, assumpsit or on the case, founded on any contract or liability, express or implied:

Fifth. All actions of trespass upon land:

Sixth. All actions of replevin, and all other actions for taking, detaining or injuring goods or chattels:

Seventh. All other actions on the case, except actions for slanderous words, and for libels.

251.—Sect. 6. All actions for assault and battery, and for false imprisonment, shall be commenced within three years next after the cause of action shall accrue, and not afterwards.

252.—Sect. 7. All actions for slanderous words, and for libels, shall be commenced within two years next after the cause of action shall accrue, and not after.

253.—Sect. 8. All actions against sheriffs, for the misconduct or negligence of their deputies, shall be commenced within four years next after the cause of action shall accrue, and not afterwards.

254.—Sect. 9. None of the foregoing provisions shall apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness, but the action, in such case, shall be commenced within fourteen years next after the cause of action shall accrue thereon, and not afterwards.

255.—Sect. 10. All actions of debt or scire facias on judgment shall be brought within eight years, next after the rendition of such judgment, and all actions of debt on specialties within eight years after the cause of action accrued, and not afterwards.

256.—Sect. 11. All actions of covenant, other than the covenants of warranty, and seisin, contained in deeds of conveyance of lands, shall be brought within eight years next after the cause of action shall accrue, and not after.

257.—Sect. 12. All actions of covenant, brought on any covenant of warranty, contained in any deed of conveyance of land, shall be brought within eight years next after there shall have been a final decision against the title of the covenantor in such

deed; and all actions of covenant brought on any covenant of seisin, contained in any such deed, shall be brought within fifteen years next after the cause of action shall accrue, and not after.

258.—Sect. 13. When any person shall be disabled to prosecute an action in the courts of this state, by reason of his being an alien, subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods, herein limited for the commencement of any of the actions before mentioned.

259.—Sect. 14. If, at the time when any cause of action of a personal nature, mentioned in this chapter, shall accrue against any person, he shall be out of the state, the action may be commenced, within the time herein limited therefor, after such person shall come into the state; and if, after any cause of action shall have accrued, and before the statute has run, the person against whom it has accrued, shall be absent from and reside out of the state, and shall not have known property within this state, which could, by the common and ordinary process of law, be attached, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.

260.—Sect. 15. If any person, entitled to bring any of the actions, before mentioned in this chapter, or liable to any such action, shall die before the expiration of the time herein limited therefor, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced, by the executor or administrator, within two years after such death, or against the administrator or executor of the deceased person, or the same may be presented to the commissioners on said estate, as the case may be, at any time within two years after the grant of letters testamentary or of administration, and not afterwards; if barred by the provisions of this chapter; provided, however, if the commissioners on such estate are required to make their report to the probate court before the expiration of said two years, the claim against the deceased shall be presented to the commissioners within the time allowed other creditors to present their claims.

261.—Sect. 16. If, in any action, duly commenced within the time in this chapter limited and allowed therefor, the writ

shall fail of a sufficient service, or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise defeated or avoided, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, or on exceptions, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year; or, if no executor or administrator be appointed within that time, then within one year after letters testamentary or of administration shall have been granted to him.

262.—Sect. 17. Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time, during which such injunction shall be in force, shall not be deemed any portion of the time in this chapter limited, for the commencement of suit.

263.—Sect. 18. If any person, entitled to bring any action in this chapter specified, shall, at the time when the cause of action accrues, be a minor or a married woman, insane or imprisoned, such person may bring the said action, within the times in this chapter respectively limited, after the disability shall be removed.

264.—Sect. 19. None of the provisions of this chapter shall apply to suits, brought to enforce payment on bills, notes or other evidences of debt, issued by moneyed corporations.

265.—Sect. 20. All the provisions of this chapter shall apply to the case of a debt or contract, alleged by way of set-off; and the time of limitation of such debt shall be computed in like manner as if an action had been commenced therefor, at the time when the plaintiff's action was commenced.

266.—Sect. 21. The limitations, herein before prescribed for the commencement of actions, shall apply to the same actions, when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens.

267.—Sect. 22. In actions of debt, or

upon the case, founded on any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby.

268.—Sect. 23. If there are two or more joint contractors, or joint executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any acknowledgment or promise, made or signed by any other or others of them.

269.—Sect. 24. In actions commenced against two or more joint contractors, or joint executors or administrators of any contractor, if it shall appear on the trial, or otherwise, that the plaintiff is barred by the provisions of this chapter, as to one or more of the defendants, but is entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff.

270.—Sect. 25. If, in any action on contract, the defendant shall plead in abatement, that any other person ought to have been jointly sued, and issue be joined on that plea, and it shall appear on the trial, that the action was, by reason of the provisions of this chapter, barred against the person so named in the plea, the said issue shall be found for the plaintiff.

271.—Sect. 26. Nothing, contained in the four preceding sections, shall alter, take away or lessen the effect of a payment of any principal or interest, made by any person.

272.—Sect. 27. If there are two or more joint contractors or joint executors or administrators of any contractor, no one of them shall lose the benefits of the provisions of this chapter, so as to be chargeable by reason only of any payment, made by any other or others of them.

273.—Sect. 28. None of the provisions of this chapter, respecting the acknowledgment of a debt, or a new promise to pay it, shall apply to any such acknowledgment or promise, made before the first day of Janu-

ary, in the year of our Lord eighteen hundred and forty-two, but every such last mentioned acknowledgment or promise, although not made in writing, shall have the same effect as if no provisions, relating thereto, had been herein contained.

274.—Sect. 29. The provisions of this chapter, which alter or vary the law, now in force relative to the limitation of actions, shall not apply to any case, where the cause of action accrues before this chapter shall take effect, and go into operation; and in all cases, where the cause of action accrues before this chapter takes effect, the laws now in force limiting the time for the commencement of suits thereon, shall continue in operation.

275. *Virginia*. 1. *As to lands*. All writs of formedon in descender, remainder, or reverter, of any lands, tenements or hereditaments, shall be sued out within twenty years next after the title or cause of action accrued, and not afterwards: and no person having any right or title of entry into any lands, &c. shall make any entry but within twenty years next after such right or title accrued. Persons entitled to such writ or right or title of entry, who are under twenty-one years of age, *femes covert*, non compos mentis, imprisoned, or not within the commonwealth, at the time such right or title accrues, may themselves or their heirs, notwithstanding the said twenty years have expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled.

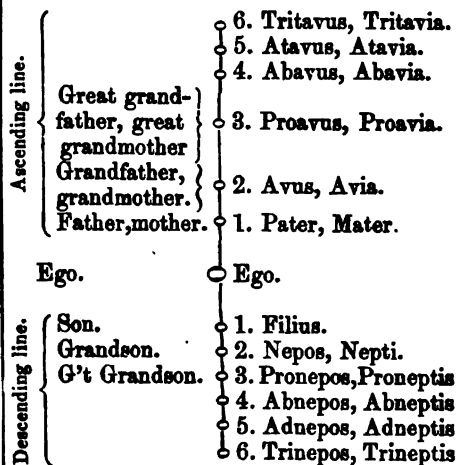
276. In all writs of right, and other actions possessory, any person may maintain a writ of right upon the possession or seisin of his ancestor or predecessor within fifty years, or any other possessory action upon the possession or seisin of his ancestor or predecessor, within forty years; but no person shall maintain a real action upon his own possession or seisin, but within thirty years next before the teste of the writ.

277.—2. *As to personal actions*. The provisions in relation to personal actions are as follows: 1. Upon all actions upon the case, (other than for slander,) actions of account or assumpsit, (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants,) debt grounded upon any lending or contract without specialty, debt for arrears of rent, trespass, detinue, trover, or replevin for goods and chattels,

and trespass *quare clausum fregit*, five years: 2. Upon actions of assault, battery, wounding, or imprisonment, three years: 3. Upon actions of slander, one year. Infants, *femes covert*, persons non compos mentis, imprisoned, beyond seas, or out of the country, are allowed full time to bring all such actions, except that of slander, after the disability has been removed.

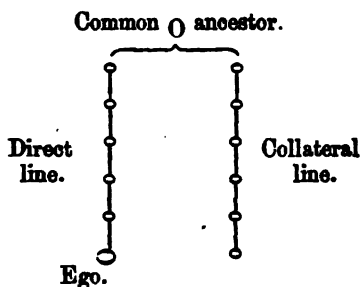
278. All actions or suits, founded upon any account for goods sold and delivered, or for articles charged in any store account, must be commenced within one year next after the cause of action, or the delivery of the goods, and not after; except that, in the case of the death of the creditors or debtors, before the expiration of the said term of one year, the farther time of one year, from the death of such creditor or debtor, shall be allowed. In suits in the name of any person residing beyond the seas, or out of this country, for recovery of any debt due for goods actually sold and delivered here by his factor or factors, the saving in favor of persons beyond the seas at the time their causes of action accrued, is not to be allowed; but, if any factor shall happen to die before the expiration of the time in which suit should have been brought, his principal shall be allowed two years from his death, to bring suit for any debt due on account of any contract or dealing with such factor. 1 Rev. Code, 489-491.

LINE, *descents*. The series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects successively all the relations by blood to each other. *Vide Consanguinity; Degree*.



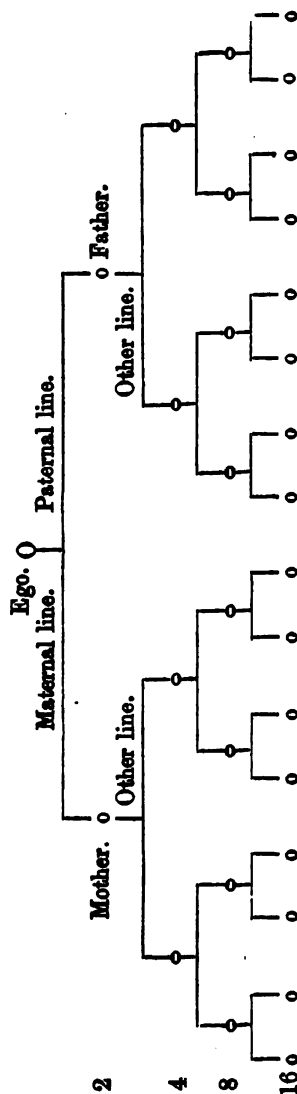
2. The line is either direct or collateral. The direct line is composed of all the persons who are descended from each other. If, in the direct line, any one person is assumed as the *propositus*, in order to count from him upwards and downwards, the line will be divided into two parts, the ascending and descending lines. The ascending line is that, which counting from the *propositus*, ascends to his ancestors, to his father, grandfather, great-grandfather, &c. The descending line, is that which, counting from the same person, descends to his children, grandchildren, great-grandchildren, &c. The preceding table is an example.

3. The collateral line considered by itself, and in relation to the common ancestor, is a direct line; it becomes collateral when placed along side of another line below the common ancestor, in whom both lines unite for example:



4. These two lines are independent of each other; they have no connexion, except by their union in the person of the common ancestor. This reunion is what forms the relation among the persons composing the two lines.

5. A line is also *paternal* or *maternal*. In the examination of a person's ascending line, the line ascends first to his father, next to his paternal grandfather, his paternal great-grandfather, &c. so on from father to father; this is called the paternal line. Another line will be found to ascend from the same person to his mother, his maternal grandmother, and so from mother to mother; this is the maternal line. These lines, however, do not take in all the ascendants, there are many others who must be imagined. The number of ascendants is double at each degree, as is shown by the following table:



Vide 2 Bl. Com. 200, b. 2, c. 14; Poth. Des Successions, ch. 1, art. 3, § 2; and article *Ascendants*.

LINE, *measures*. A line is a lineal measure containing the one twelfth part of an inch.

LINE, estates. The division between two estates. Limit; border; boundary.

2. When a line is mentioned in a deed as ending at a particular monument, (q. v.) it is to be extended in the direction called for, without regard to distance, until it reach the boundary. 1 Taylor, 110, 803; 2 Hawks, 219; 3 Hawks, 21; 2 Taylor, 1.

And a marked line is to be adhered to, although it depart from the course. 7 Wheat. 7; 2 Overt. 304; 3 Call, 239; 7 Monr. 333; 2 Bibb, 261; 4 Bibb, 503; 4 Monr. 29; see further, 2 Dana, 2; 6 Wend. 467; 1 Bibb, 466; 1 Marsh. 382; 3 Marsh. 382; 3 Murph. 82; 13 Pick. 145; 13 Wend. 300; 5 J. J. Marsh. 587.

3. Where a number of persons settle simultaneously or at short intervals in the same neighborhood, and their tracts, if extended in certain directions, would overlap each other, the settlers sometimes by agreement determine upon dividing lines, which are called *consentible lines*. These lines, when fairly agreed upon, have been sanctioned by the courts; and such agreements are conclusive upon all persons claiming under the parties to them with notice, but not upon bona fide purchasers for a valuable consideration without notice, actual or constructive. 5 S. & R. 273; 9 W. & S. 66; 3 S. & R. 323; 5 Bin. 129; 10 Watts, 324; 17 S. & R. 57; Jones, L. O. T.

4. Lines fixed by compact between nations are binding on their citizens and subjects. 11 Pet. 209; 1 Overt. 269; 1 Ves. sen., Rep. 450; 1 Atk. R. 2; 1 Ch. Cas. 85; 1 P. Wms. 723-27; 2 Atk. R. 592; 1 Vern. 48; 1 Ves. 19; 2 Ves. 284; 3 S. & R. 331.

LINEAGE. Properly speaking lineage is the relationship of persons in a direct line; as the grandfather, the father, the son, the grandson, &c.

LINEAL. That which comes in a line. *Lineal consanguinity* is that which subsists between persons, one of whom is descended in a direct line from the other. *Lineal descent*, is that which takes place among lineal kindred.

LINEAL WARRANTY, old English law. A warranty by the heir, when he derived title to the land warranted, either from or through the ancestor who made the warranty. See *Warranty*.

LIQUIDATED. That which is made clear, certain, and manifest; as, liquidated damages, ascertained damages; liquidated debt, an ascertained debt, as to amount. A debt is liquidated when it is certain what is due, and how much is due, *cum certum est an et quantum debeat*; for although it may appear that something is due, if it does not also appear how much is due, the debt is not liquidated. An unliquidated claim is one which one of the parties to the contract,

cannot alone render certain. 5 M. & R. 11; 1 N. S. 130; 6 N. S. 715; 6 N. S. 10, 13 L. R. 275; 7 L. R. 134, 599. Such a claim cannot be set off. 2 Dall. 237; S. C. 1 Yeates' R. 571; 10 Serg. & Rawle, 14; see Poth. Ob. n. 628; Dig. 50, 17, 24; Id. 42, 1, 64; Id. 1, 45, 112; Id. 46, 5, 11; Code, 7, 47. Dom. Lois Civ. l. 4, t. 2, s. 2, n. 2; Arg. Inst. l. 4, c. 7; 7 Toull. n. 369; 6 Duv. Dr. Civ. Fr. n. 304.

LIQUIDATED DAMAGES. By this term is understood the fixed amount, which a party to an agreement promises to pay to the other, in case he shall not fulfil some primary or principal engagement into which he has entered by the same agreement; it differs from a penalty. (q. v.) Vide *Damages liquidated*.

2. The damages will be considered as liquidated in the following cases: 1. When the damages are uncertain, and not capable of being ascertained by any satisfactory or known rule; whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case. 2 T. R. 32; 1 Alc. & N. 389; 2 Burr. 2225; 10 Ves. 429; 7 Cowen, 307; 4 Wend. 468. 2. When, from the nature of the case, and the tenor of the agreement, it is clear, that the damages have been the subject of actual and fair calculation and adjustment between the parties. 2 Greenl. Ev. § 259; 2 Story, Eq. § 1318; 3 C. & P. 240; 10 Mass. 450, 462; 6 Bro. P. C. 436; 3 Taunt. 473; 7 John. 72; 4 Mass. 433; 3 Conn. 58; 1 Bouv. Inst. n. 655, 765.

LIQUIDATION. A fixed and determinate valuation of things which before were uncertain.

LIRA. The name of a foreign coin. In all computations at the custom house, the lira of Sardinia shall be estimated at eighteen cents and six mills. Act of March 22, 1846. The lira of the Lombardo-Venetian Kingdom, and the lira of Tuscany, at sixteen cents. Act of March 22, 1846.

LIS. A suit; an action; a controversy in court; a dispute.

LIS MOTA. The cause of the suit or action. By this term is understood the commencement of the controversy, and the beginning of the suit. 4 Campb. R. 417; 6 Carr. & P. 552, 561; 2 Russ. & My. 161; Greenl. Ev. § 131, 132.

LIS PENDENS. The pendency of a suit;

the time between which it is instituted and finally decided.

2. It has been decided that the mere serving of a subpoena in chancery, unless a bill be also filed, is not a sufficient *lis pendens*, but the bill being filed, the *lis pendens* commences from the service of the subpoena, although that may not be returnable till the following term; 1 Vern. 318; and after a decree, final in its nature, there remains no *lis pendens*. 1 Vern. 459.

3. It is a general rule, that *lis pendens* is a general notice of an equity to all the world. 3 Atk. 343; 2 P. Wms. 282; Amb. 676; 1 Vern. 286. Vide 2 Fonbl. Eq. 152, note; 1 Supp. to Ves. jr. 284; 3 Rawle, R. 14; Pow. Mortg. Index, h. t.; 1 John. Ch. R. 566; 2 John. Ch. R. 158; 4 John. Ch. Rep. 83; 2 Rand. Rep. 93; 1 McCord, Ch. R. 264; Harp. Eq. R. 224; 1 Bibb, R. 314; 5 Ham. Rep. 462; 4 Cowen, R. 667; 1 Wend. R. 583; 1 Desaus. R. 167, 170; 2 Edw. R. 115; 1 Hogan, R. 69; 6 Har. & John. 21; 2 Dana, R. 480; Jac. R. 202; 1 Russ. & My. 617; Com. Dig. Chancery, 4 C 3; 2 Bell's Com. 152, 5th ed.; 1 Bail. Eq. R. 479; 7 Dana, R. 110; 7 J. J. Marsh. 529; 1 Clarke, R. 560, 584; 14 Ohio, 109, 323.

4. When a defendant is arrested pending a former suit or action, in which he was held to bail, he will not, in general, be held to bail, if the second suit be for the same cause of action. Grah. Prac. 98; Troub. & Haly's Prac. 44; 4 Yeates' R. 206. But under special circumstances, he may be held to bail twice, and of these circumstances the court will judge. 2 Miles, Rep. 99, 100, 142. See 14 John. R. 347. When such a second action is commenced, the first ought to be discontinued, and the costs paid; but, it seems, it is sufficient if they are paid before the replication of *nul tiel record* to a plea of *autre action pendant* in the second suit. Grah. Pr. 98; and see 1 John. Cas. 397; 7 Taunt. 151; 1 Marsh. R. 395; Merl. Rep. Litispendance; 5 Ohio R. 462; 6 Ohio R. 225; 1 Blackf. R. 53; Id. 315; *Autre action pendent*; *Bail*; *Litigiosity*.

LIST. A table of cases arranged for trial or argument; as, the trial list, the argument list. See 3 Bouv. Inst. n. 3031.

LISTERS. This word is used in some of the states to designate the persons appointed to make lists of taxables. See Verm. Rev. Stat. 588.

LITERAL CONTRACT, *civil law*. A contract, the whole of the evidence of which is reduced to writing. This contract is perfected by the writing, and binds the party who subscribed it, although he has received no consideration. Lec. Elem. § 887.

LITERARY PROPERTY. This name has been given to the right which authors have in their works. This is secured to them by copyright. (q. v.) Vide 2 Bl. Com. 405-6; 4 Vin. Ab. 278; Bac. Ab. Prorogation, F 5; 2 Kent, Com. 306 to 315; 1 Supp. to Ves. jr. 360, 376; 2 Id. 469; Nicklin on Literary Property; Dane's Ab. Index, h. t.; 1 Chit. Pr. 98; 2 Amer. Jur. 248; 10 Amer. Jur. 62; 1 Law Intell. 66; Curt. on Copyr. 11; 1 Bell's Com. B. 1, part 2, c. 4, s. 2, p. 115; 1 Bouv. Inst. n. 508, et seq. Vide *Copyright*.

LITIGANT. One engaged in a suit; one fond of litigation.

LITIGATION. A contest, authorized by law, in a court of justice, for the purpose of enforcing a right.

2. In order to prevent injustice, courts of equity will restrain a party from further litigation, by a writ of injunction; for example, after two verdicts on trials at bar, in favor of the plaintiff, a perpetual injunction was decreed. Str. 404. And not only between two individuals will a court of equity grant this relief, as in the above case of several ejectments, but also, when one general legal right, as a right of fishery, is claimed against several distinct persons, in which case there would be no end of bringing actions, since each action would only bind the particular right in question, between the plaintiff and defendant in such action, without deciding the general right claimed. 2 Atk. 484; 2 Ves. jr. 587. Vide *Circuity of Actions*.

LITIGIOSITY, *Scottish law*. The pendency of a suit; it is an implied prohibition of alienation, to the disappointment of an action, or of diligence, the direct object of which is to obtain possession, or to acquire the property of a particular subject. The effect of it is analogous to that of inhibition. (q. v.) 2 Bell's Com. 152, 5th ed. Vide *Lis Pendens*.

LITIGIOUS. That which is the subject of a suit or action; that which is contested in a court of justice. In another sense, litigious signifies a disposition to sue; a fondness for litigation.

LITIGIOUS RIGHTS, *French law*. Those which are or may be contested either in

whole or in part, whether an action has been commenced, or when there is reason to apprehend one. Poth. Vente, n. 584; 9 Mart. R. 183; Troplong, De la Vente, n. 984 a 1003; Civ. Code of Lo. art. 2623; Id. 3522, n. 22. Vide *Contentious jurisdiction*.

LITIS CONTESTATIO, *civil law*. "Contestari." It is when each party to a suit (uterque reus) says "Teste estote." It was, therefore, so called, because persons were called on by the parties to the suit "to bear witness," "to be witnesses." It is supposed that this contestatio was the usual termination of certain acts before the magistratus or in jure, of which the persons called to be witnesses were at some future time to bear record before the judex, in judicio. The lis contestata, in the system of Justinian, consisted in the statements made by the parties to a suit before the magistrate respecting the claim or demand, and the answer or defence to it. When this was done, the cause was ready for hearing. Savig. Traité de Droit Romain, tom. vi. § cclviii.; Smith, Dict. Gr. & Rom. Antiq. h. v. The contesting of the suit, or pleading the general issue. Vide 2 Bro. Civ. and Adm. Law, 358.

LITISPENDENCE. The part of an action being depending and undetermined; the time during which an action is pending. See *Lis pendens*.

LITRE. A French measure of capacity. It is of the size of a décimètre, or one-tenth part of a cubic mètre. It is equal to 61.028 cubic inches. Vide *Measure*.

LIVERY, *Engl. law*. 1. The delivery of possession of lands to those tenants who hold of the king *in capite*, or knight's service. 2. Livery was also the name of a writ which lay for the heir of age, to obtain the possession of seisin of his lands at the king's hands. F. N. B. 155. 3. It signifies, in the third place, the clothes given by a nobleman or gentleman to his servant.

LIVERY OF SEISIN, *estates*. A delivery of possession of lands, tenements, and hereditaments, unto one entitled to the same. This was a ceremony used in the common law for the conveyance of real estate; and the livery was in *deed*, which was performed by the feoffor and the feoffee going upon the land, and the latter receiving it from the former; or in *law*, where the same was not made on the land, but in sight of it. 2 Bl. Com. 315, 316.

2. In most of the states, livery of seisin

is unnecessary, it having been dispensed with either by express law or by usage. The recording of the deed has the same effect. In Maryland, however, it seems that a deed cannot operate as a feoffment, without livery of seisin. 5 Harr. & John. 158. Vide 4 Kent, Com. 381; 2 Hill, Ab. c. 26, s. 4; 1 Misso. R. 553; 1 Pet. R. 508; 1 Bay's R. 107; 5 Har. & John. 158; 2 Fairf. R. 318; Dane's Abridgment, h. t.; and the article *Seisin*.

LIVRE TOURNOIS, *com. law*. A coin used in France before the revolution. It is to be computed, in the ad valorem duty on goods, &c., at eighteen and a half cents. Act of March 2, 1798, s. 61, 1 Story's L. U. S. 626. Vide *Foreign Coins*.

LOADMANAGE, *maritime law, contracts*. The pay to loadsmen; that is, persons who sail or row before ships, in barks or small vessels, with instruments for towing the ship, and directing her course, in order that she may escape the dangers in her way. Poth. Des Avaries, n. 147; Guidon de la Mer, ch. 14; Bac. Ab. Merchant and Merchandise, F.

LOAN, *contracts*. The act by which a person lets another have a thing to be used by him gratuitously, and which is to be returned, either in specie or in kind, agreeably to the terms of the contract. The thing which is thus transferred is also called a loan. 1 Bouv. Inst. n. 1077.

2. A loan in general implies that a thing is lent without reward; but, in some cases, a loan may be for a reward; as, the loan of money. 7 Pet. R. 109.

3. In order to make a contract usurious, there must be a loan; Cowp. 112, 770; 1 Ves. jr. 527; 2 Bl. R. 859; 3 Wils. 390; and the borrower must be bound to return the money at all events. 2 Scho. & Lef. 470. The purchase of a bond or note is not a loan; 3 Scho. & Lef. 469; 9 Pet. R. 103; but if such a purchase be merely colorable, it will be considered as a loan. 2 John. Cas. 60; Id. 66; 12 S. & R. 46; 15 John. R. 44.

LOAN FOR CONSUMPTION, or, **MUTUUM**. (q. v.) A contract by which the owner of a personal chattel, called the lender, delivers it to another, known as the borrower, by which it is agreed that the borrower shall consume the chattel loaned, and return, at the time agreed upon, another chattel, of the same quality, kind, and number, to the lender, either gratuitously or for a consideration; as, if Peter lends to Paul one

bushel of wheat, to be used by the latter, so that it shall not be returned to Peter, but instead of which Paul will return to Peter another bushel of wheat of the same kind and quality, at a time agreed upon.

2. It is evident that this contract differs essentially from a loan for use. In the latter, the property of the thing lent remains with the lender, and, if it be destroyed, without the fault or negligence of the borrower, it is his loss, and the thing to be returned is the identical thing lent; but in the loan for consumption, the property passes to the borrower, and in case of its destruction, he must bear the loss, and the identical property is never to be returned, but other property of the like kind, quality, and number. This contract bears a nearer resemblance to a barter or exchange; in a loan for consumption the borrower agrees to exchange with the lender a bushel of wheat, which he has not, but expects to obtain, for another bushel of wheat which the lender now has, and with which he is willing to part; or a more familiar example may be given: Debtor borrows from Creditor, one hundred dollars to use as he shall deem best, and he promises to return to Creditor another hundred dollars at a future time.

3. In cases of loan for consumption, the lender may charge for the use of the thing loaned or not; as, if I lend one thousand dollars to a friend for a month, I may charge interest or not; but a loan for use is always gratuitous; when anything is charged for the use, it becomes a hiring. See *Hire*; and also *Mutuum*.

LOAN FOR USE, or COMMODATUM, contracts. A bailment, or loan of an article for a certain time, to be used by the borrower, without paying for it. 2 Kent's Com. 446, 447. Sir William Jones defines it to be a bailment of a thing for a certain time, to be used by the borrower, without paying for it. Jones' Bailm. 118. According to the Louisiana Code, art. 2864, it is an agreement by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement, under an obligation on the part of the borrower, to return it after he shall have done using it. This loan is essentially gratuitous. The Code Civil, art. 1875, defines it in nearly the same words. Lord Holt has defined this bailment to be, when goods or chattels, that are useful, are lent to a friend gratis, to be used by him; and it is called *commodatum*, he adds, because

the thing is to be restored in specie. 2 Ld. Ray. 909, 913.

2. The loan for use resembles somewhat a gift, for the lender, as in a gift, gives something to the borrower; but it differs from the latter, because there the property of the thing given is transferred to the donee; instead of which, in the loan for use, the thing given is only the use, and the property in the thing lent remains in the lender. This contract has also some analogy to the *mutuum*, or loan for consumption; but they differ in this, that in the loan for use the lender retains the property in the thing lent, and it must be returned *in individuo*; in the loan for consumption, on the contrary, the things lent are to be consumed, such as money, corn, oats, grain, cider, &c., and the property in them is transferred to the borrower, who becomes a debtor to the lender for the same quantity of like articles. Poth. Prêt à Usage, n. 9, 10.

3. Several things are essential to constitute this contract; first, there must be a thing which is lent; and this, according to the civil law, may be either a thing movable, as a horse, or an immovable, as a house or land, or goods, or even a thing incorporeal. But in our law, the contract seems confined entirely to goods and chattels, or personal property, and not to extend to real estate. It must be a thing lent, in contradistinction to a thing deposited or sold, or entrusted to another for the purpose of the owner. Story on Bailm. § 223.

4. Secondly. It must be lent gratuitously, for if any compensation is to be paid in any manner whatsoever, it falls under another denomination, that of hire. Ayliffe's Pand. B. 4, tit. 16, n. 516; Louis. Code, art. 2865; Pothier, Prêt à Usage, c. 1, art. 1, n. 1, c. 2, art. 3, n. 11.

5. Thirdly. It must be lent for use, and for the use of the borrower. It is not material whether the use be exactly that which is peculiarly appropriate to the thing lent, as a loan of a bed to lie on, or a loan of a horse to ride; it is equally a loan, if the thing is lent to the borrower for any other purpose; as, to pledge as a security on his own account. Story on Bailm. § 225. But the rights of the borrower are strictly confined to the use actually or impliedly agreed to by the lender, and cannot be lawfully exceeded. Poth. Prêt à Usage, c. 1, § 1, art. 1, n. 5. The use may be for a limited time, or for an indefinite time.

6. Fourthly. The property must be lent to be specifically returned to the lender at the determination of the bailment; and, in this respect it differs from a *mutuum*, or loan for consumption, where the thing borrowed, such as corn, wine, and money, is to be returned in kind and quantity. See *Mutuum*. It follows, that a loan for use can never be of a thing which is to be consumed by use; as, if wine is lent to be drunk at a feast, even if no return in kind is intended, unless, perhaps, so far as it is not drunk; for, as to all the rest, it is strictly a gift.

7. In general, it may be said that the borrower has the right to use the thing during the time and for the purpose which was intended between the parties. But this right is strictly confined to the use, expressed or implied in the particular transaction; and the borrower, by any excess, will make himself responsible. Jones' Bailm. 68; Cro. Jac. 244; 2 Ld. Raym. 909, 916; 1 Const. Rep. So. Car. 121; Louis. Code, art. 2869; Code Civil, art. 1881; 2 Bulst. 306.

8. The obligations of the borrower are, to take proper care of the thing borrowed, to use it according to the intention of the lender, to restore it in proper time, and to restore it in proper condition. Story on Bailm. § 236; Louis. Code, art. 2869; Code Civ. 1880.

9. By the common law, this bailment may always be terminated at the pleasure of the lender. (q. v.) Vin. Abr. Bailment, D; Bac. Abr. Bailment, D.

10. The property in the thing lent, in a loan for use, remains in the lender. Story on Bailment, § 283; Code Civil, art. 1877; Louis. Code, art. 2866.

11. It is proper to remark that the loan for use must be lawful; a loan by Peter to Paul of a ladder to enable him to commit a larceny, or of a gun, to commit a murder, is not a loan for use, but Peter by this act becomes an accomplice of Paul. 17 Duv. n. 503; 6 Duverg. n. 32.

LOCAL. Pertaining to a place; something annexed to the freehold or tied to a certain place; as, local courts, or courts whose jurisdiction is limited to a particular place; local allegiance, or allegiance due while you are in a particular place or country; local taxes, or those which are collected for particular districts.

LOCAL ACTION, *practice, pleadings*. An action is local when the venue must be laid

in the county where the cause of action arose. 1 Chit. Pl. 271; 21 Vin. Ab. 79; 3 Bl. Com. 294; Bac. Ab. Actions, Local, &c.; Dane's Ab. Index, h. t.; 15 Mass. 284; 1 Brock. 203; 1 Greenl. 246. Vide *Action*; *Venue*.

LOCALITY, *Scotch law*. This name is given to a life rent created in marriage contracts in favor of the wife, instead of leaving her to her legal life rent of terce. 1 Bell's Com. 55. See *Jointure*.

LOCATIO. Hire; a letting out.

LOCATIO CONDUCTIO, *civil law*. Location conduction is a consensual contract, by which a person becomes bound to deliver to another the use of a thing for a certain time, or to do work at a certain price. 1 Bouv. Inst. n. 984.

LOCATIO MERCIIUM VEHENDARUM, *contracts*. A term used in the civil law, to signify the carriage of goods for hire.

2. In respect to contracts of this sort entered into by private persons, not exercising the business of common carriers, there does not seem to be any material distinction varying the rights, obligations and duties of the parties from those of other bailees for hire. Every such private person is bound to ordinary diligence, and a reasonable exercise of skill; and of course he is not responsible for any losses not occasioned by ordinary negligence, unless he has expressly, by the terms of his contract, taken upon himself such risk. 2 Ld. Raym. 909, 917, 918; 4 Taunt. 787; 6 Taunt. 577; 2 Marsh. 293; Jones' Bailm. 103, 106, 121; 2 Bos. & Pull. 417; 1 Bouv. Inst. n. 1020. See *Common Carrier*.

LOCATIO OPERIS, *contracts*. A term used in the civil law, to signify the hiring of labor and services. It is a contract by which one of the parties gives a certain work to be performed by the other, who binds himself to do it for the price agreed between them, which he who gives the work to be done promises to pay to the other for doing it. Poth. Louage, n. 392. This is divided into two branches, first, *Locatio operis faciendi*; and, secondly, *Locatio mercium vehendarum*. See these words.

LOCATIO OPERIS FACIENDI, *contracts*. A term used in the civil law. There are two kinds, first, the *locatio operis faciendi*, strictly so called, or the hire of labor and services; such as the hire of tailors to make clothes, and of jewelers to set gems, and of watchmakers to repair watches. Jones' Bailm. 90, 96, 97. Secondly, *Locatio cus-*

today, or the receiving of goods on deposit for a reward, which is properly the hire of care and attention about the goods. Story on Bailm. §§ 422, 442; 1 Bouv. Inst. n. 994.

2. In contracts for work, it is of the essence of the contract, first, that there should be work to be done; secondly, for a price or reward; and, thirdly, a lawful contract between parties capable and intending to contract. Pothier, Louage, n. 395 to 408.

LOCATIO REI, contracts. A term used in the civil law, which signifies the hiring of a thing. It is a contract by which one of the parties obligates himself to give to the other the use and enjoyment of a certain thing for a period of time agreed upon between them, and in consideration of a price which the latter binds himself to pay in return. Poth. Contr. de Louage, n. 1. See *Bailment; Hire; Hirer; Letter*.

LOCATION, contracts. A contract by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire. 1 Bell's Com. B. 2, pt. 3, c. 2, s. 4, art. 2, § 1, page 255. Vide *Bailment; Hire*.

LOCATION, estates. Among surveyors, who are authorized by public authority to lay out lands by a particular warrant, the act of selecting the land designated in the warrant and surveying it, is called its location. In Pennsylvania, it is an application made by any person for land, in the office of the secretary of the late land office of Pennsylvania, and entered in the books of said office, numbered and sent to the surveyor general's office. Act June 25, 1781, § 2, 2 Sm. Laws, 7.

LOCATOR, civil law. He who leases or lets a thing to hire to another. His duties are, 1st. To deliver to the hirer the thing hired, that he may use it. 2d. To guaranty to the hirer the free enjoyment of it. 3d. To keep the thing hired in good order in such manner that the hirer may enjoy it. 4th. To warrant that the thing hired has not such defects as to destroy its use. Poth. Du. Contr. de Louage, n. 53.

LOCK-UP HOUSE. A place used temporarily as a prison.

LOCO PARENTIS. In the place of a parent.

2. It is frequently important, in cases of devises and bequests, to ascertain whether the testator did or did not stand towards the devisee or legatee, *in loco paren-*

tis. In general, those who assume the parental character may be considered as standing in that relation; but this character must clearly appear.

3. The fact of his so standing may be shown by positive proof, or the express declarations of the testator in his will, or by circumstances; as, when a grandfather; 2 Atk. 518; a brother; 1 B. & Beat. 298; or an uncle; 2 A. 492; takes an orphan child under his care, or supports him, he assumes the office of a parent. The law places a master in *loco parentis* in relation to his apprentice. See 2 Ashm. R. 178, 207; 2 Bouv. Inst. n. 2216.

LOCUM TENENS. He who holds the place of another, a deputy; as A B, locum tenens of C D, mayor of the city of Philadelphia.

LOCUS. The place where a thing is done.

LOCUS CONTRACTUS. The place of the contract. In general, the law of the place where the contract is made, governs in everything which relates to the mode of construing it. Vide *Lex loci contractus*.

LOCUS DELICTI. The place where the tort, offence, or injury has been committed.

LOCUS PENITENTIAE, contracts, crim. law. Literally this signifies a place of repentance; in law, it is the opportunity of withdrawing from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed. 2 Bro. C. R. 569; Ersk. Laws of Scotl. 290. Vide article *Attempt*.

LOCUS IN QUO. The place in which. In pleadings it is the place where anything is alleged to have been done. 1 Salk. 94.

LOCUS REI SITÆ. The place where a thing is situated. In proceedings *in rem*, in real actions in the civil law, or those which have for their object the recovery of a thing; and in real actions in the common law, or those for the recovery of land, the proper forum is the *locus rei sitæ*. 2 Gall. R. 191.

LOCUS SIGILLI. The place of the seal. 2. In many of the states, instead of sealing deeds, writs, and other papers or documents requiring it, a scroll is made in which the letters L. S. are printed or written, which is an abbreviation of *Locus sigilli*. This in some of the states has all the efficacy of a seal, but in others it has no such effect. See *Scroll*.

LODGER. One who has a right to inhabit another man's house. He has not the same right as a tenant; and is not entitled to the same notice to quit. Woodf. L. & T. 177. See 7 Mann. & Gr. 87; S. C. 49 E. C. L. R. 85, 151, and article *Inmate*.

LODGINGS. Habitation in another's house, in which the owner dwells; the occupier being termed a lodger.

LOG BOOK. A ship's journal. It contains a minute account of the ship's course, with a short history of every occurrence during the voyage. 1 Marsh. Ins. 408. When a log book is required by law to be kept, it is an official register so far as regards the transactions required by law to be entered in it, but no further. Abbott on Shipp. by Story, 468, n. 1; 1 Summ. R. 373; 2 Summ. 19, 78; 4 Mason, R. 544; 1 Esp. R. 427.

LOQUELA, practice. An imparlance. *Loquela sine die*, a respite in law to an indefinite time. Formerly by *loquela* was meant the allegations of fact mutually made on either side, now denominated the pleadings. Steph. Pl. 29.

LORD. In England, this is a title of honor. Fortunately in the U. S. no such titles are allowed.

LORD'S DAY. The same as Sunday. (q. v.) Dies Dominicus non est juridicus. Co. Litt. 185; Noy's Max. 2.

LOSS, contracts. The deprivation of something which one had, which was either advantageous, agreeable or commodious.

2. In cases of partnership, the losses are in general borne by the partners equally, unless stipulations or circumstances manifest a different intention. Story, Partn. § 24. But it is not essential that the partners should all share the losses. They may agree, that if there shall be no profits, but a loss, that the loss shall be borne by one or more of the partners exclusively, and that the others shall, *inter se*, be exempted from all liabilities for losses. Colly. Partn. 11; Gow, Partn. 9; 3 M. & Wels. 357; 5 Barn. & Ald. 954; Story, Partn. § 23.

3. When a thing sold is lost by an accident, as by fire, the loss falls on the owner, *res perit domino*, and questions not unfrequently arise, as to whether the thing has been delivered and passed to the purchaser, or whether it remains still the property of the seller. See, on this subject, *Delivery*.

4. **LOSS, IN INSURANCE, contracts.** A loss is the injury or damage sustained by the insured, in consequence of the happening

of one or more of the accidents or misfortunes against which the insurer, in consideration of the premium, has undertaken to indemnify the insured. 1 Bouv. Inst. n. 1215.

2. These accidents or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy. And no loss, however great or unforeseen, can be a loss within the policy, unless it be the direct and immediate consequence of one or more of these perils. Marsh. Ins. B. 1, c. 12. As to the risks which are within the common policy, see Marsh. Ins. c. 7, s. 2.

3. Every loss is either total or partial.

4. The term *total loss* is understood in two different senses; natural and legal. In its natural sense it signifies the complete and absolute destruction of the thing insured. In its legal sense, it means, not merely the entire destruction or deprivation of the thing insured, but also such damage to it, though it specifically remain, as renders it of little or no value to the owner. A loss is also deemed total, if, by the happening of any of the perils or misfortunes insured against, the voyage be lost, or be not worth pursuing, and the projected adventure be frustrated; or if the value of what be saved, be less than the freight. See Dougl. 231; 1 T. R. 608; Id. 187; Str. 1065; 13 East, R. 323; 2 M. & S. 374; 1 N. R. 236; 1 Wils. 191; 4 T. R. 785; 9 East, R. 283; 3 B. & P. 388; Marsh. Ins. B. 1, c. 12; 1 T. R. 187.

5. A *partial loss*, is any loss or damage short of, or not amounting to a total loss, for if it be not the latter it must be the former. See 4 Mass. 374; 6 Mass. 102; Id. 122; Id. 817; 7 Mass. 349; 9 Mass. 20; 12 Mass. 170; 12 Mass. 288; 6 Mass. 479; 8 Mass. 494; 10 Johns. Rep. 487; 8 Johns. 237; 5 Binn. 595; 2 Serg. & Rawle, 558.

6. Partial losses are sometimes denominated *average losses*, because they are often in the nature of those losses which are the subject of average contributions; and they are distinguished into general and particular averages. See tit. *Average*.

7. Losses are occasioned in a variety of ways, but most usually by the following: 1. By perils of the sea. See tit. *Perils of the Sea*. 2. By collision, as where one ship drives against, or runs foul of another. Marsh. Ins. B. 1, c. 12, s. 2. 3. By fire. Marsh. B. 1, c. 12, s. 8. 4. By capture.

See tit. *Capture*; Marsh. Ins. B. 1. c. 12, s. 4; 2 Caines' C. Err. 158; 7 Johns. R. 449; 13 Johns. R. 161; 14 Johns. R. 227; 3 Wheat. 183; 4 Cranch, 43; 6 Mass. 197. 5 By detention of princes. By the terms of the policy, the insurer is liable for all loss occasioned by "arrest or detentions of all kings, princes, and people, of what nation, condition, or quality soever." Under these words, the insurers are liable for all losses occasioned by arrests or detention of the ship or goods insured, by the authority of any prince or public body claiming to exercise sovereign power, under what pretence soever. Marsh. Ins. B. 1, c. 12, s. 5. See *Embargo*; *People*. 6. By Barratry. Marsh. Ins. B. 1, c. 12, s. 6. See tit. *Barratry*; 2 Caines' R. 67; Id. 222; 3 Caines' Rep. 1; 1 Johns. R. 229; 8 Johns. R. 209, 2d edit.; 5 Day, 1; 11 Johns. Rep. 40; 13 Johns. Rep. 451; 2 Binn. 574; 2 Dall. 187; 8 Cranch, 39; 3 Wheat. 168. 7. By average by contribution. See Marsh. Ins. B. 1, c. 12, s. 7; this Dict. tit. *Average*. 8. By salvage. See tit. *Salvage*; Marsh. Ins. B. 1, c. 12, s. 8. 9. By the death of animals. If animals, such as horses, cattle, or beasts or birds of curiosity, be insured in their passage by sea, their death, occasioned by tempests, by the shot of an enemy, by jet-tison in a storm, or by any other extraordinary accident, occasioned by the perils enumerated in the policy, is a loss for which the underwriters are liable. Not so, if it be occasioned by mere disease or natural death. Marsh. Ins. B. 1, c. 12, s. 10. 10. By fraud. Marsh. Ins. B. 1, c. 12, s. 11. See, generally, Com. Dig. Merchant, E 9, n.; Bac. Abr. Merchant, I.

LOST. What was once possessed and cannot now be found.

2. When a bond or other deed was lost, formerly the obligee or plaintiff was compelled to go into equity to seek relief, because there was no remedy at law, the plaintiff being required to make profert in his declaration. 1 Chan. c. 77. But in process of time courts of law dispensed with profert in such cases, and thereby obtained concurrent jurisdiction with the courts of chancery, so that now the loss of any paper, other than a negotiable note, will not prevent the plaintiff from recovering at law as well as in equity. 3 Atk. 214; 1 Ves. 341; 5 Ves. 235; 6 Ves. 812, 7 Ves. 19; 3 V. & B. 54.

3. When a negotiable note has been

lost, equity will grant relief. In such case the claimant must tender an indemnity to the debtor, and file a bill in chancery to compel payment. 7 B. & C. 90; Ryan & Mo. 90; 4 Taunt. 602; 2 Ves. sen. 327; 16 Ves. 430.

LOST PAPERS. When a paper containing an agreement between parties, a will, and the like, has been so mislaid, that after a diligent search it cannot be found, it is said to be lost.

2. When such a document has been lost, and it is required to prove its contents, the party must prove that he has made diligent search, and, in good faith, exhausted all sources of information accessible to him. For this purpose his own affidavit is sufficient. 1 Atk. 446; 1 Greenl. Ev. § 349. On being satisfied of this, the court will allow secondary evidence to be given of its contents. See *Evidence*.

3. Even a will, proved to be lost, may be admitted to probate, upon secondary evidence. 1 Greenl. Ev. § 84, 509, 575; 2 Greenl. Ev. § 668, a, 2d ed. But the fact of the loss must be proved by the clearest evidence, because it may have been destroyed by the testator *animo revocandi*. 8 Metc. 487; 2 Addams, 223; 6 Wend. 173; 1 Hagg. Eccl. R. 115; 3 Pick. 67; 5 B. Munroe, 58; 2 Curt. 913.

LOST OR NOT LOST. These words are sometimes inserted in policies of marine insurance. They are used when the underwriter undertakes that if the ship or goods should be lost at the time of the insurance, still the underwriter is liable, provided there is no fraud. Moll. B. 2, c. 7, s. 5; Hildy. on Mar. Ins. 10.

LOT. Anything on which depends the accidental determination of a right by which we acquire or lose something; or it is that which fortuitously determines what we are to acquire. When it can be certainly known what are our rights, we ought never to resort to a decision by lot; but when it is impossible to tell what actually belong to us, as if an estate is divided into three parts and one part given to each of three persons, the proper way to ascertain each one's part is to draw lots. Wolff, Dr. &c., de la Nat. § 669.

LOT OF GROUND. A small piece of land in a town or city usually employed for building, a yard, a garden or such other urban use. Lots are in-lots, or those within the boundary of the city or town, and out-lots, those which are out of such boundary,

and which are used by some of the inhabitants of such town or city.

LOTTERY. A scheme for the distribution of prizes by chance.

2. In most, if not all of the United States, lotteries not specially authorized by the legislatures of the respective states are prohibited, and the persons concerned in establishing them are subjected to a heavy penalty. This is the case in Alabama, Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, Mississippi, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont and Virginia. In Louisiana, a license is granted to sell tickets in a lottery not authorized by the legislature of that state, on the payment of \$5000, and the license extends only to one lottery. In many of the states, the lotteries authorized by other states, are absolutely prohibited. *Encycl. Amer. h. t.*

LOUISIANA. The name of one of the new states of the United States of America. This state was admitted into the Union by the act of congress, entitled "An act for the admission of the state of Louisiana into the Union, and to extend the laws of the United States to the said state," approved April 8, 1812, 2 Story's L. U. S. 1224—the preamble of which recites and the first section enacts as follows, namely:

2. Whereas the representatives of the people of all that part of the territory or country ceded, under the name of "Louisiana," by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits; that is to say: beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude; thence, due north, to the northernmost part of the thirty-third degree of north latitude; thence, along the said parallel of latitude, to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning; including all islands within three leagues of the coast; did, on the twenty-second day of January, one thousand eight hundred and twelve, form for themselves a constitution and state government, and give to the said state the name of the state of Louisiana, in pursuance

of an act of congress, entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of the said state into the Union, on an equal footing with the original states, and for other purposes:" And the said constitution having been transmitted to congress, and by them being hereby approved; therefore,

3.—§ 1. *Be it enacted, &c.* That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana: Provided, That it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states, and the territories of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state; and that the above condition, and also all other the conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed, and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union. See 11 M. R. 309.

4. By the present constitution of the state of Louisiana, which was adopted in 1845; the powers of the government of the state of Louisiana, are divided into three distinct departments, each of them confided to a separate body of magistracy, to wit: The legislative to one, the executive to another, and the judicial to a third. Title I.

5.—1st. The legislative power is vested in a general assembly, which consists of a senate and house of representatives.

6.—§ 1. The senate will be considered with reference to the qualification of the electors; the qualification of the members; the length of time for which they are elected; and the time of their election. 1. In all elections by the people, every free white male, who has been two years a citizen of the United States, who has attained the age of twenty-one years, and resided in the state two consecutive years next preceding the election, and the last year thereof in the parish in which he offers to vote, shall have

the right of voting: *Provided*, That no person shall be deprived of the right of voting, who, at the time of the adoption of this constitution, was entitled to that right under the constitution of 1812. Absence from the state for more than ninety consecutive days, shall interrupt the acquisition of the residence required in the preceding section, unless the person absenting himself shall be a housekeeper, or shall occupy a tenement for carrying on business, and his dwelling house or tenements for carrying on business, be actually occupied during his absence, by his family or servants, or some portion thereof, or by some one employed by him. No soldier, seaman, or marine in the army or navy of the United States, no pauper, no person under interdiction, nor under conviction of any crime punishable by hard labor, shall be entitled to vote at any election in this state. 2. No person shall be a senator, who, at the time of his election, has not been a citizen of the United States ten years, and who has not attained the age of twenty-seven years, and resided in the state four years next preceding his election, and the last year thereof, in the district in which he may be chosen. The number of senators shall be thirty-two. 3. The members of the senate shall be chosen for the term of four years. 4. Their election takes place on the first Monday in November, every two years, so that one half of their number are elected every two years, and a perpetual rotation thereby kept up.

7.—§ 2. The house of representatives will be treated of in the same manner as that of the senate. 1. The electors are qualified in the same manner as those of the senate. 2. No person shall be a representative, who, at the time of his election, is not a free white male, and has not been for three years a citizen of the United States, and has not attained the age of twenty-one years, and resided in the state for three years next preceding the election, and the last year thereof in the parish for which he may be chosen. The number of representatives shall not be more than one hundred, nor less than seventy. 3. They are chosen every two years. 4. Their election is on the first Monday in November, every two years. Title II.

8.—2d. The supreme executive power of the state shall be vested in a chief magistrate, who shall be styled the governor of the state of Louisiana. He is elected by the qualified electors at the time and place

of voting for representatives; the person having the greatest number of votes, shall be declared elected. But if two or more persons shall be equal in the highest number of votes polled, one of them shall immediately be chosen governor by the joint vote of the members of the general assembly.

2. No person shall be eligible to the office of governor, who shall not have attained the age of thirty-five years, been fifteen years a citizen of the United States, and a resident within the state for the same space of time next preceding his election. 3. He shall hold his office during the term of four years, but shall be ineligible for the succeeding four years after its termination.

4. His principal functions are as follows: He shall be commander-in-chief of the army and navy of this state, and of the militia thereof, except when they shall be called into the service of the United States. He shall take care that the laws be faithfully executed. From time to time give to the general assembly information respecting the situation of the state, and recommend to their consideration such measures as he may deem expedient. Shall have power to grant reprieves for all offences against the state. With the consent of the senate, have power to grant pardons and remit fines and forfeitures, after conviction, except in cases of impeachment. In cases of treason, may grant reprieves until the end of the next session of the general assembly, in which the pardoning power shall be vested. Shall nominate, and by and with the advice and consent of the senate, appoint all officers established by this constitution, whose mode of appointment is not otherwise prescribed by the constitution, nor by the legislature. Have power to fill vacancies during the recess of the senate, provided he appoint no one whom the senate have rejected for the same office. May, on extraordinary occasions convene the general assembly at the seat of government, or at a different place, if that should have become dangerous from an enemy or from an epidemic; and in case of disagreement between the two houses as to the time of adjournment, he may adjourn them to such time as he may think proper, not exceeding four months. He shall have the veto power. Title III.

9.—3d. The judicial power is vested by title IV. of the constitution, as follows:

10.—§ 1. The judicial power shall be vested in a supreme court, in district courts, and in justices of the peace.

11.—§ 2. The supreme court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases when the matter in dispute shall exceed three hundred dollars, and to all cases in which the constitutionality or legality of any tax, toll, or impost of any kind or nature soever, shall be in contestation, whatever may be the amount thereof; and likewise to all fines, forfeitures, and penalties imposed by municipal corporations, and in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding three hundred dollars is actually imposed.

12.—§ 3. The supreme court shall be composed of one chief justice, and of three associate justices, a majority of whom shall constitute a quorum. The chief justice shall receive a salary of six thousand dollars, and each of the associate judges a salary of five thousand five hundred dollars annually. The court shall appoint its own clerks. The judges shall be appointed for the term of eight years.

13.—§ 4. When the first appointments are made under this constitution, the chief justice shall be appointed for eight years, one of the associate judges for six years, one for four years, and one for two years: and in the event of the death, resignation, or removal of any of said judges before the expiration of the period for which he was appointed, his successor shall be appointed only for the remainder of his term; so that the term of service of no two of said judges shall expire at the same time.

14.—§ 5. The supreme court shall hold its sessions in New Orleans, from the first Monday of the month of November, to the end of the month of June, inclusive. The legislature shall have power to fix the sessions elsewhere during the rest of the year; until otherwise provided, the sessions shall be held as heretofore.

15.—§ 6. The supreme court, and each of the judges thereof, shall have power to issue writs of *habeas corpus*, at the instance of all persons in actual custody under process, in all cases in which they may have appellate jurisdiction.

16.—§ 7. In all cases in which the judges shall be equally divided in opinion, the judgment appealed from shall stand affirmed; in which case each of the judges shall give his separate opinions in writing.

17.—§ 8. All judges, by virtue of their

office, shall be conservators of the peace throughout the state. The style of all processes shall be, "The State of Louisiana." All prosecutions shall be carried on in the name and by the authority of the state of Louisiana, and conclude, against the peace and dignity of the same.

18.—§ 9. The judges of all the courts within this state shall, as often as it may be possible so to do, in every definite judgment, refer to the particular law in virtue of which such judgment may be rendered, and in all cases adduce the reasons on which their judgment is founded.

19.—§ 10. No court or judge shall make any allowance by way of fee or compensation in any suit or proceedings, except for the payment of such fees to ministerial officers as may be established by law.

20.—§ 11. No duties or functions shall ever be attached by law to the supreme or district courts, or to the several judges thereof, but such as are judicial; and the said judges are prohibited from receiving any fees of office or other compensation than their salaries for any civil duties performed by them.

21.—§ 12. The judges of all courts shall be liable to impeachment; but for any reasonable cause, which shall not be sufficient ground for impeachment, the governor shall remove any of them on the address of three-fourths of the members present of each house of the general assembly. In every such case the cause or causes for which such removal may be required, shall be stated at length in the address, and inserted in the journal of each house.

22.—§ 13. The first legislature assembled under this constitution shall divide the state into judicial districts, which shall remain unchanged for six years, and be subject to reorganization every sixth year thereafter. The number of districts shall not be less than twelve, nor more than twenty. For each district one judge, learned in the law, shall be appointed, except in the districts in which the cities of New Orleans and Lafayette are situated, in which the legislature may establish as many district courts as the public interest may require.

23.—§ 14. Each of the said judges shall receive a salary to be fixed by law, which shall not be increased or diminished during his term of office, and shall never be less than two thousand five hundred dollars annually. He must be a citizen of the United States, over the age of thirty years, and

have resided in the state for six years next preceding his appointment, and have practised law therein for the space of five years.

24.—§ 15. The judges of the district courts shall hold their offices for the term of six years. The judges first appointed shall be divided by lot into three classes, as nearly equal as can be, and the term of office of the judges of the first class shall expire at the end of two years, of the second class at the end of four years, and of the third class at the end of six years.

25.—§ 16. The district courts shall have original jurisdiction in all civil cases, when the amount in dispute exceeds fifty dollars, exclusive of interest. In all criminal cases, and in all matters connected with successions, their jurisdiction shall be unlimited.

26.—§ 17. The jurisdiction of justices of the peace shall never exceed, in civil cases, the sum of one hundred dollars, exclusive of interest, subject to appeal to the district court in such cases as shall be provided for by law. They shall be elected by the qualified voters of each parish for the term of two years, and shall have such criminal jurisdiction as shall be provided for by law.

LOW WATER MARK. That part of the shore of the sea to which the waters recede when the tide is the lowest. Vide *High Water Mark; River; Sea Shore*; Dane's Ab. h. t.; 1 Halst. R. 1.

LOYAL. Legal; according to law; as, *loyal* matrimony, a lawful marriage; attached to the existing law.

LOYALTY. That which adheres to the law, that which sustains an existing government. See Penal Laws of China, 3.

LUCID INTERVAL, med. jur. That space of time between two fits of insanity, during which a person *non compos mentis* is completely restored to the perfect enjoyment of reason upon every subject upon which the mind was previously cognizant. Shelf. on Lun. 70; Male's Elem. of Forensic Medicine, 227; and see Dr. Haslam on Madness, 46; Reid's Essays on Hypochondriasis, 317; Willis on Mental Derangement, 151.

2. To ascertain whether a partial restoration to sanity is a lucid interval, we must consider the nature of the interval and its duration. 1st. Of its nature. "It must not," says D'Aguesseau, "be a superficial tranquillity, a shadow of repose, but on the contrary, a profound tranquillity, a real repose; it must not be a mere ray of reason,

which only makes its absence more apparent when it is gone, not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal, not a glimmering which unites night to the day; but a perfect light, a lively and continued lustre, a full and entire day, interposed between two separate nights of the fury which precedes and follows it; and to use another image, it is not a deceitful and faithless stillness, which follows or forebodes a storm, but a sure and steady tranquillity for a time, a real calm, a perfect serenity; without looking for so many metaphors to represent an idea, it must not be a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health." 2d. Of its duration. "As it is impossible," he continues, "to judge in a moment of the qualities of an interval, it is requisite that there should be a sufficient length of time for giving a perfect assurance of the temporary reestablishment of reason, which it is not possible to define in general, and which depends upon the different kinds of fury, but it is certain there must be a time, and a considerable time." 2 Evan's Poth. on Oblig. 668, 669.

3. It is the duty of the party who contends for a lucid interval to prove it; for a person once insane is presumed so, until it is shown that he has a lucid interval or has recovered. Swinb. 77; Co. Litt. by Butler, n. 185; 3 Bro. C. C. 443; 1 Rep. Con. Ct. 225; 1 Pet. R. 168; 1 Litt. R. 102. Except perhaps the alleged insanity was very long ago, or for a very short continuance. And the wisdom of a testament, when it is proved that the party framed it without assistance, is a strong presumption of the sanity of a testator. 1 Phill. R. 90; 1 Hen. & Munf. 476.

4. Medical men have doubted of the existence of a lucid interval, in which the mind was completely restored to its sane state. It is only an abatement of the symptoms, they say, and not a removal of the cause of the disease; a degree of irritability of the brain remains behind which renders the patient unable to withstand any unusual emotion, any sudden provocation, or any unexpected pressing emergency. Dr. Combe, Observations on Mental Derangement, 241; Haslam, Med. Jur. of Insanity, 224; Fodéré, De Médecine Légale, tom. 1, p. 205, § 140; Georget, Des Maladies

Mentales, 46; 2 Phillim. R. 90; 2 Hagg. Eccl. R. 433; 1 Phillim. Eccl. R. 84.

See further, Godolph. 25; 3 Bro. C. C. 443; 11 Ves. 11; Com. Dig. Testimoigne, A 1; 1 Phil. Ev. 8; 2 Hale, 278; 10 Harg. State Tr. 478; Erskine's Speeches, vol. 5, p. 1; 1 Fodéré, Méd. Lég. § 205.

LUCRE. Gain, profit. Cl. des Lois Rom. h. t.

LUCRI CAUSA. This is a Latin expression, which signifies that the thing to which it applies is done for the sake of gain.

2. It was supposed that when a larceny was committed the taking should have been *lucri causa*; but it has been considered that it is not necessary the taking should be *lucri causa*, if it be *fraudulenter*, with intent to wholly deprive the owner of the property. Russ. & Ry. 292; 2 Russ. on Cr. 92; 1 Car. & K. 532. Vide Inst. lib. 4, t. 1, s. 1.

LUGGAGE. Such things as are carried by a traveller, generally for his personal accommodation; baggage. In England this word is generally used in the same sense that baggage is used in the United States. See *Baggage*.

LUNACY, *med. jur.* A disease of the mind, which is differently defined as it applies to a class of disorders, or only to one species of them. As a general term it includes all the varieties of mental disorders, not fatuous.

2. Lunacy is adopted as a general term, on account of its general use as such in various legislative acts and legal proceedings, as commissions of lunacy, and in this sense it seems to be synonymous with *non compos mentis*, or of *unsound mind*.

3. In a more restricted sense, lunacy is the state of one who has had understanding, but by disease, grief, or other accident, has lost the use of reason. 1 Bl. Com. 304.

4. The following extract from a late work, Stock on the Law of Non Compos Mentis, will show the difficulties of discovering what is and what is not lunacy. "If it be difficult to find an appropriate definition or comprehensive name for the various species of lunacy," says this author, page 9, "it is quite as difficult to find any thing approximating to a positive evidence of its presence. There are not in lunacy, as in fatuity, external signs not to be mistaken, neither is there that similarity of manner and conduct which enables any one,

who has observed instances of idiocy or imbecility, to detect their presence in all subsequent cases, by the feebleness of perception and dullness of sensibility common to them all. The varieties of lunacy are as numerous as the varieties of human nature, its excesses commensurate with the force of human passion, its phantasies coëxtensive with the range of human intellect. It may exhibit every mood from the most serious to the most gay, and take every tone from the most sublime to the most ridiculous. It may confine itself to any trifling feeling or opinion, or overcast the whole moral and mental conformation. It may surround its victim with unreal persons and events, or merely cause him to regard real persons and events with an irrational favor or dislike, admiration or contempt. It may find satisfaction in the most innocent folly, or draw delight from the most atrocious crime. It may lurk so deeply as to elude the keenest search, or obtrude so openly as to attract the most careless notice. It may be the fancy of an hour, or the distraction of a whole life. Such being the fact, it is not surprising that many scientific and philosophical men have vainly exhausted their observation and ingenuity to find out some special quality, some peculiar mark or characteristic common to all cases of lunacy, which might serve at least as a guide in deciding on its absence or presence in individual instances. Being hopeless of a definition, they would willingly have contented themselves with a test, but even this the obscurity and difficulty of the subject seem to forbid.

5. Lord Erskine, who, in his practice at the bar, had his attention drawn this way, from being engaged in some of the most remarkable trials of his time involving questions of lunacy, has given as his test, "a delusive image, the inseparable companion of real insanity," (Ersk. Misc. Speeches); and Dr. Haslam, whose opportunities of observation have surpassed most other persons, has proposed nearly the same, by saying that "*false belief* is the essence of insanity." (Haslam on Insanity.) Sir John Nicholl, in his admirable judgment in the case of Dew v. Clark, thus expresses himself: "The true criterion is, where there is delusion of mind there is insanity; that is, when persons believe things to exist, which exist only, or at least, in that degree exist only in their own imagination, and of the non-existence of which neither argument nor proof can

convince them; they are of unsound mind; or as one of the counsel accurately expressed it, it is only the belief of facts, which no rational person would have believed, that is insane delusion." (Report by Haggard, p. 7.) Useful as these several remarks are, they are not absolutely true. It is indeed beyond all question that the great majority of lunatics indulge in some "delusive image," entertain some "false belief." They assume the existence of things or persons which do not exist, and so yield to a delusive image, or they come to wrong conclusions about persons and things which do exist, and so fall into a false belief. But there is a class of cases where lunacy is the result of exclusive indulgence in particular trains of thought or feeling, where these tests are sometimes wholly wanting, and yet where the entire absorption of the faculties in one predominant idea, the devotion of all the bodily and mental powers to one useless or injurious purpose, prove that the mind has lost its equilibrium. With some passions, indeed, such as self-esteem and fear, what was at first an engrossing sentiment, will often go on to a positive delusion; the self-adoring egotist grows to fancy himself a sovereign or a deity; the timid valetudinarian becomes the prey of imaginary diseases, the victim of unreal persecutions. But with many other passions, such as desire, avarice or revenge, the neglect and forgetfulness of all things save one, the insensibility to all restraints of reason, morality, or prudence, often proceed to such an extent as to justify holding an individual as a lunatic, incapable of all self-restraint, although, strictly speaking, not possessed by any delusive image or false belief. Much less do these tests apply to many cases of irresistible propensity to acts wholly irrational, such as to murder or to steal without the smallest assignable motive, which, rare as they are, certainly occur from time to time, and cannot but be held as an example of at least partial and temporary lunacy. It is to cases where no false belief or image can be detected, that the remark of Lord Erskine is more particularly applicable; "they frequently mock the wisdom of the wisest in judicial trials," (Ersk. Misc. Speeches,) and were not the paramount object of all legal punishment the benefit of the community, which makes it inexpedient to spare offenders against the law, if insanity be the ground of their defence, except upon the clearest proof, lest skilful dissemblers should thereby be led to

hope for impunity, very subtle questions might no doubt be raised as to the degree of moral responsibility and mental sanity attaching to the perpetrators of many atrocious acts, seeing that they often commit them under temptations quite inadequate to allure men of common prudence, or under passions so violent as to suspend altogether the operations of reason or free will. For as it is impossible to obtain an accurate definition of lunacy, so it is manifestly so, to draw the line correctly between it and its opposite rationality, or, to borrow the words of Chief Justice Hale, (1 Hale's P. C. p. 30,) "Doubtless most persons that are felons, of themselves and others, are under a degree of partial insanity when they commit those offences. It is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest on circumstances duly to be weighed and considered both by the judge and jury, lest on one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes."

LUNAR. That which belongs to the moon; relating to the moon; as a lunar month. See *Month*.

LUNATIC, persons. One who has had an understanding, but who, by disease, grief, or other accident, has lost the use of his reason. A lunatic is properly one who has had lucid intervals, sometimes enjoying his senses, and sometimes not. 4 Co. 123; 1 Bl. Com. 304; Bac. Abr. Idiots, &c., A; 1 Russ. on Crimes, 8; Shelf. on Lun. 4; Merlin, mot D mence; Fonb. Eq. Index, h. t.; 15 Vin. Ab. 131; 8 Com. Dig. 721; 1 Supp. to Ves. jr. 94, 130, 369, 404; 2 Supp. to Ves. jr. 51, 106, 151, 360; 1 Vern. 9, 137, 262; Louis. Code, tit. 9, c. 1; and articles *Lucid Interval*; *Lunacy*.

LYING IN GRANT. Incorporeal rights and things which cannot be transferred by livery of possession, but which exist only in idea, in contemplation of law, are said to lie in grant, and pass by the mere delivery of the deed. Vide *Grant*; *Livery of Seisin*; *Seisin*.

LYING IN WAIT. Being in ambush for the purpose of murdering another.

2. Lying in wait is evidence of deliberation and intention.

3. Where murder is divided into degrees, as in Pennsylvania, lying in wait is such evidence of malice, that it makes the killing,

when it takes place, murder in the first degree. Vide Dane's Ab. Index, h. t.

LYNCH-LAW. A common phrase used to express the vengeance of a mob, inflicting

an injury, and committing an outrage upon a person suspected of some offence. In England this is called *Lidford Law*. Toml. L. Dict. art. Lidford Law.

M.

M. When persons were convicted of manslaughter in England, they were formerly marked with this letter on the brawn of the thumb.

2. This letter is sometimes put on the face of treasury notes of the United States, and signifies that the treasury note bears interest at the rate of one mill per centum, and not one per centum interest. 13 Peters, 176.

MACE-BEARER, Eng. law. An officer attending the court of session.

MACEDONIAN DECREE, civil law. A decree of the Roman senate, which derived its name, from that of a certain usurer who was the cause of its being made, in consequence of his exactions. It was intended to protect sons who lived under the paternal jurisdiction, from the unconscionable contracts which they sometimes made on the expectations after their fathers' deaths; another, and perhaps, the principle object, was to cast odium on the rapacious creditors. It declared such contracts void. Dig. 14, 6, 1; Domat, Lois, Civ. liv. 1, tit. 6, § 4; Fonbl. Eq. B. 1, c. 2, § 12, note. Vide *Catching bargain*; *Post obit*.

MACHINATION. The act by which some plot or conspiracy is set on foot.

MACHINE. A contrivance which serves to apply or regulate moving power; or it is a tool more or less complicated, which is used to render useful natural instruments. Clef. des Lois Rom. h. t.

2. The act of congress gives to inventors the right to obtain a patent right for any new and useful improvement on any art, machine, manufacture, &c. Act of congress, July 4, 1836, s. 6. See Pet. C. C. 394; 3 Wash. C. C. 443; 1 Wash. C. C. 108; 1 Wash. C. C. 168; 1 Mason, 447; Paine, 300; 4 Wash. C. C. 538; 1 How. U. S. 202; S. C. 17 Pet. 228; 2 McLean, 176.

MADE KNOWN. These words are used as a return to a *scire facias*, when it has been served on the defendant.

MAGISTER. A master, a ruler, one

whose learning and position makes him superior to others, thus: one who has attained to a high degree, or eminence, in science and literature, is called a *master*; as, master of arts.

MAGISTER AD FACULTATES, Eng. eccl. law. The title of an officer who grants dispensations; as, to marry, to eat flesh on days prohibited, and the like. Bac. Ab. Eccles. Courts, A 5.

MAGISTER NAVIS. The master of a ship; a sea captain.

MAGISTER SOCIETATIS, civil law. The principal manager of the business of a society or partnership.

MAGISTRACY, mun. law. In its most enlarged signification, this term includes all officers, legislative, executive, and judicial. For example, in most of the state constitutions will be found this provision; "the powers of the government are divided into three distinct departments, and each of these is confided to a separate *magistracy*, to wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another." In a more confined sense, it signifies the body of officers whose duty it is to put the laws in force; as, judges, justices of the peace, and the like. In a still narrower sense it is employed to designate the body of justices of peace. It is also used for the office of a magistrate.

MAGISTRATE, mun. law. A public civil officer, invested with some part of the legislative, executive, or judicial power given by the constitution. In a narrower sense this term includes only inferior judicial officers, as justices of the peace.

2. The president of the United States is the chief magistrate of this nation; the governors are the chief magistrates of their respective states.

3. It is the duty of all magistrates to exercise the power, vested in them for the good of the people, according to law, and with zeal and fidelity. A neglect or the

part of a magistrate to exercise the functions of his office, when required by law, is a misdemeanor. Vide 15 Vin. Ab. 144; Ayl. Pand. tit. 22; Dig. 80, 16, 57; Merl. Rép. h. t.; 13 Pick. R. 523.

MAGNA CHARTA. The great charter. The name of an instrument granted by King John, June 19, 1215, which secured to the English people many liberties which had before been invaded, and provided against many abuses which before rendered liberty a mere name.

2. It is divided into thirty-eight chapters, which relate as follows, namely: 1. To the freedom of the church and ecclesiastical persons. 2. To the nobility, knights' service, &c. 3. Heirs and their being in ward. 4. Guardians for heirs within age, who are to commit no waste. 5. To the land and other property of heirs, and the delivery of them up when the heirs are of age. 6. The marriage of heirs. 7. Dower of women in the lands of their husbands. 8. Sheriffs and their bailiffs. 9. To the ancient liberties of London and other cities. 10. To distress for rent. 11. The court of common pleas, which is to be located. 12. The assise on disseisin of lands. 13. Assises of daren presentments, brought by ecclesiastics. 14. The amercement of a freeman for a fault. 15. The making of bridges by towns. 16. Provisions for repairing sea banks and sewers. 17. Forbids sheriffs and coroners to hold pleas of the crown. 18. Prefers the king's debt when the debtor dies insolvent. 19. To the purveyance of the king's house. 20. To the castleguard. 21. To the manner of taking property for public use. 22. To the lands of felons, which the king is to have for a year and a day, and afterwards the lord of the fee. 23. To weirs which are to be put down in rivers. 24. To the writ of *præcipe in capite* for lords against tenants offering wrong, &c. 25. To measures. 26. To inquisitions of life and member, which are to be granted freely. 27. To knights' service and other ancient tenures. 28. To accusations, which must be under oath. 29. To the freedom of the subject. No freeman shall be disseised of his freehold, imprisoned and condemned, but by judgment of his peers, or by the law of the land. 30. To merchant strangers, who are to be civilly treated. 31. To escheats. 32. To the power of selling land by a freeman, which is limited. 33. To patrons of abbeys, &c. 34. To the right of a woman to appeal for the death of her husband. 35. To the time of holding

courts. 36. To mortmain. 37. To escuage and subsidy. 38. Confirms every article of the charter. See a copy of Magna Charta in 1 Laws of South Carolina, edited by Judge Cooper, p. 78. In the Penny Magazine for the year 1838, page 229, there is a copy of the original seal of King John, affixed to this instrument, and a specimen of a fac simile of the writing of Magna Charta, beginning at the passage, *Nullus liber homo capiatur vel imprisonetur, &c.* A copy of both may be found in the Magazin Pittoresque, for the year 1834, p. 52, 53. Vide 4 Bl. Com. 423.

MAIDEN. The name of an instrument formerly used in Scotland for beheading criminals.

MAIL. This word, derived from the French *malle*, a trunk, signifies the bag, valise, or other contrivance used in conveying through the post office, letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail.

2. The laws of the United States have provided for the punishment of robberies or wilful injuries to the mail; the act of March 3, 1825, 3 Story's Laws U. S. 1985, provides—

§ 22. That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not less than five years, nor exceeding ten years; and, if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail, the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the United States, by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by imprisonment, not less than two years, nor exceeding ten years. And, if any person shall steal the mail, or shall steal or take from, or out of, any mail, or from, or out of, any post office, any letter or packet; or, if any person shall take the mail, or any letter or packet therefrom, or from any post office, whether with or without

the consent of the person having custody thereof, and shall open, embezzle, or destroy any such mail, letter, or packet, the same containing any articles of value, or evidence of any debt, due, demand, right, or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing, mentioned and described in the twenty-first section of this act; or, if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter, or packet, containing any article of value, or evidence thereof, or either of the writings referred to, or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned not less than two, nor exceeding ten years. And if any person shall take any letter, or packet, not containing any article of value, or evidence thereof, out of a post office, or shall open any letter or packet, which shall have been in a post office, or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle, or destroy, any such mail, letter, or packet, such offender, upon conviction, shall pay, for every such offence, a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months.

3.—§ 23. That, if any person shall rip, out, tear, burn, or otherwise injure, any valise, portmanteau, or other bag, used, or designed to be used, by any person acting under the authority of the postmaster general, or any person in whom his powers are vested, in a conveyance of any mail, letter, packet, or newspaper, or pamphlet, or shall draw or break any staple, or loosen any part of any lock, chain, or strap, attached to, or belonging to any such valise, portmanteau, or bag, with an intent to rob, or steal any mail, letter, packet, newspaper, or pamphlet, or to render either of the same insecure, every such offender, upon conviction, shall, for every such offence, pay a sum, not less than one hundred dollars, nor exceeding five hundred dollars, or be imprisoned not less than one year, nor exceeding three years, at the discretion of the court before whom such conviction is had.

4.—§ 24. That every person who, from and after the passage of this act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to

the same penalties and punishments as the persons are subject to, who shall actually do or perpetrate any of the said acts or crimes, according to the provision of this act.

5.—§ 25. That every person who shall be imprisoned by a judgment of court, under and by virtue of the twenty-first, twenty-second, twenty-third, or twenty-fourth sections of this act, shall be kept at hard labor during the period of such imprisonment.

MAILE, *ancient English law*. A small piece of money; it also signified a rent, because the rent was paid with maile.

MAIM, *pleadings*. This is a technical word necessary to be introduced into all indictments for mayhem; the words "feloniously did maim," must of necessity be inserted, because no other word, or any circumlocution, will answer the same purpose. 4 Inst. 118; Hawk. B. 2, c. 23, s. 17, 18, 77; Hawk. B. 2, c. 25, s. 55; 1 Chit. Cr. Law, *244.

TO MAIM, *crim. law*. To deprive a person of such part of his body as to render him less able in fighting or defending himself than he would have otherwise been. Vide *Mayhem*.

MAINE. One of the new states of the United States of America. This state was admitted into the Union, by the Act of Congress of March 3, 1820, 3 Story's L. U. S. 1761, from and after the fifteenth day of March, 1820, and is thereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

2. The constitution of this state was adopted October 29th, 1819. The powers of the government are vested in three distinct departments, the legislative, executive and judicial.

3.—1. The *legislative* power is vested in two distinct branches, a house of representatives and senate, each to have a negative on the other, and both to be styled *The legislature of Maine*. 1. The *house of representatives* is to consist of not less than one hundred, nor more than two hundred members; to be apportioned among the counties according to law; to be elected by the qualified electors for one year from the next day preceding the annual meeting of the legislature. 2. The *senate* consists of not less than twenty, nor more than thirty-one members, elected at the same

time, and for the same term, as the representatives, by the qualified electors of the districts into which the state shall, from time to time, be divided. Art. 4, part 2, s. 1. The veto power is given to the governor, by art. 4, part 3, s. 2.

4.—2. The supreme *executive* power of the state is vested in a *governor*, who is elected by the qualified electors, and holds his office one year from the first Wednesday of January in each year. On the first Wednesday of January annually, seven persons, citizens of the United States, and resident within the state, are to be elected by joint ballot of the senators and representatives in convention, who are called the *council*. This council is to advise the governor in the executive part of government, art. 5, part 2, s. 1 and 2.

5.—3. The *judicial* power of the state is distributed by the 6th article of the constitution as follows:

6.—§ 1. The judicial power of this state shall be vested in a supreme judicial court, and such other courts as the legislature shall, from time to time, establish.

7.—§ 2. The justices of the supreme judicial court shall, at stated times, receive a compensation, which shall not be diminished during their continuance in office, but they shall receive no other fee or reward.

8.—§ 3. They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate, or house of representatives.

9.—§ 4. All judicial officers, except justices of the peace, shall hold their offices during good behaviour, but not beyond the age of seventy years.

10.—§ 5. Justices of the peace and notaries public shall hold their offices during seven years, if they so long behave themselves well, at the expiration of which term, they may be re-appointed, or others appointed, as the public interest may require.

11.—§ 6. The justices of the supreme judicial court shall hold no office under the United States, nor any state, nor any other office under this state, except that of justice of the peace.

For a history of the province of Maine, see 1 Story on the Const. § 82.

MAINOUR, crim. law. The thing stolen found in the hands of the thief who has stolen it; hence when a man is found with property which he has stolen, he is said to

be taken with the mainour, that is, it is found in his *hands*.

2. Formerly there was a distinction made between a larceny, when the thing stolen was found in the hands of the criminal, and when the proof depended upon other circumstances not quite so irrefragable; the former properly was termed *priso ve maynovere*, or *ove mainer*, or *mainour*, as it is generally written. Barr. on the Stat. 315, 316, note.

MAINPERNABLE. Capable of being bailed; one for whom bail may be taken; bailable.

MAINPERNORS, English law. Those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance.

2. Mainpernors differ from bail: a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are merely sureties for his appearance at the day; bail are only sureties that the party be answerable for all the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 3. Bl. Com. 128; vide Dane's Index, h. t.

MAINPRISE, Engl. law. The taking a man into friendly custody, who might otherwise be committed to prison, upon security given for his appearance at a time and place assigned. Wood's Inst. B. 4, c. 4.

2. Mainprise differs from bail in this, that a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed. 6 Mod. 231; 7 Mod. 77, 85, 98; Ld. Raym. 606; Bac. Ab. Bail in Civil Cases; 4 Inst. 180. Vide *Mainpernors*; *Writ of Mainprise*; and 15 Vin. Ab. 146; 3 Bl. Com. 128.

MAINTENANCE, crimes. A malicious, or at least, officious interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action, without any authority of law. 1 Russ. Cr. 176.

2. But there are many acts in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justified, 1. Because the party has an interest in the thing in variance; as when he has a bare

contingency in the lands in question, which possibly may never come in esse. Bac. Ab. h. t. 2. Because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife. 3. Because the relation of landlord and tenant or master and servant subsists between the party to the suit and the person who assists him. 4. Because the money is given out of charity. 1 Bailey, S. C. Rep. 401. 5. Because the person assisting the party to the suit, is an attorney or counsellor: the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man. 1 Russ. Cr. 179. Bac. Ab Maintenance: Bro. Maintenance. This offence is punishable by fine and imprisonment. 4 Black. Com. 124; 2 Swift's Dig. 328; Bac. Ab. h. t. Vide 3 Hawks, 86; 1 Greenl. 292; 11 Mass. 553, 6 Mass. 421; 5 Pick. 359; 5 Monr. 413; 6 Cowen, 431; 4 Wend. 306; 14 John. R. 124; 3 Cowen, 647; 3 John. Ch. R. 508; 7 D. & R. 846; 5 B. & C. 188.

MAINTENANCE, *quasi contracts*. The support which one person, who is bound by law to do so, gives to another for his living; for example, a father is bound to find maintenance for his children; and a child is required by law to maintain his father or mother, when they cannot support themselves, and he has ability to maintain them. 1 Bouv. Inst. n. 284-6.

MAINTAINED, *pleadings*. This is a technical word, indispensable in an indictment for maintenance, which no other word or circumlocution will supply. 1 Wils. 325.

MAINTAINORS, *criminal law*. Those who maintain or support a cause depending between others, not being retained as counsel or attorney. For this they may be fined and imprisoned. 2 Swift's Dig. 328; 4 Bl. Com. 124; Bac. Ab. Barrator.

MAISON DE DIEU. House of God. In England this term, which is borrowed from the French, signified formerly a hospital, an almshouse, a monastery. 39 Eliz. c. 5.

MAJESTY. Properly speaking, this term can be applied only to God, for it signifies that which surpasses all things in grandeur and superiority. But it is used to kings and emperors, as a title of honor. It sometimes means power, as when we say, the majesty of the people. See Wolff, § 998.

MAJOR, *persons*. One who has attained his full age, and has acquired all his civil

rights; one who is no longer a minor; an adult.

MAJOR. Military language. The lowest of the staff officers; a degree higher than captain.

MAJOR GENERAL. A military officer, commanding a division or number of regiments; the next in rank below a lieutenant general.

MAJORES. The male ascendant beyond the sixth degree were so called among the Romans, and the term is still used in making genealogical tables.

MAJORITY, *persons*. The state or condition of a person who has arrived at full age. He is then said to be a major, in opposition to minor, which is his condition during infancy.

MAJORITY, *government*. The greater number of the voters; though in another sense, it means the greater number of votes given; in which sense it is a mere plurality. (q. v.)

2. In every well regulated society, the majority has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws; and the minority are bound, whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject. 1 Tuck. Bl. Com. App. 168, 172; 9 Dane's Ab. 37 to 43; 1 Story, Const. § 330.

3. As to the rights of the majority of part owners of vessels, vide 3 Kent, Com. 114 et seq. As to the majority of a church, vide 16 Mass. 488.

4. In the absence of all stipulations, the general rule in partnerships is, that each partner has an equal voice, and a majority acting *bona fide*, have the right to manage the partnership concerns, and dispose of the partnership property, notwithstanding the dissent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified. 2 Bouv. Inst. n. 1954.

5. As to the majorities of companies or corporations, see Angel, Corp. 48, et seq.; 3 M. R. 495. Vide, generally, Rutherf. Inst. 249; 9 Serg. & Rawle, 99; Bro. Corporation, pl. 63; 15 Vin. Abr. 183, 184; and the article *Authority; Plurality; Quorum*.

TO MAKE. *English law*. To perform or execute; as to *make his law*, is to perform that law which a man had bound him-

self to do; that is, to clear himself of an action commenced against him, by his oath, and the oaths of his neighbors. Old Nat. Br. 161. To make default, is to fail to appear in proper time. To make oath, is to swear according to the form prescribed by law.

MAKER. This term is applied to one who makes a promissory note and promises to pay it when due. He who makes a bill of exchange is called the drawer, and frequently in common parlance and in books of Reports we find the word drawer inaccurately applied to the maker of a promissory note. See *Promissory note*.

MAKING HIS LAW. A phrase used to denote the act of a person who wages his law. Bac. Ab. *Wager of law*, in *pr*.

MALA FIDES. Bad faith. It is opposed to *bona fides*, good faith.

MALA PRAXIS, crim. law. A Latin expression, to signify bad or unskilful practice in a physician or other professional person, as a midwife, whereby the health of the patient is injured.

2. This offence is a misdemeanor (whether it be occasioned by curiosity and experiment or neglect) because it breaks the trust which the patient has put in the physician, and tends directly to his destruction. 1 Lord Raym. 213. See forms of indictment for mala praxis, 3 Chitty Crim. Law, 863; 4 Wentw. 360; Vet. Int. 231; Trem. P. C. 242. Vide also, 2 Russ. on Cr. 288; 1 Chit. Pr. 43; Com. Dig. Physician; Vin. Ab. Physician.

3. There are three kinds of mal practice. 1. Wilful mal practice, which takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in danger or death to the individual under his care; as, in the case of criminal abortion.

4.—2. Negligent mal practice, which comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires: as if a physician should administer medicines while in a state of intoxication, from which injury would arise to his patient.

5.—3. Ignorant mal practice, which is the administration of medicines, calculated to do injury, which do harm, and which a well educated and scientific medical man would know were not proper in the case. Besides the public remedy for mal practice, in many cases the party injured may bring a civil action. 5 Day's R. 260; 9 Conn.

209. See M. & Rob. 107; 1 Saund. 312, n. 2; 1 Ld. Raym. 213; 1 Briand, Méd. Lég. 50; 3 Watts, 355; 9 Conn. 209.

MALA PROHIBITA. Those things which are prohibited by law, and therefore unlawful.

2. A distinction was formerly made in respect of contracts, between *mala prohibita* and *mala in se*; but that distinction has been exploded, and, it is now established that when the provisions of an act of the legislature have for their object the protection of the public, it makes no difference with respect to contracts, whether the thing be prohibited absolutely or under a penalty. 5 B. & A. 335, 340; 10 B. & C. 98; 3 Stark. 61; 13 Pick. 518; 2 Bing. N. C. 686, 646.

MALE. Of the masculine sex; of the sex that begets young; the sex opposed to the female. Vide *Gender*; *Man*; *Sex*; *Worthiest of blood*.

MALEDICTION, Eccles. law. A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights.

MALEFACTOR. He who has been guilty of some crime; in another sense, one who has been convicted of having committed a crime.

MALEFICIUM, civil law. Waste, damage, torts, injury. Dig. 5, 18, 1.

MALFEASANCE, contracts, torts. The unjust performance of some act which the party had no right, or which he had contracted not to do. It differs from misfeasance, (q. v.) and nonfeasance. (q. v.) Vide 1 Chit. Pr. 9; 1 Chit. Pl. 184.

MALICE, crim. law. A wicked intention to do an injury. 4 Mason, R. 115, 505; 1 Gall. R. 524. It is not confined to the intention of doing an injury to any particular person, but extends to an evil design, a corrupt and wicked notion against some one at the time of committing the crime; as, if A intended to poison B, conceals a quantity of poison in an apple and puts it in the way of B, and C, against whom he had no ill will, and who, on the contrary, was his friend, happened to eat it, and die, A will be guilty of murdering C with malice aforethought. Bac. Max. Reg. 15; 2 Chit. Cr. Law, 727; 3 Chit. Cr. Law, 1104.

2. Malice is express or implied. It is *express*, when the party evinces an intention to commit the crime, as to kill a man; for example, modern duelling. 3 Bulstr. 171.

It is *implied*, when an officer of justice is killed in the discharge of his duty, or when death occurs in the prosecution of some unlawful design.

3. It is a general rule that when a man commits an act, unaccompanied by any circumstance justifying its commission, the law presumes he has acted advisedly and with an intent to produce the consequences which have ensued. 3 M. & S. 15; Foster, 255; 1 Hale, P. C. 455; 1 East, P. C. 223 to 232, and 340; Russ. & Ry. 207; 1 Moody, C. C. 263; 4 Bl. Com. 198; 15 Vin. Ab. 506; Yelv. 105 a; Bac. Ab. Murder and Homicide, C 2. Malice aforethought is deliberate premeditation. Vide *Aforethought*.

MALICE, *torts*. The doing any act injurious to another without a just cause.

2. This term, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. 11 S. & R. 39, 40.

3. Indeed in some cases it seems not to require any intention in order to make an act malicious. When a slander has been published, therefore, the proper question for the jury is, not whether the intention of the publication was to injure the plaintiff, but whether the tendency of the matter published, was so injurious. 10 B. & C. 472; S. C. 21 E. C. L. R. 117.

4. Again, take the common case of an offensive trade, the melting of tallow for instance; such trade is not itself unlawful, but if carried on to the annoyance of the neighboring dwellings, it becomes unlawful with respect to them, and their inhabitants may maintain an action, and may charge the act of the defendant to be malicious. 3 B. & C. 584; S. C. 10 E. C. L. R. 179.

MALICE AFORETHOUGHT, *pleadings*. In an indictment for murder, these words, which have a technical force, must be used in charging the offence; for without them, and the artificial phrase *murder*, the indictment will be taken to charge manslaughter only. Fost. 424; Yelv. 205; 1 Chit. Cr. Law, *242, and the authorities and cases there cited.

2. Whenever malice aforethought is necessary to constitute the offence, these words must be used in charging the crime in the indictment. 2 Chit. Cr. Law, *787; 1 East, Pl. Cr. 402; 2 Mason, R. 91.

MALICIOUS. With bad and unlawful motives; wicked.

MALICIOUS ABANDONMENT. The forsaking without a just cause a husband by the wife, or a wife by her husband. Vide *Abandonment, malicious*.

MALICIOUS MISCHIEF. This expression is applied to the wanton or reckless destruction of property, and the wilful perpetration of injury to the person. Alis. Prin. 448; 3 Dev. & Batt. 130; 8 Leigh, 719; 5 Ired. R. 364; 8 Port. 447; 2 Metc. 21; 3 Greenl. 177.

MALICIOUS PROSECUTION, or MALICIOUS ARREST, *torts*, or *remedies*. These terms import a wanton prosecution or arrest, made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result.

2. This definition will be analysed by considering, 1. The nature of the prosecution or arrest. 2. Who is liable under it. 3. What are malice and probable cause. 4. The proceedings. 5. The result of the prosecution; and afterwards, 6. The remedy.

3.—§ 1. Where the defendant commenced a *criminal prosecution* wantonly and in other respects against law, he will be responsible. Addis. R. 270; 12 Conn. 219. The prosecution of a *civil suit*, when malicious, is a good cause of action, even when there has been no arrest. 1 P. C. C. 210; 11 Conn. 582; 1 Wend. 345. But no action lies for commencing a civil action, though without sufficient cause. 1 Penns. R. 235.

4.—§ 2. The action lies against the prosecutor and even against a mere informer, when the proceedings are malicious. 5 Stew. & Port. 367. But grand jurors are not liable to an action for a malicious prosecution, for information given by them to their fellow jurors, on which a prosecution is founded. Hardin, 556. Such action lies against a plaintiff in a civil action who maliciously sues out the writ and prosecutes it; 16 Pick. 453; but an action does not lie against an attorney at law for bringing the action, when regularly employed. 16 Pick. 478. See 6 Pick. 198.

5.—§ 3. There must be malice and want of probable cause. 1 Wend. 140, 345; 7 Cowen, 281; 2 P. A. Browne, Appx. xlii.; Cooke, 90; Litt. Sel. Cas. 106; 4 Litt. 334; 3 Gil. & John. 377; 1 N. & M. 36; 12 Conn. 219; 3 Call. 446; 2 Hall, 315;

3 Mason, 112; 2 N. & M. 54, 143. See *Malice; Probable cause*.

6.—§ 4. The proceedings under which the original prosecution or action was held, must have been *regular*, in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the supposed offender, the now plaintiff. 3 Pick. 379, 383. When the proceedings are irregular, the prosecutor is a trespasser. 3 Blackf. 210. See *Regular and irregular process*.

7.—§ 5. The malicious prosecution or action must be ended, and the plaintiff must show it was groundless, either by his acquittal or by obtaining a final judgment in his favor in a civil action. 1 Root, R. 553; 1 N. & M. 36; 2 N. & M. 54, 143; 7 Cowen, 715; 2 Dev. & Bat. 492.

8.—§ 6. The remedy for a malicious prosecution is an action on the case to recover damages for the injury sustained. 5 Stew. & Porter, 367; 2 Conn. 700; 11 Mass. 500; 6 Greenl. 421; 8 Gill. & John. 377. See *Case; Regular and irregular process*.

See, generally, Bull. N. P. 11; 1 Saund. 228; 12 Mod. 208; 1 T. R. 493 to 551; Bac. Ab. Actions on the case, H; Bouv. Inst. Index, h. t.

MALUM IN SE. Evil in itself.

2. An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *mala in se*.

3. An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden; as playing at games, which being innocent before, have become unlawful in consequence of being forbidden. Vide Bac. Ab. Assumpsit, A, note; 2 Rolle's Ab. 355.

MALVEILLES. Ill-will. In some ancient records this word signifies malicious practices, or crimes and misdemeanors.

MALVERSATION, *French law*. This word is applied to all punishable faults committed in the exercise of an office, such as corruptions, exactions, extortions and larceny. Merl. Répert. h. t.

MAN. A human being. This definition includes not only the adult male sex of the human species, but women and children; examples: "of offences against *man*, some are more immediately against the king, others more immediately against the

subject." Hawk. P. C. book 1, c. 2, s. 1. "Offences against the life of *man* come under the general name of homicide, which in our law signifies the killing of a *man* by a *man*." Id. book 1, c. 8, s. 2.

2. In a more confined sense, man means a person of the male sex; and sometimes it signifies a male of the human species above the age of puberty. Vide *Rape*. It was considered in the civil or Roman law, that although *man* and *person* are synonymous in grammar, they had a different acceptation in law; all persons were men, but all men, for example, slaves, were not persons, but things. Vide Barr. on the Stat. 216, note.

MANAGER. A person appointed or elected to manage the affairs of another, but the term is more usually applied to those officers of a corporation who are authorized to manage its affairs. 1 Bouv. Inst. n. 190.

2. In banking corporations these officers are commonly called directors, and the power to conduct the affairs of the company, is vested in a board of directors. In other private corporations, such as rail-road companies, canal, coal companies, and the like, these officers are called managers. Being agents, when their authority is limited, they have no power to bind their principal beyond such authority. 17 Mass. R. 29; 1 Greenl. R. 81.

3. The persons appointed on the part of the house of representatives to prosecute impeachments before the senate, are called managers.

MANBOTE. In a barbarous age, when impunity could be purchased with money, the compensation which was paid for homicide was called *manbote*.

MANCIPATIO, *civil law*. The act of transferring things called *res mancipi*. (q. v.) This is effected in the presence of not less than five witnesses, who must be Roman citizens and of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of brazen scales, and hence is called *Libripens*. The purchaser (*qui mancipio accipit*) taking hold of the thing, says: I affirm that this slave (*homo*) is mine, *ex jure quiritium*, and he is purchased by me with this piece of money (*æs*) and brazen scales. He then strikes the scales with the piece of money and gives it to the seller as a symbol of the price (*quasi pretii loco*.) The purchaser or person to whom the *mancipatio* was made did not acquire the possession of the *manci-*

patio; for the acquisition of possession was a separate act. *Gaius*, 1, 119; *Id.* iv. 131.

Both *mancipatio* and *in jure cessio* existed before the twelve tables. *Frag. Vat.* 50. *Mancipation* no longer existed in the code of Justinian, who took away all distinction between *res mancipi* and *res mancipii*. *Smith's Dict. Gr. & Rom. Antiq. Verb. Mancipium*; *Coop. Jus.* 442.

MANDAMUS, practice. The name of a writ, the principal word of which when the proceedings were in Latin, was *mandamus*, *we command*.

2. It is a command issuing in the name of the sovereign authority from a superior court having jurisdiction, and is directed to some person, corporation, or inferior court, within the jurisdiction of such superior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the superior court has previously determined, or at least supposes to be consonant to right and justice. 20 *Pick.* 484; 21 *Pick.* 258; *Dudley*, 37; 4 *Humph.* 437.

3. *Mandamus* is not a writ of right, it is not consequently granted of course, but only at the discretion of the court to whom the application for it is made; and this discretion is not exercised in favor of the applicant, unless some just and useful purpose may be answered by the writ. 2 *T. R.* 385; 1 *Cowen's R.* 501; 11 *Shepl.* 151; 1 *Pike*, 11.

4. This writ was introduced to prevent disorders from a failure of justice; therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. 3 *Burr. R.* 1267; 1 *T. R.* 148, 9; 2 *Pick.* 414; 4 *Pick.* 68; 10 *Pick.* 235, 244; 7 *Mass.* 340; 3 *Binn.* 273; 5 *Halst.* 57; *Cooke*, 160; 1 *Wend.* 318; 5 *Pet.* 190; 1 *Caines, R.* 511; *John. Cas.* 181; 12 *Wend.* 183; 8 *Pet.* 291; 12 *Pet.* 524; 2 *Penning.* 1024; *Hardin*, 172; 7 *Wheat.* 534; 5 *Watts.* 152; 2 *H. & M.* 132; 3 *H. & M.* 1; 1 *S. & R.* 473; 5 *Binn.* 87; 3 *Conn.* 243; 2 *Virg. Cas.* 499; 5 *Call.* 548. *Mandamus* will not lie where the law has given another specific remedy. 1 *Wend.* 318; 10 *John.* 484; 1 *Cow.* 417; *Coleman*, 117; 1 *Pet.* 567; 2 *Cowen*, 444; 2 *McCord*, 170; *Minor*, 46; 2 *Leigh*, 165; *Const. Rep.* 165, 175, 703.

5. The 13th section of the act of congress of September, 24, 1789, gives the

supreme court power to issue writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States. The issuing of a *mandamus* to courts, is the exercise of an appellate jurisdiction, and, therefore constitutionally vested in the supreme court; but a *mandamus* directed to a public officer, belongs to original jurisdiction, and, by the constitution, the exercise of original jurisdiction by the supreme court is restricted to certain specified cases, which do not comprehend a *mandamus*. The latter clause of the above section, authorizing this writ to be issued by the supreme court, to persons holding office under the authority of the United States, is, therefore, not warranted by the constitution, and void. 1 *Cranch*, *R.* 175.

6. The circuit courts of the United States may also issue writs of *mandamus*, but their power in this particular, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. 7 *Cranch, R.* 504; 8 *Wheat. R.* 598; 1 *Paine's R.* 453. *Vide*, generally, 3 *Bl. Com.* 110; *Com. Dig.* h. t.; *Bac. Ab.* h. t.; *Vin. Ab.* h. t.; *Selw. N. P.* h. t.; *Chit. Pr.* h. t.; *Serg. Const. Index*, h. t.; *Ang. on Corp. Index*, h. t.; 3 *Chit. Bl. Com.* 265 n. 7; 1 *Kent. Com.* 322; *Dane's Ab. Index*, h. t.; 6 *Watts & Serg.* 386, 397; *Bouv. Inst. Index*, h. t.; and the article *Courts of the United States*.

MANDANT. The principal in the contract of mandate is so called. *Story, Ag.* § 337.

MANDATARIUS. One who is entrusted with and undertakes to perform a mandate. This word is used by the civilians in the same sense that we use *mandatary*. *Poth. du Mandat*, n. 1.

MANDATARY, contracts. One who undertakes to perform a mandate. *Jones' Bailm.* 53; *Story on Bailm.* § 138. *Dr. Halifax* calls him *mandatee*. *Halif. Anal. Civ. Law*, 70, §§ 16, 17.

2. It is the duty of a mere *mandatary*, it is said, to take ordinary care of the property entrusted to him. *Vide Negligence*. But it has been held that he is liable only for gross negligence. 14 *S. & R.* 275; 2 *Hawks, R.* 145; 2 *Murph. R.* 373; 3 *Dana, R.* 205; 3 *Mason, R.* 132; 11 *Wend, R.* 25; *Wright, R.* 598; 1 *Bouv. 1st. n.* 1073.

MANDATE, practice. A judicial com-

mand or precept issued by a court or magistrate, directing the proper officer to enforce a judgment, sentence or decree. Jones' Bailm. 52; Story on Bailm. § 137.

MANDATE. Mandatum or commission, *contracts*. Sir William Jones defines a mandate to be, a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. Jones' Bailm. 52; 2 Ld. Raym. 909, 918. This seems more properly an enumeration of the various sorts of mandates than a definition of the contract. According to Mr. Justice Story, it is a bailment of personal property, in regard to which the bailee engages to do some act without reward. Bailm. § 137. And Mr. Chancellor Kent defines it to be when one undertakes, without recompense, to do some act for the other in respect to the thing bailed. Comm. 443. See, for other definitions, Story on Bailm. § 137; Pothier, Pand. lib. 17, tit. 1; Wood's Civ. Law, B. 3, c. 5, p. 242; Halifar's Anal. of the Civ. Law, 70; Code of Louis. art. 2954; Code Civ. art. 1984; 1 Bouv. Inst. n. 1068.

2. From the very term of the definition, three things are necessary to create a mandate. First, that there should exist something, which should be the matter of the contract; secondly, that it should be done gratuitously; and, thirdly, that the parties should voluntarily intend to enter into the contract. Poth. Pand. Lib. 17, tit. 1, p. 1, § 1; Poth. Contr. de Mandat, c. 1, § 2.

3. There is no particular form or manner of entering into the contract of mandate, prescribed either by the common law, or by the civil law, in order to give it validity. It may be verbal or in writing; it may be express or implied; it may be in solemn form or in any other manner. Story on Bailm. § 160. The contract may be varied at the pleasure of the parties. It may be absolute or conditional, general or special, temporary or permanent. Wood's Civ. Law, 242; 1 Domat, B. 1, tit. 15, § 1, 6, 7, 8; Poth. Contr. de Mandat, c. 1, § 3, n. 34, 35, 36.

4. As to the degree of diligence which the mandatory is bound to exercise, see *Mandatory; Negligence*; Pothier, Mandat, h. t.; Louis. Code, tit. 15; Code Civ. t. 13, c. 2; Story on Bailm. § 168 to 195; 1 Bouv. Inst. n. 1078.

5. As to the duties and obligations of the mandator, see Story on Bailm. § 196 to 201; Code Civ. tit. 13, c. 3; Louis. Code, tit. 15, c. 4; 1 Bouv. Inst. n. 1074.

6. The contract of mandate may be dissolved in various ways: 1. It may be dissolved by the mandatary at any time before he has entered upon its execution; but in this case, as indeed in all others, where the contract is dissolved before the act is done which the parties intended, the property bailed is to be restored to the mandator.

7.—2. It may be dissolved by the death of the mandatary; for being founded in personal confidence, it is not presumed to pass to his representatives, unless there is some special stipulation to that effect. But this principally applies to cases where the mandate remains wholly unexecuted; for if it be in part executed, there may, in some cases, arise a personal obligation on the part of the representatives to complete it. Story on Bailm. § 202; 2 Kent's Com. 504, § 4; Pothier, Mandat, c. 4, § 1, n. 101.

8. Whenever the trust is of a nature which requires united advice, confidence and skill of all, and is deemed a joint personal trust to all, the death of one joint mandatary dissolves the contract as to all. See Story on Bailm. § 202; Co. Litt. 112, b; Id. 181, b; Com. Dig. Attorney, C 8; Bac. Abr. Authority, C; 2 Kent's Com. 504; 7 Taunt. 408.

9. The death of the mandator, in like manner, puts an end to the contract. See 2 Mason's R. 342; 8 Wheat. R. 174; 2 Kent's Com. 507; 1 Domat, B. 1, tit. 15, § 4, n. 6, 7, 8; Pothier, Contract de Mandat, c. 4, § 2, n. 103. But although an unexecuted mandate ceases with the death of the mandator, yet, if it be executed in part at that time, it is binding to that extent, and his representatives must indemnify the mandatary. Story on Bailm. §§ 204, 205.

10.—8. The contract of mandate may be dissolved by a change in the state of the parties; as if either party becomes insane, or, being a woman, marries before the execution of the mandate. Story on Bailm. § 206; 2 Roper, Husb. and Wife, 69, 73; Salk. 117; Bac. Abr. Baron and Feme, E; 2 Kent's Com. 506.

11.—4. It may be dissolved by a revocation of the authority, either by operation of law, or by the act of the mandator.

12. It ceases by operation of law, when the power of the mandator ceases over the subject-matter; as, if he be a guardian, it ceases, as to his ward's property, by the termination of the guardianship. Pothier, Contract de Mandat, c. 4, § 4, n. 112.

13. So, if the mandator sells the property, it ceases upon the sale, if it be made known to the mandatary. 7 Ves. jr. 276; Story on Bailm. § 207.

14. By the civil law the contract of mandate ceases by the revocation of the authority. Story on Bailm. § 208; Code Civ. art. 2003 to 2008; Louis, Code, art. 2997.

15. At common law, the party giving an authority is generally entitled to revoke it. See 5 T. R. 215; Wallace's R. 126; 5 Binn. 316. But if it be given as a part of a security, as if a letter of attorney be given to collect a debt, as a security for money advanced, it is irrevocable by the party, although revoked by death. 2 Mason's R. 342; 8 Wheat. 174; 2 Esp. R. 365; 7 Ves. 28; 2 Ves. & Bea. 51; 1 Stark. R. 121; 4 Campb. 272.

MANDATE, civil law. Mandates were the instructions which the emperor addressed to public functionaries, and which were to serve as rules for their conduct. 2. These mandates resembled those of the pro-consuls, the *mandata jurisdictionis*, and were ordinarily binding on the legates or lieutenants of the emperor of the imperial provinces, and, there they had the authority of the principal edicts. Sav. Dr. Rom. ch. 3, § 24, n. 4.

MANDATOR, contracts. The person employing another to perform a mandate. Story on Bailm. § 138; 1 Brown; Civ. Law, 382; Halif. Anal. Civ. Law, 70.

MANDAVI BALLIVO, English law. The return made by a sheriff, when he has committed the execution of a writ to a bailiff of a liberty, who has the right to execute the writ.

MANHOOD. The ceremony of doing homage by the vassal to his lord was denominated homagium or manhood, by the feudists. The formula used was *devenio vester homo*, I become your man. 2 Bl. Com. 54. See *Homage*.

MANIA, med. jur. This subject will be considered by examining it, first, in a medical point of view; and, secondly, as to its legal consequences.

2.—§ 1. Mania may be divided into intellectual and moral.

1. Intellectual mania is that state of mind which is characterised by certain hallucinations, in which the patient is impressed with the reality of facts or events which have never occurred, and acts in accordance with such belief; or, having some notion not

altogether unfounded, carries it to an extravagant and absurd length. It may be considered as involving all or most of the operations of the understanding, when it is said to be *general*; or as being confined to a particular idea, or train of ideas, when it is called *partial*.

3. These will be separately examined.

1st. General intellectual mania is a disease which presents the most chaotic confusion into which the human mind can be involved, and is attended by greater disturbance of the functions of the body than any other. According to Pinel, *Traité d'Alienation Mentale*, p. 63, "The patient sometimes keeps his head elevated and his looks fixed on high; he speaks in a low voice, or utters cries and vociferations without any apparent motive; he walks to and fro, and sometimes arrests his steps as if fixed by the sentiment of admiration, or wrapt up in profound reverie. Some insane persons display wild excesses of merriment, with immoderate bursts of laughter. Sometimes also, as if nature delighted in contrasts, gloom and taciturnity prevail, with involuntary showers of tears, or the anguish of deep sorrow, with all the external signs of acute mental suffering. In certain cases a sudden reddening of the eyes and excessive loquacity give presage of a speedy explosion of violent madness and the urgent necessity of a strict confinement. One lunatic, after long intervals of calmness, spoke at first with volubility, uttered frequent shouts of laughter, and then shed a torrent of tears; experience had taught the necessity of shutting him up immediately, for his paroxysms were at such times of the greatest violence." Sometimes, however, the patient is not altogether devoid of intelligence; answers some questions very appropriately, and is not destitute of acuteness and ingenuity. The derangement in this form of mania is not confined to the intellectual faculties, but not unfrequently extends to the moral powers of the mind.

4.—2d. Partial intellectual mania is generally known by the name of *monomania*. (q. v.) In its most usual and simplest form, the patient has conceived some single notion contrary to common sense and to common experience, generally dependent on errors of sensation; as, for example, when a person believes that he is made of glass, that animals or men have taken their abode in his stomach or bowels. In these cases the understanding is frequently found to be sound on all subjects, except those connected with

the hallucination. Sometimes, instead of being limited to a single point, this disease takes a wider range, and, there is a class of cases, where it involves a train of morbid ideas. The patient then imbibes some notions connected with the various relations of persons, events, time, space, &c., of the most absurd and unfounded nature, and endeavors, in some measure, to regulate his conduct accordingly; though, in most respects, it is grossly inconsistent with his delusion.

5. Moral mania or *moral insanity*, (q. v.) is divided into, first, *general*, where all the moral faculties are subject to a general disturbance; and, secondly, *partial*, where one or two only of the moral powers are perverted.

6. These will be briefly and separately examined. 1st. It is certain that many individuals are living at large who are affected, in a degree at least, by *general moral mania*. They are generally of singular habits, wayward temper, and eccentric character; and circumstances are frequently attending them which induce a belief that they are not altogether sane. Frequently there is a hereditary tendency to madness in the family; and, not seldom, the individual himself has at a previous period of life sustained an attack of a decided character: his temper has undergone a change, he has become an altered man, probably from the time of the occurrence of something which deeply affected him, or which deeply affected his bodily constitution. Sometimes these alterations are imperceptible, at others, they are sudden and immediate. Individuals afflicted with this disease not unfrequently "perform most of the common duties of life with propriety, and some of them, indeed, with scrupulous exactness, who exhibit no strongly marked features of either temperament, no traits of superior or defective mental endowment, but yet take violent antipathies, harbor unjust suspicions, indulge strong propensities, affect singularity in dress, gait, and phraseology; are proud, conceited, and ostentatious; easily excited and with difficulty appeased; dead to sensibility, delicacy, and refinement; obstinately riveted to the most absurd opinions; prone to controversy, and yet incapable of reasoning; always the hero of their own tale, using hyperbolic, high flown language to express the most simple ideas; accompanied by unnatural gesticulation, inordinate action, and frequently by the most alarming

expression of countenance. On some occasions they suspect sinister intentions on the most trivial grounds; on others are a prey to fear and dread from the most ridiculous and imaginary sources; now embracing every opportunity of exhibiting romantic courage and feats and hardihood, then indulging themselves in all manner of excesses. Persons of this description, to the casual observer, might appear actuated by a bad heart, but the experienced physician knows it is the head which is defective. They seem as if constantly affected by a greater or less degree of stimulation from intoxicating liquors, while the expression of countenance furnishes an infallible proof of mental disease. If subjected to moral restraint, or a medical regimen, they yield with reluctance to the means proposed, and generally refuse and resist, on the ground that such means are unnecessary where no disease exists; and when, by the system adopted, they are so far recovered, as to be enabled to suppress the exhibition of their former peculiarities, and are again fit to be restored to society, the physician, and those friends who put them under the physician's care, are generally ever after objects of enmity, and frequently of revenge." Cox, Pract. Obs. on Insanity; see cases of this kind of madness cited in Ray, Med. Jur. § 112 to 119; Combe's Moral Philos. lect. 12.

7.—2d. *Partial moral mania* consists in the derangement of one or a few of the affective faculties, the moral and intellectual constitution in other respects remaining in a sound state. With a mind apparently in full possession of his reason, the patient commits a crime, without any extraordinary temptation, and with every inducement to refrain from it, he appears to act without a motive, or in opposition to one, with the most perfect consciousness of the impropriety of his conduct, and yet he pursues perseveringly his mad course. This disease of the mind manifests itself in a variety of ways, among which may be mentioned the following: 1. An irresistible propensity to steal. 2. An inordinate propensity to lying. 3. A morbid activity of the sexual propensity. Vide *Erotic Mania*. 4. A morbid propensity to commit arson. 5. A morbid activity of the propensity to destroy. Ray, Med. Jur. ch. 7.

8.—§ 2. In general, persons laboring under mania are not responsible nor bound for their acts like other persons, either in

their contracts or for their crimes, and their wills or testaments are voidable. Vide *Insanity; Moral Insanity*. 2 Phillim. Ecc. R. 69; 1 Hagg. Cons. R. 414; 4 Pick. R. 32; 3 Addams, R. 79; 1 Litt. R. 371.

MANIA A POTU. Insanity arising from the use of spirituous liquors. Vide *Delirium Tremens*.

MANIFEST, com. law. A written instrument containing a true account of the cargo of a ship or commercial vessel.

2. The Act of March 2, 1799, s. 23, requires that when goods, wares, or merchandise, shall be brought into the United States, from any foreign port or place, in any ship or vessel, belonging, in whole or in part to a citizen or inhabitant of the United States, the manifest shall be in writing, signed by the master of the vessel, and that it shall contain the names of the places where the goods in such manifest mentioned, shall have been respectively taken on board, and the places within the United States, for which they are respectively consigned, particularly noticing the goods destined for each place, respectively; the name, description, and build of such vessel, and her true admeasurement or tonnage, the place to which she belongs, with the name of each owner, according to her register, the name of her master, and a just and particular account of the goods so laden on board, whether in package or stowed loose, of any kind whatsoever, with the marks and numbers on each package, the numbers and descriptions of the packages in words at length, whether leaguer, pipe, butt, puncheon, hogshead, barrel, keg, case, bale, pack, truss, chest, box, bandbox, bundle, parcel, cask, or package of any kind, describing each by its usual denomination; the names of the persons to whom they are respectively consigned, agreeably to the bills of lading, unless when the goods are consigned to order, when it shall be so expressed; the names of the several passengers on board, distinguishing whether cabin or steerage passengers, or both, with their baggage, specifying the number and description of packages belonging to each, respectively; together with an account of the remaining sea stores, if any. And if any merchandise be imported, destined for different districts, or ports, the quantities and packages thereof shall be inserted in successive order in the manifest; and all spirits, wines and teas, constituting the whole or any part of the cargo of any vessel, shall be

inserted in successive order, distinguishing the ports to which they may be destined, and the kinds, qualities and quantities thereof; and if merchandise be imported by citizens or inhabitants of the United States, in vessels other than of the United States, the manifests shall be of the form and shall contain the particulars aforesaid, except that the vessel shall be specially described as provided by a form in the act. 1 Story's Laws, 593, 594.

3. The want of a manifest, where one is required, or when it is false, is severely punished.

MANIFEST, evidence. That which is clear and requires no proof; that which is notorious. See *Notoriety*.

MANIFESTO. A solemn declaration, by the constituted authorities of a nation, which contains the reasons for its public acts towards another.

2. On the declaration of war, a manifesto is usually issued in which the nation declaring the war, states the reasons for so doing. Vattel, liv. 3, c. 4, § 64; Wolff, § 1187. See *Anti-Manifesto*.

MANKIND. Persons of the male sex; but in a more general sense, it includes persons of both sexes; for example, the statute of 25 Hen. VIII., c. 6, makes it felony to commit sodomy with mankind or beast. Females as well as males are included under the term mankind. Fortesc. 91; Bac. Ab. Sodomy. See *Gender*.

MANNER AND FORM, pleading. After traversing any allegation in pleading, it is usual to say "in manner and form as he has in his declaration in that behalf alleged," which is as much as to include in the traverse, not only the mere fact opposed to it, but that in the *manner and form* in which it is stated by the other party. These words, however, only put in issue the substantial statement of the manner of the fact traversed, and do not extend to the time, place, or other circumstances attending it, if they were not originally material and necessary to be proved as laid. 3 Bouv. Inst. p. 297. See *Modo et forma*.

MANNOPUS. An ancient word which signifies goods taken in the hands of an apprehended thief.

MANOR, estates. This word is derived from the French *manoir*, and signifies a house, residence, or habitation. At present its meaning is more enlarged, and includes not only a dwelling-house, but also lands. Vide Co. Litt. 58, 108; 2 Roll. Ab. 121;

Merl. Répert. mot Manoir. See Serg. Land Laws of Pennsylv. 195.

2. By the English law, a manor is a tract of land originally granted by the king to a person of rank, part of which was given by the grantee to his followers, and the rest he retained under the name of his demesnes; that which remained uncultivated was called the lord's waste, and served for public roads and common of pasture for the lord and his tenants.

MANSION. This term is synonymous with house. (q. v.) 1 Chit. Pr. 167; 2 T. R. 502; 1 Tho. Co. Litt. 215, n. 35; 9 B. & C. 681; S. C. 17 E. C. L. R. 472, and the cases there cited; Com. Dig. Justices, P 5; 3 Serg. & Rawle, 199. A portion only of a building may come under the description of a mansion-house. 1 Leach, 89, 428; 1 East, P. C. c. 15, s. 19. See 2 Bouv. Inst. n. 1571, note.

MANSLAUGHTER, *crim. law.* The unlawful killing of another without malice either express or implied. 4 Bl. Com. 190; 1 Hale, P. C. 466. The distinctions between manslaughter and murder, consists in the following. In the former, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter. 1 East, P. C. 218; Foster, 290.

2. It also differs from murder in this, that there can be no accessaries before the fact, there having been no time for premeditation. 1 Hale, P. C. 487; 1 Russ. Cr. 485. Manslaughter is voluntary, when it happens upon a sudden heat; or involuntary, when it takes place in the commission of some unlawful act.

3. The cases of manslaughter may be classed as follows; those which take place in consequence of, 1. Provocation. 2. Mutual combat. 3. Resistance to public officers, &c. 4. Killing in the prosecution of an unlawful or wanton act. 5. Killing in the prosecution of a lawful act, improperly performed, or performed without lawful authority.

4.—1. The provocation which reduces the killing from murder to manslaughter, is an answer to the presumption of malice, which the law raises in every case of homicide; it is therefore no answer when express malice is proved. 1 Russ. Cr. 440; Foster, 132; 1 East, P. C. 289; and to be available the provocation must have been rea-

sonable and recent, for no words or slight provocation will be sufficient, and if the party has had time to cool, malice will be inferred.

5.—2. In cases of mutual combat, it is generally manslaughter only when one of the parties is killed. When death ensues from duelling the rule is different, and such killing is murder.

6.—3. The killing of an officer by resistance to him while acting under lawful authority is murder; but if the officer be acting under a void or illegal authority, or out of his jurisdiction, the killing is manslaughter, or excusable homicide, according to the circumstances of the case. 1 Moody, C. C. 80, 132; 1 Hale, P. C. 458; 1 East, P. C. 314; 2 Stark. N. P. C. 205; S. C. 3 E. C. L. R. 315.

7.—4. Killing a person while doing an act of mere wantonness, is manslaughter; as, if a person throws down stones in a coal-pit, by which a man is killed, although the offender was only a trespasser. Lewin, C. C. 179.

8.—5. When death ensues from the performance of a lawful act, it may, in consequence of the negligence of the offender, amount to manslaughter. For instance, if the death has been occasioned by negligent driving. 1 East, P. C. 268; 1 C. & P. 320; S. C. 9 E. C. L. R. 408; 6 C. & P. 629; S. C. 25 E. C. L. R. 569. Again, when death ensues from the gross negligence of a medical or surgical practitioner, it is manslaughter. 1 Hale, P. C. 429; 3 C. & P. 632; S. C. 14 E. C. L. R. 495.

MANSTEALING. This word is sometimes used synonymously with kidnapping. The latter is more technical. 4 Bl. Com. 219.

MANU FORTI. With strong hand. (q. v.) This term is used in pleading in cases of forcible entry, and no other words are of equal import. Dane's Ab. ch. 132, a. 6; ch. 203, a. 12.

MANU OPERA. This has the same meaning with *mannopus*. (q. v.)

MANUAL. That which is employed or used by the hand, of which a present profit may be made. Things in the manual occupation of the owner cannot be distrained for rent. Vide *Tools*.

MANUCAPTIO, *practice.* In the English law it is a writ which lies for a man taken on suspicion of felony and the like, who cannot be admitted to bail by the

sheriff, or others having power to let to mainprise. F. N. B. 249.

MANUCAPTORS. The same as mainperners. (q. v.)

MANUFACTURE. This word is used in the English and American patent laws. This term includes two classes of things; first, all machinery which is to be used and is not the object of sale; and, secondly, substances (such, for example, as medicines) formed by chemical processes, when the vendible substance is the thing produced, and that which operates preserves no permanent form. In the first class, the machine, and, in the second the substance produced, is the subject of the patent. 2 H. Bl. 492. See 8 T. R. 99; 2 B. & A. 349; Dav. Pat. Cas. 278; Webst. on Pat. 8; Phil. on Pat. 77; Perp. Manuel des Inv. c. 2, s. 1; Renouard, c. 5, s. 1; Westminster Review, No. 44, April 1835, p. 247; 1 Bell's Com., B. 1, part 2, c. 4, s. 1, p. 110, 5th ed.

MANUMISSION, contracts. The agreement by which the owner or master of a slave sets him free and at liberty; the written instrument which contains this agreement is also called a manumission.

2. In the civil law it was different from emancipation, which, properly speaking, was applied to the liberation of children from paternal power. Inst. liv. 1, t. 5 & 12; Co. Litt. 187, a; Dane's Ab. h. t.

MANURE, Dung. When collected in a heap, it is considered as personal property, but, when spread, it becomes a part of the land and acquires the character of real estate. Alleyn, 31; 2 Ired. R. 326.

MANUS. Anciently signified the person taking an oath as a compurgator. The use of this word probably came from the party laying his *hand* on the New Testament. Manus signifies, among the civilians, power, and is frequently used as synonymous with *potestas*. Lec. El. Dr. Rom. § 94.

MANUSCRIPT. A writing; a writing which has never been printed.

2. The act of congress securing to authors a copyright passed February 3, 1831, sect. 9, protects authors in their manuscripts, and renders any person who shall unlawfully publish a manuscript liable to an action, and authorizes the courts to enjoin the publisher. See *Copyright*. The right of the author to his manuscripts, at common law, cannot be contested. 4 Burr. 2396; 2 Eden, Ch. R. 329; 2 Story, R. 100; 2 Atk. 342; Ambl. 694; 2 B. & A.

290; 2 Story, Eq. Jur. § 943; Eden, Inj. 322; 2 B. & A. 298; 2 Bro. P. C. (Toml. ed.) 138; 4 Vin. Ab. 278; 2 Atk. 342; 2 Ves. & B. 23. These rights will be considered as abandoned if the author publishes his manuscripts, without securing the copyright under the acts of congress. See Bouv. Inst. Index, h. t.; *Copyright*.

MARAUDER. One who, while employed in the army as a soldier, commits a larceny or robbery in the neighborhood of the camp, or while wandering away from the army. Merl. Rép. h. t.

MARC-BANCO. The name of a coin. The marc-banco of Hamburg, as money of account, at the custom-house, is deemed and taken to be of the value of thirty-five cents. Act of March 3, 1843.

MARCHES, Eng. law. This word signifies the limits, or confines, or borders. Bac. Law Tracts, tit. Jurisdiction of the Marches, p. 246. It was applied to the limits between England and Wales or Scotland. In Scotland the term marches is applied to the boundaries between private properties.

MARETUM. Marshy ground overflowed by the sea or great rivers. Co. Litt. 5.

MARINARIUS. An ancient word which signified a mariner or seaman; in England *marinarius capitaneus*, was the admiral or warden of the ports.

MARINE. Whatever concerns the navigation of the sea, and forms the naval power of a nation is called its marine.

MARINE CONTRACT. One which relates to business done or transacted upon the sea and in sea ports, and over which the courts of admiralty have jurisdiction concurrent with the courts of common law; such contracts include according to civilians and jurists among other things, charter parties, affreightments, marine hypothecations, contracts for the marine service in the building, repairing, supplying and navigating ships; contracts and quasi contracts respecting averages, contributions and jettisons, and policies of insurance. 2 Gall. R. 398, where Judge Story gave a very learned opinion on the subject.

MARINE INSURANCE, contracts. A contract by which one party, for a stipulated premium, undertakes to indemnify the other, against all perils or sea risks, to which his ship, freight or cargo, or some of them, may be exposed, during a certain voyage or fixed period of time. 1 Bouv. Inst. n. 1175, et seq. See *Insurance Marine*.

MARINE INTEREST, contracts. A compensation paid for the use and risk of money loaned on respondentia and bottomry; provided the money be loaned and put in risk, there is no limit as to the amount which may be lawfully charged by the lender. 2 Marsh. Ins. 749; Hall on Mar. Loans; Pothier, Prêt à la Grosse, n. 19; 1 Stuart's (L. C.) R. 130.

MARINE LEAGUE. A measure equal to the twentieth part of a degree. Bouch. Inst. n. 1845, note. Vide *Cannon Shot; Sea.*

MARINER. One whose occupation is to navigate vessels on the sea. Vide *Seamen; Shipping articles.*

2. By act of congress, 1 Story, Laws of U. S., ch. 56, s. 4, p. 109, it is provided, that no sum exceeding one dollar shall be recovered from any seaman or mariner (in the merchant service,) by any person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged, shall be ended.

MARITAGIUM. Anciently that portion which was given with a daughter in marriage.

2. During the existence of the feudal law, it was the right which the lord of the fee had, under certain tenures, to dispose of the daughters of his vassal in marriage. By this word was also understood marriage. Beames' Glanv. 138 n; Bract. 21 a; Spelm. Gl. ad voc.; 2 Bl. Com. 69; Co. Litt. 21 b, 76 a.

MARITAL. That which belongs to marriage; as marital rights, marital duties.

2. Contracts made by a feme sole with a view to deprive her intended husband of his marital rights, with respect to her property, are a fraud upon him, and may be set aside in equity. By the marriage, the husband assumes the duty of paying her debts, contracted previous to the coverture, and of supporting her during its existence; and he cannot, therefore, be fraudulently deprived, by the intended wife, of those rights which enable him to perform the duties which attach to him. 2 Cha. R. 42; Newl. Contr. 424; 1 Vern. 408; 2 Vern. 17; 2 P. Wms. 357, 674; 2 Bro. C. C. 345; 1 Ves., jr. 22; 2 Cox, R. 28; 2 Beav. 528; 2 Ch. R. 81; White's L. C. in Eq. *277; 1 Hill, Ch. R. 1, 4; 13 Maine, R. 124; 1 McMull. Eq. R. 237; 3 Iredell's Eq. R. 487; 4 Wash. C. C. R. 224.

MARITAL PORTION. In Louisiana, this name is given to that part of a deceased husband's estate, to which the widow is entitled. Civil Code, 334, art. 55; 3 Mart. N. S. 1.

MARITIME. That which belongs to or is connected with the sea.

MARITIME CAUSE. Maritime causes are those arising from maritime contracts, whether made at sea or on land, that is, such as relate to the commerce, business or navigation of the sea; as, charter parties, affreightments, marine loans, hypothecations, contracts for maritime service in building, repairing, supplying and navigating ships, contracts and quasi contracts respecting averages, contributions and jettisons; contracts relating to marine insurance, and those between owners of ships. 3 Bouv. Inst. n. 2621.

2. There are maritime causes also for torts and injuries committed at sea.

3. In general, the courts of admiralty have a concurrent jurisdiction with courts of law, of all maritime causes; and in some cases they have exclusive jurisdiction.

MARITIME CONTRACT. One which relates to the navigation of the sea.

2. The admiralty has jurisdiction in case of the breach of such contract, whether it has been entered into on land or at sea. 4 Wash. C. C. R. 453; see 2 Gallis. 465; 2 Sumn. 1; Gilp. 529.

MARITIME LAW. That system of law which relates to the affairs of the sea, such as seamen, ships, shipping, navigation, and the like.

MARITIME LOAN. A contract or agreement by which one, who is the lender, lends to another, who is the borrower, a certain sum of money, upon condition that if the thing upon which the loan has been made, should be lost by any peril of the sea, or vis major, the lender shall not be repaid, unless what remains shall be equal to the sum borrowed; and if the thing arrive in safety, or in case it shall not have been injured, but by its own defects or the fault of the master or mariners, the borrower shall be bound to return the sum borrowed, together with a certain sum agreed upon as the price of the hazard incurred. Emer. Mar. Loans, c. 1, s. 2; Poth. h. t. Vide *Bottomry; Gross Adventure; Interest, maritime; Respondentia.*

MARITIME PROFIT, mar. law. The French writers use the term maritime profit to sig-

nify any profit derived from a maritime loan. *Vide Interest maritime.*

MARK. This term has several acceptations. 1. It is a sign traced on paper or parchment, which stands in the place of a signature, usually made by persons who cannot write. 2 *Cart. R. 324; M. & M. 516; 12 Pet. 150; 7 Bing. 457; 2 Ves. 455; 1 V. & B. 362; 1 Ves. jr. 11.* A mark is now held to be a good signature, though the party was able to write. 8 *Ad. & El. 94; 3 Nev. & Per. 228; 3 Curt. 752; 5 John. 144. Vide Subscription.*

2.—2. It is the sign, writing or ticket put upon manufactured goods to distinguish them from others. *Poph. R. 144; 3 B. & C. 541; 2 Atk. R. 485; 2 V. & B. 218; 3 M. & C. 1; Ed. Inj. 314. Vide Trade Marks.*

3.—3. Mark or marc, denotes a weight used in several parts of Europe, and for several commodities, especially gold and silver. When gold and silver are sold by the mark, it is divided into twenty-four carats.

4.—4. Mark is also in England a money of accounts, and in some other countries a coin. The English marc is two-thirds of a pound sterling, or 18s. 4d., and the Scotch mark is of equal value in Scotch money of account. *Encyc. Amer. h. t.*

MARKET. A public place appointed by public authority, where all sorts of things necessary for the subsistence, or for the conveniences of life, are sold.

2. Markets are generally regulated by local laws.

3. By the term market is also understood the demand there is for any particular article; as, the cotton market in Europe is dull. *Vide 15 Vin. Ab. 42; Com. Dig. h. t.*

MARKET OVERT, Engl. law. Market overt is an open or public market; that is, a place appointed by law or custom for the sale of goods and chattels at stated times in public.

2. In London, every day except Sunday, is market day. In the country, particular days are fixed for market days. 2 *Bl. Com. 449.*

8. It is a general rule that sales of vendible articles made in market overt, are good not only between the parties, but are also binding on all those who have any property or right therein. *Id. 2 Chitt. Com. Law, 148 to 154; Com. Dig. Market, E; Bac. Abr. Fairs and Market, E; 5 B. & A. 624. Dane's Abr. chap. 45, a 2.*

4. There is no law recognizing the effect of a sale in market overt in Pennsylvania; 3 *Yeates, R. 847; 5 Serg. & Rawle, 130; in New York; 1 Johns. R. 480; in Massachusetts; 8 Mass. R. 521; 14 Mass. R. 500; in Ohio; 5 Ohio, R. 208; nor in Vermont; 1 Tyl. R. 341; nor indeed in any of the United States. 10 Pet. 161.*

MARLEBRIDGE, STATUTE OF. The name of a statute passed the 52 Hen. III. A. D. 1267, so called because it was enacted at Marlebridge. *Barr. on Stat. 58.*

MARQUE AND REPRISAL. The name given to a commission granted by the supreme power of a state to a private person for the purpose of seizing the property of a foreign state or its subjects. *Wheat. Law of Nations, 340. Vide Letters of Marque.*

MARRIAGE. A contract made in due form of law, by which a free man and a free woman reciprocally engage to live with each other during their joint lives, in the union which ought to exist between husband and wife. By the terms freeman and free-woman in this definition are meant, not only that they are free and not slaves, but also that they are clear of all bars to a lawful marriage. *Dig. 23, 2, 1; Ayl. Parer. 359; Stair, Inst. tit. 4, s. 1; Shelford on Mar. and Div. c. 1, s. 1.*

2. To make a valid marriage, the parties must be willing to contract, able to contract, and have actually contracted.

3.—1. They must be *willing* to contract. Those persons, therefore, who have no legal capacity in point of intellect, to make a contract, cannot legally marry, as idiots, lunatics, and infants, males under the age of fourteen, and females under the age of twelve, and when minors over those ages marry, they must have the consent of their parents or guardians.

4. There is no will when the person is mistaken in the party whom he intended to marry; as, if Peter intending to marry Maria, through error or mistake of person, in fact marries Eliza; but an error in the fortune, as if a man marries a woman whom he believes to be rich, and he finds her to be poor; or in the quality, as if he marry a woman whom he took to be chaste, and whom he finds of an opposite character, this does not invalidate the marriage, because in these cases, the error is only of some quality or accident, and not in the person. *Poynt. on Marr. and Div. ch. 9.*

5. When the marriage is obtained by

force or fraud, it is clear that there is no consent; it is, therefore, void *ab initio*, and may be treated as null by every court in which its validity may incidentally be called in question. 2 Kent, Com. 66; Shelf. on Marr. and Div. 199; 2 Hagg. Cons. R. 246; 5 Paige, 43.

6.—2. Generally, all persons who are of sound mind, and have arrived to years of maturity, are *able* to contract marriage. To this general rule, however, there are many exceptions, among which the following may be enumerated.

7.—1. The previous marriage of the party to another person who is still living.

8.—2. Consanguinity, or affinity between the parties within the prohibited degree. It seems that persons in the descending or ascending line, however remote from each other, cannot lawfully marry; such marriages are against nature; but when we come to consider collaterals, it is not so easy to fix the forbidden degrees, by clear and established principles. Vaugh. 206; S. C. 2 Vent. 9. In several of the United States, marriages within the limited degrees are made void by statute. 2 Kent, Com. 79; Vide Poynt. on Marr. and Div. ch. 7.

9.—3. Impotency, (q. v.) which must have existed at the time of the marriage, and be incurable. 2 Phill. Rep. 10; 2 Hagg. Rep. 332.

10.—4. Adultery. By statutory provision in Pennsylvania, when a person is convicted of adultery with another person, or is divorced from her husband, or his wife, he or she cannot afterwards marry the partner of his or her guilt. This provision is copied from the civil law. Poth. Contr. de Mariage, part 3, c. 3, art. 7. And the same provision exists in the French code civil, art. 298. See 1 Toull. n. 555.

11.—3. The parties must not only be willing and able, but *must have actually contracted* in due form of law.

12. The common law requires no particular ceremony to the valid celebration of marriage. The consent of the parties is all that is necessary, and as marriage is said to be a contract *jure gentium*, that consent is all that is needful by natural or public law. If the contract be made *per verba de presenti*, or if made *per verba de futuro*, and followed by consummation, it amounts to a valid marriage, and which the parties cannot dissolve, if otherwise competent; it is not necessary that a clergyman should be

present to give validity to the marriage; the consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or public prosecutions for bigamy. 1 Salk. 119; 4 Burr. 2057; Dougl. 171; Burr. Settl. Cas. 509; 1 Dow, 148; 2 Dow, 482; 4 John. 2; 18 John. R. 346; 6 Binn. 405; 1 Penn. R. 452; 2 Watts, R. 9. But a promise to marry at a future time, cannot, by any process of law, be converted into a marriage, though the breach of such promise will be the foundation of an action for damages.

13. In some of the states, statutory regulations have been made on this subject. In Maine and Massachusetts, the marriage must be made in the presence, and with the assent of a magistrate, or a stated or ordained minister of the gospel. 7 Mass. Rep. 48; 2 Greenl. Rep. 102. The statute of Connecticut on this subject, requires the marriage to be celebrated by a clergyman or magistrate, and requires the previous publication of the intention of marriage, and the consent of parents; it inflicts a penalty on those who disobey its regulations. The marriage, however, would probably be considered valid, although the regulations of the statutes had not been observed. Reeve's Dom. Rel. 196, 200, 290. The rule in Pennsylvania is, that the marriage is valid, although the directions of the statute have not been observed. 2 Watts, Rep. 9; 1 How. S. C. R. 219. The same rule probably obtains in New Jersey; 2 Halsted, 138; New Hampshire; 2 N. H. Rep. 268; and Kentucky. 3 Marsh. R. 370. In Louisiana, a license must be obtained from the parish judge of the parish in which at least one of the parties is domiciliated, and the marriage must be celebrated before a priest or minister of a religious sect, or an authorized justice of the peace; it must be celebrated in the presence of three witnesses of full age, and an act must be made of the celebration, signed by the person who celebrated the marriage, by the parties and the witnesses. Code, art. 101 to 107. The 89th article of the Code declares, that such marriages only are recognized by law, as are contracted and solemnized according to the rules which it prescribes. But the Code does not declare null a marriage not pre-

ceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties, nor does it make such an act exclusive evidence of the marriage. The laws relating to forms and ceremonies are directory to those who are authorized to celebrate marriage. 6 L. R. 470.

14. A marriage made in a foreign country, if good there, would, in general, be held good in this country, unless when it would work injustice, or be *contra bonos mores*, or be repugnant to the settled principles and policy of our laws. Story, Conf. of Laws, § 87; Shelf. on M. & D. 140; 1 Bland. 188; 2 Bland. 485; 3 John. Ch. R. 190; 8 Ala. R. 48.

15. Marriage is a contract intended in its origin to endure till the death of one of the contracting parties. It is dissolved by death or divorce.

16. In some cases, as in prosecutions for bigamy, by the common law, an actual marriage must be proved, in order to convict the accused. See 6 Conn. R. 446. This rule is much qualified. See *Bigamy*.

17. But for many purposes it may be proved by circumstances; for example, cohabitation; acknowledgment by the parties themselves that they were married; their reception as such by their friends and relations; their correspondence, on being casually separated, addressing each other as man and wife; 2 Bl. R. 899; declaring, deliberately, that the marriage took place in a foreign country; 2 Moo. & R. 503; describing their children, in parish registers of baptism, as their legitimate offspring; 2 Str. 1073; 8 Ves. 417; or when the parties pass for husband and wife by common reputation. 1 Bl. R. 639; S. C. 4 Burr. 2057; Dougl. 174; Cowp. 594; 3 Swans. R. 400; 8 S. & R. 159; 2 Hayw. R. 3; 1 Taylor, R. 121; 1 H. & McH. 152; 2 N. & McC. 114; 5 Day, R. 290; 4 H. & M. 507; 9 Mass. R. 414; 4 John. 52; 18 John. 346. After their death, the presumption is generally conclusive. Cowp. 591; 6 T. R. 330.

18. The civil effects of marriage are the following: 1. It confirms all matrimonial agreements between the parties.

19.—2. It vests in the husband all the personal property of the wife, that which is in possession absolutely, and chooses in action, upon the condition that he shall reduce them to possession; it also vests in the husband the right to manage the real estate of the wife, and enjoy the profits

arising from it during their joint lives, and after her death, an estate by the curtesy, when a child has been born. It vests in the wife, after the husband's death, an estate in dower in the husband's lands, and a right to a certain part of his personal estate, when he dies intestate. In some states, the wife now retains her separate property by statute.

20.—3. It creates the civil affinity which each contracts towards the relations of the other.

21.—4. It gives the husband marital authority over the person of his wife.

22.—5. The wife acquires thereby the name of her husband, as they are considered as but one, of which he is the head: *erunt duo in carne una*.

23.—6. In general, the wife follows the condition of her husband.

24.—7. The wife, on her marriage, loses her domicile and gains that of her husband.

25.—8. One of the effects of marriage is to give paternal power over the issue.

26.—9. The children acquire the domicile of their father.

27.—10. It gives to the children who are the fruits of the marriage, the rights of kindred not only with the father and mother, but all their kin.

28.—11. It makes all the issue legitimate.

Vide, generally, 1 Bl. Com. 433; 15 Vin. Ab. 252; Bac. Ab. h. t.; Com. Dig. Baron and Feme, B; Id. Appx. h. t.; 2 Sell. Pr. 194; Ayl. Parergon, 359; 1 Bro. Civ. Law, 94; Rutherf. Inst. 162; 2 Supp. to Ves. jr. 334; Roper on Husband & Wife; Poynter on Marriage and Divorce; Merl. Répert. h. t.; Pothier, Traité du Contrat de Marriage; Toullier, h. t.; Chit. Pract. Index, h. t.; Dane's Ab. Index, h. t.; Burge on the Conf. of Laws, Index, h. t.; Bouv. Inst. Index, h. t.

MARRIAGE BROKAGE. By this expression is meant the act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them. The money paid for such service is also known by this name.

2. It is a doctrine of the courts of equity that all marriage brokerage contracts are utterly void, as against public policy; and are, therefore, incapable of confirmation. 1 Fonb. Eq. B. 1, ch. 4, s. 10, note s; 1 Story, Eq. Jur. § 263; Newl. on Contr. 469.

MARRIAGE PORTION. That property which

is given to a woman on her marriage. Vide *Dowry*.

MARRIAGE, PROMISE OF. A promise of marriage is a contract entered into between a man and woman that they will marry each other.

2. When the promise is made between persons competent to contract matrimony, an action lies for a breach of it. Vide *Promise of Marriage*.

MARRIAGE SETTLEMENT. An agreement made by the parties in contemplation of marriage, by which the title to certain property is changed, and the property to some extent becomes tied up, and is rendered inalienable. Rice's Eq. R. 315. See 2 Hill, Ch. R. 3; Ril. Ch. Cas. 76; 8 Leigh, 29; 1 Dev. & Bat. Eq. 389; 2 Dev. & Bat. Eq. 103; 1 Bald. 344; 15 Mass. 106; 1 Yeates, 221; 7 Pet. 348; 4 Bouv. Inst. n. 3947. Vide *Settlement, Contracts*.

MARSHAL. An officer of the United States, whose duty it is to execute the process of the courts of the United States. His duties are very similar to those of a sheriff.

2. It is enacted by the act to establish the judicial courts of the United States, 1 Story's L. U. S. 53, as follows:

§ 27. That a marshal shall be appointed, in and for each district, for the term of four years, but shall be removable from office at pleasure; whose duty it shall be to attend the district and circuit courts, when sitting therein, and also the supreme court in the district in which that court shall sit: and to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either. And before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies, before the judge of the district court, to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the follow-

ing oath of office: "I, A B, do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of _____ under the authority of the United States, and true returns make; and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be,) of the district of _____ during my continuance in said office, and take only my lawful fees. So help me God."

3.—§ 28. That in all causes wherein the marshal, or his deputy, shall be a party, the writs and precepts therein shall be directed to such disinterested person, as the court, or any justice or judge thereof may appoint, and the person so appointed is hereby authorized to execute and return the same. And in case of the death of any marshal, his deputy or deputies, shall continue in office unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn: And the defaults, or misfeasances in office of such deputy or deputies in the mean time, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal, shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life, and in the exercise of his said office, until his successor was appointed, and sworn or affirmed: And every marshal, or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands, respectively, at the time of such removal or expiration of office; and the marshal shall be held answerable for the delivery to his successors of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed, and qualified as the law directs.

4. By the act making certain alterations in the act for establishing the judicial courts, &c. passed June 9, 1794, 1 Story's L. U. S. 365, it is enacted,

§ 7. That so much of the act to estab-

lish the judicial courts of the United States, as is, or may be, construed to require the attendance of the marshals of all the districts at the supreme court, shall be, and the same is hereby repealed: And that the said court shall be attended, during its session, by the marshal of the district only, in which the court shall sit, unless the attendance of the marshals of other districts shall be required by special order of the said court.

5. The act of February 28, 1795, 1 Story's L. U. S. 391, directs,

§ 9. That the marshals of the several districts, and their deputies, shall have the same powers, in executing the laws of the United States, as sheriffs and their deputies, in the several states, have by law in executing the laws of the respective states.

6. There are various other legislative provisions in relation to the duties and rights of marshals, which are here briefly noticed with reference to the laws themselves.

7.—1. The act of May 8, 1792, s. 4, provides for the payment of expenses incurred by the marshal in holding the courts of the United States, the payment of jurors, witnesses, &c.

8.—2. The act of April 16, 1817, prescribes the duties of the marshal in relation to the proceeds of prizes captured by the public armed ships of the United States and sold by decree of court.

9.—3. The resolution of congress of March 3, 1791; the act of February 25, 1799, s. 5; and the resolution of March 3, 1821; all relate to the duties of marshals in procuring prisons, and detaining and keeping prisoners.

10.—4. The act of April 10, 1806, directs how and for what marshals shall give bonds for the faithful execution of their office.

11.—5. The act of September 18, 1850, s. 5, prescribes the duties of the marshal in relation to obeying and executing all warrants and precepts issued under the provisions of this act, and the penalties he shall incur for refusing to receive and execute the said warrants when rendered, and for permitting the fugitive to escape after arrest.

Vide Story's L. U. S. Index, h. t.; Serg. Const. Law, ch. 25; 2 Dall. 402; United States v. Burr, 365; Mason's R. 100; 2 Gall. 101; 4 Cranch, 96; 7 Cranch, 276; 9 Cranch, 86, 212; 6 Wheat. 194; 9 Wheat. 645; Minot, Stat. U. S. Index, h. t.

MARSHALLING SECURITIES, *equity*.

When a party has two funds by which his debt is secured, and another creditor has a claim only on one of these funds, a court of equity will compel the creditor having a double security to resort to that fund which will leave the other creditor his security, this is called *marshalling assets*. 4 Bouv. Inst. n. 3788; 1 Story, Eq. Jur. § 633; Amb. 91; 8 Ves. 389; 9 Ves. 209.

2. Marshalling of assets respects two different funds, and two different sets of parties, where one set can resort to either fund, the other only to one. It is grounded on obvious equity. It does no prejudice to any body, and it effectuates the testator's intent. It takes place in favor of simple contract creditors, and of legatees, devisees and heirs, and in a few other cases, but not in favor of the next of kin. 4 Bro. C. C. 411; 1 P. Wms. 680.

3. The cases in which a court of equity marshals real and personal assets for the payment of simple contract debts and legacies, may be classed as follows: 1. Where there are specialty and simple contract debts and legacies and lands left to descend. In this case if the specialty creditors take a satisfaction for their debts out of the personal estate, the simple contract creditors first, and then the legatees, shall stand in the place of the specialty creditors, for obtaining satisfaction out of the lands, to the amount of so much as was received by the specialty creditors out of the personal estate.

4.—2. Where there are specialty and simple contract debts, and lands are specifically devised. In this case if the creditors take a satisfaction for their debts out of the personal estate, the simple contract creditors shall stand in the place of the specialty creditors for obtaining a satisfaction out of the lands to the amount of so much as was received by the specialty creditors out of the personal estate, but then there can be no relief for the legatees, because there is as much equity to support the specific devise of the lands, as to support the bequest of the legatees.

5.—3. Where the debts are charged upon the lands. Here the legatees shall have the personal estate towards their satisfaction, and if the creditors take it in payment or towards the discharge of their debts, the legatees shall stand in their place *pro tanto* to have a discharge out of the lands.

6.—4. When simple contract debts and

legacies are both charged on the land. In this case the land shall be sold and all paid equally. 1 Madd. Ch. Pr. 617.

MARSHALSEA. *English law.* The name of a prison belonging to the court of the king's bench.

MARTIAL LAW. Vide *Law Martiai.*

MARYLAND. One of the original states of the United States of America. The province of Maryland was included in the patent of the Southern or Virginia company; and upon the dissolution of that company, it reverted to the crown. Charles the First, on the 20th of June, 1632, granted it by patent to Lord Baltimore. Under this charter Maryland continued to be governed, with some short intervals of interruption, down to the period of the American Revolution, by the successors of the original proprietor. 1 Chalmer's Annals, 203.

2. Upon the revolution of 1688, the government of Maryland was seized into the hands of the crown, and was not again restored to the proprietary until 1716; from that period no alteration occurred until the American Revolution. Bacon's Laws of Maryland, 1692, 1716.

3. The original constitution of this state was adopted on the 14th day of August, 1776. The present constitution was adopted in 1851.

4. The powers of the government are distributed into the legislative, the executive, and the judicial.

5.—1st. The legislature shall consist of two distinct branches, a senate and a house of delegates, which shall be styled "The general assembly of Maryland." Art. III. s. 1.

6.—2. The general assembly shall meet on the first Wednesday of January, 1852, on the same day, in the year 1853, and on the same day, 1854, and on the same day in every second year thereafter, and at no other time, unless convened by the proclamation of the governor. Art. III. s. 7.

7.—3. The senate will be considered with reference to the qualification of the electors; the qualification of the members; the length of time for which they are elected; and the time of their election. 1. Every free white male person, of twenty-one years of age or upwards, who shall have been one year next preceding the election a resident of the state, and for six months a resident of the city of Baltimore, or of any county in which he may offer to vote, and being at

the time of the election, a citizen of the United States, shall be entitled to vote in the ward or election district in which he resides, in all elections hereafter to be held; and at all such elections the vote shall be taken by ballot. And in case any county or city shall be so divided as to form portions of different electoral districts for the election of congressmen, senator, delegate or other officer or officers, then to entitle a person to vote for such officer, he must have been a resident of that part of the county or city which shall form a part of the electoral district in which he offers to vote for six months next preceding the election: but a person who shall have acquired a residence in such county or city, entitling him to vote at any such election, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county or city to which he has removed. Art. I. s. 1. 2. No person shall be eligible as a senator who at the time of his election is not a citizen of the United States, and who has not resided at least three years next preceding the day of his election, in this state, and the last year thereof in the county or city which he may be chosen to represent, if such county or city shall have been so long established, and if not, then in the county from which, in whole or in part, the same may have been formed; nor shall any person be eligible as a senator unless he shall have attained the age of twenty-five years. No member of congress, or person holding any civil or military office under the United States, shall be eligible as a senator; and if any person, after his election as a senator, be elected to congress, or be appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat. No minister or preacher of the gospel of any denomination, and no person holding any civil office of profit or trust under the state, except justices of the peace, shall be eligible as senator. Art. III. ss. 9, 10, 11. 3. Every county of the state, and the city of Baltimore, shall be entitled to elect one senator, who shall serve for four years from the day of their election. The first election shall take place on the first Wednesday of November, 1851, and an election for one-half the senators, as nearly as practicable, shall be held on the same day every second year thereafter. Art. III. ss. 2, 3, 4, 5.

8.—4. The house of delegates will be:

treated of in the same manner which has been observed in considering the senate.

1. The electors are qualified in the same manner as the electors of the senate. 2. No person shall be a delegate who shall not have attained the age of twenty-one years; the other qualifications are the same as those for a senator. 3. The whole number of delegates shall never exceed eighty, nor be less than sixty-five, and shall be apportioned among the several counties according to the population of each, the city of Baltimore to have four more delegates than the most populous county; no county to have less than two delegates, the apportionment to be made after the returns of the national census in 1860 are published, and in like manner after each subsequent census. They are to serve two years from the day of their election, which takes place on the same day as that for senators.

9.—1. The executive power of the state shall be vested in a governor, whose term of office shall commence on the second Wednesday of January next ensuing his election, and continue for four years, and until his successor shall have qualified.

10.—2. The first election for governor under this constitution shall be held on the first Wednesday of November, in the year eighteen hundred and fifty-three, and on the same day and month in every fourth year thereafter, at the places of voting for delegates to the general assembly, and every person qualified to vote for delegates shall be qualified and entitled to vote for governor; the election to be held in the same manner as the election of delegates, and the returns thereof, under seal, to be addressed to the speaker of the house of delegates, and enclosed and transmitted to the secretary of state, and delivered to the said speaker at the commencement of the session of the legislature next ensuing said election.

11.—3. The speaker of the house of delegates shall then open the said returns in the presence of both houses, and the person having the highest number of votes, and being constitutionally eligible, shall be the governor, and shall qualify in the manner herein prescribed, on the second Wednesday of January next ensuing his election, or as soon thereafter as may be practicable.

12.—4. If two or more persons shall have the highest and an equal number of votes, one of them shall be chosen governor by the senate and house of delegates; and all

questions in relation to the eligibility of governor, and to the returns of said election, and to the number and legality of votes therein given, shall be determined by the house of delegates. And if the person or persons having the highest number of votes be ineligible, the governor shall be chosen by the senate and house of delegates. Every election of governor, by the legislature, shall be determined by a joint majority of the senate and house of delegates, and the vote shall be taken *viva voce*. But if two or more persons shall have the highest and an equal number of votes, then a second vote shall be taken, which shall be confined to the persons having an equal number; and if the votes should again be equal, then the election of governor shall be determined by lot between those who shall have the highest and an equal number on the first vote.

13.—5. The state shall be divided into three districts—St. Mary's, Charles, Calvert, Prince George's, Anne Arundle, Montgomery, and Howard counties, and the city of Baltimore to be the first; the eight counties of the Eastern shore to be the second; and Baltimore, Harford, Frederick, Washington, Allegany, and Carroll counties, to be the third. The governor, elected from the third district in October last, shall continue in office during the term for which he was elected. The governor shall be taken from the first district, at the first election of governor under this constitution; from the second district at the second election, and from the third district at the third election, and in like manner, afterwards, from each district, in regular succession.

14.—6. A person to be eligible to the office of governor, must have attained the age of thirty years, and been for five years a citizen of the United States, and for five years next preceding his election a resident of the state, and for three years a resident of the district from which he was elected.

15.—7. In case of the death or resignation of the governor, or of his removal from the state, the general assembly, if in session, or if not, at their next session, shall elect some other qualified resident of the same district, to be the governor for the residue of the term for which the said governor had been elected.

16.—8. In case of any vacancy in the office of governor during the recess of the legislature, the president of the senate shall discharge the duties of said office till a

governor is elected as herein provided for; and in case of the death or resignation of said president, or of his removal from the state, or of his refusal to serve, then the duties of said office shall, in like manner, and for the same interval, devolve upon the speaker of the house of delegates, and the legislature may provide by law for the case of impeachment or inability of the governor, and declare what person shall perform the executive duties during such impeachment or inability; and for any vacancy in said office, not herein provided for, provision may be made by law, and if such vacancy should occur without such provision being made, the legislature shall be convened by the secretary of state for the purpose of filling said vacancy.

17.—9. The governor shall be commander-in-chief of the land and naval forces of the state, and may call out the militia to repel invasions, suppress insurrections, and enforce the execution of the laws; but shall not take the command in person without the consent of the legislature.

18.—10. He shall take care that the laws be faithfully executed.

19.—11. He shall nominate, and by and with the advice and consent of the senate, appoint all civil and military officers of the state, whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office.

20.—12. In case of any vacancy during the recess of the senate, in any office which the governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force till the end of the next session of the legislature, or till some other person is appointed to the same office, whichever shall first occur, and the nomination of the person thus appointed during the recess, or of some other person in his place, shall be made to the senate within thirty days after the next meeting of the legislature.

21.—13. No person, after being rejected by the senate, shall be again nominated for the same office at the same session, unless at the request of the senate; or be appointed to the same office during the recess of the legislature.

22.—14. All civil officers appointed by the governor and senate shall be nominated to the senate within fifty days from the commencement of each regular session of the legislature; and their term of office shall

commence on the first Monday of May next ensuing their appointment, and continue for two years (unless sooner removed from office) and until their successors, respectively, qualify according to law.

23.—15. The governor may suspend or arrest any military officer of the state, for disobedience of orders, or other military offence, and may remove him in pursuance of the sentence of a court-martial; and may remove for incompetency or misconduct, all civil officers, who receive appointments from the executive for a term not exceeding two years.

24.—16. The governor may convene the legislature, or the senate alone, on extraordinary occasions; and whenever, from the presence of an enemy or from any other cause, the seat of government shall become an unsafe place for the meeting of the legislature, he may direct their sessions to be held at some other convenient place.

25.—17. It shall be the duty of the governor semi-annually, and oftener if he deem it expedient, to examine the bank-book, account books, and official proceedings of the treasurer and comptroller of the state.

26.—18. He shall, from time to time, inform the legislature of the condition of the state, and recommend to their consideration such measures as he may judge necessary and expedient.

27.—19. He shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases in which he is prohibited by other articles of this constitution, and to remit fines and forfeitures for offences against the state; but shall not remit the principal or interest of any debt due to the state, except in cases of fines and forfeitures; and before granting a *nolle prosequi*, or pardon, he shall give notice, in one or more newspapers, of the application made for it, and of the day on or after which his decision will be given; and in every case in which he exercises this power, he shall report to either branch of the legislature, whenever required, the petitions, recommendations and reasons which influence his decision.

28.—20. The governor shall reside at the seat of government, and shall receive for his services an annual salary of thirty-six hundred dollars.

29.—21. When the public interest requires it, he shall have power to employ counsel, who shall be entitled to such com-

pensation as the legislature may allow in each case after the services of such counsel shall have been performed.

29.—22. A secretary of state shall be appointed by the governor, by and with the advice and consent of the senate, who shall continue in office, unless sooner removed by the governor, till the end of the official term of the governor from whom he received his appointment, and shall receive an annual salary of one thousand dollars.

30.—23. He shall carefully keep and preserve a record of all official acts and proceedings (which may, at all times, be inspected by a committee of either branch of the legislature,) and shall perform such other duties as may be prescribed by law, or as may properly belong to his office.

31.—3d. The judicial power of this state shall be vested in a court of appeals, in circuit courts, in such courts for the city of Baltimore as may be hereinafter prescribed, and in justices of the peace.

32.—2. The court of appeals shall have appellate jurisdiction only, which shall be coextensive with the limits of the state. It shall consist of a chief justice and three associate justices, any three of whom shall form a quorum, whose judgment shall be final and conclusive in all cases of appeals; and who shall have the jurisdiction which the present court of appeals of this state now has, and such other appellate jurisdiction as hereafter may be provided for by law. And in every case decided, an opinion, in writing, shall be filed, and provision shall be made, by law, for publishing reports of cases argued and determined in the said court. The governor, for the time being, by and with the advice and consent of the senate, shall designate the chief justice, and the court of appeals shall hold its sessions at the city of Annapolis, on the first Monday of June, and the first Monday of December, in each and every year.

33.—3. The state shall be divided into four judicial districts: Allegany, Washington, Frederick, Carroll, Baltimore, and Harford counties, shall compose the first; Montgomery, Howard, Anne Arundel, Calvert, St. Mary's, Charles and Prince George's, the second; Baltimore city, the third; and Cecil, Kent, Queen Anne's, Talbot, Caroline, Dorchester, Somerset, and Worcester, shall compose the fourth district. And one person from among those learned in the law, having been admitted to practice in this state, and who shall have been a citizen of

this state at least five years, and above the age of thirty years at the time of his election, and a resident of the judicial district, shall be elected from each of said districts by the legal and qualified voters therein, as a judge of the said court of appeals, who shall hold his office for the term of ten years from the time of his election, or until he shall have attained the age of seventy years, whichever may first happen, and be reëligible thereto until he shall have attained the age of seventy years, and not after, subject to removal for incompetency, wilful neglect of duty, or misbehaviour in office, on conviction in a court of law, or by the governor upon the address of the general assembly, two-thirds of the members of each house concurring in such address; and the salary of each of the judges of the court of appeals shall be two thousand five hundred dollars annually, and shall not be increased or diminished during their continuance in office; and no fees or perquisites of any kind, shall be allowed by law to any of the said judges.

34.—4. No judge of the court of appeals shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or when he shall have been of counsel in said case; when the court of appeals, or any of its members shall be thus disqualified to hear and determine any case or cases in said court, so that by reason thereof no judgment can be rendered in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of said case or cases.

35.—5. All judges of the court of appeals, of the circuit courts, and of the courts for the city of Baltimore, shall, by virtue of their offices, be conservators of the peace throughout the state.

36.—6. All public commissions and grants shall run thus: "The State of Maryland," &c., and shall be signed by the governor, with the seal of the state annexed; all writs and process shall run in the same style, and be tested, sealed and signed as usual; and all indictments shall conclude "against the peace, government and dignity of the state."

37.—7. The state shall be divided into eight judicial circuits, in manner and form following, to wit: St. Mary's, Charles and

Prince George's counties shall be the first; Anne Arundel, Howard, Calvert and Montgomery counties shall be the second; Frederick and Carroll counties shall be the third; Washington and Allegany counties shall be the fourth; Baltimore city shall be the fifth; Baltimore, Harford and Cecil counties shall be the sixth; Kent, Queen Anne's, Talbot and Caroline counties shall be the seventh; and Dorchester, Somerset and Worcester counties shall be the eighth; and there shall be elected, as hereinafter directed, for each of the said judicial circuits, except the fifth, one person from among those learned in the law, having been admitted to practice in this state, and who shall have been a citizen of this state at least five years, and above the age of thirty years at the time of his election, and a resident of the judicial circuit, to be judge thereof; the said judges shall be styled circuit judges, and shall respectively hold a term of their courts at least twice in each year, or oftener if required by law, in each county composing their respective circuits; and the said courts shall be called circuit courts for the county in which they may be held, and shall have and exercise in the several counties of this state, all the power, authority and jurisdiction which the county courts of this state now have and exercise, or which may hereafter be prescribed by law, and the said judges in their respective circuits, shall have and exercise all the power, authority and jurisdiction of the present court of chancery of Maryland; provided, nevertheless, that Baltimore county court may hold its sittings within the limits of the city of Baltimore, until provision shall be made by law for the location of a county seat within the limits of the said county proper, and the erection of a court house and all other appropriate buildings, for the convenient administration of justice in said court.

38.—8. The judges of the several judicial circuits shall be citizens of the United States, and shall have resided five years in this state, and two years in the judicial circuit for which they may be respectively elected, next before the time of their election, and shall reside therein while they continue to act as judges; they shall be taken from among those who, having the other qualifications herein prescribed, are most distinguished for integrity, wisdom and sound legal knowledge, and shall be elected by the qualified voters of the said circuits, and shall hold their offices for the

term of ten years, removable for misbehaviour, on conviction in a court of law or by the governor, upon the address of the general assembly, provided that two-thirds of the members of each house shall concur in such address, and the said judges shall each receive a salary of two thousand dollars a year, and the same shall not be increased or diminished during the time of their continuance in office; and no judge of any court in this state, shall receive any perquisite, fee, commission or reward, in addition thereto, for the performance of any judicial duty.

39.—9. There shall be established for the city of Baltimore one court of law, to be styled "the court of common pleas," which shall have civil jurisdiction in all suits where the debt or damage claimed shall be over one hundred dollars, and shall not exceed five hundred dollars; and shall, also, have jurisdiction in all cases of appeal from the judgment of justices of the peace in the said city, and shall have jurisdiction in all applications for the benefit of the insolvent laws of this state, and the supervision and control of the trustees thereof.

40.—10. There shall also be established, for the city of Baltimore, another court of law, to be styled the superior court of Baltimore city, which shall have jurisdiction over all suits where the debt or damage claimed shall exceed the sum of five hundred dollars, and in case any plaintiff or plaintiffs shall recover less than the sum or value of five hundred dollars, he or they shall be allowed or adjudged to pay costs in the discretion of the court. The said court shall also have jurisdiction as a court of equity within the limits of the said city, and in all other civil cases which have not been heretofore assigned to the court of common pleas.

41.—11. Each of the said two courts shall consist of one judge, who shall be elected by the legal and qualified voters of the said city, and shall hold his office for the term of ten years, subject to the provisions of this constitution, with regard to the election and qualification of judges and their removal from office, and the salary of each of the said judges shall be twenty-five hundred dollars a year; and the legislature shall, whenever it may think the same proper and expedient, provide, by law, another court for the city of Baltimore, to consist of one judge to be elected by the qualified voters of the said city, who shall be subject

to the same constitutional provisions, hold his office for the same term of years, and receive the same compensation as the judge of the court of common pleas of the said city, and the said court shall have such jurisdiction and powers as may be prescribed by law.

42.—12. There shall also be a criminal court for the city of Baltimore, to be styled the criminal court of Baltimore, which shall consist of one judge, who shall also be elected by the legal and qualified voters of the said city, and who shall have and exercise all the jurisdiction now exercised by Baltimore city court, and the said judge shall receive a salary of two thousand dollars a year, and shall be subject to the provisions of this constitution with regard to the election and qualifications of judges, term of office, and removal therefrom.

43.—13. The qualified voters of the city of Baltimore, and of the several counties of the state, shall, on the first Wednesday of November, eighteen hundred and fifty-one, and on the same day of the same month in every fourth year forever thereafter, elect three men to be judges of the orphans' court of said city and counties respectively, who shall be citizens of the state of Maryland, and citizens of the city or county for which they may be severally elected at the time of their election. They shall have all the powers now vested in the orphans' courts of this state, subject to such changes therein as the legislature may prescribe, and each of said judges shall be paid at a per diem rate, for the time they are in session, to be fixed by the legislature, and paid by the said counties and city respectively.

44.—14. The legislature, at its first session after the adoption of this constitution, shall fix the number of justices of the peace and constables for each ward of the city of Baltimore, and for each election district in the several counties, who shall be elected by the legal and qualified voters thereof respectively, at the next general election for delegates thereafter, and shall hold their offices for two years from the time of their election, and until their successors in office are elected and qualified; and the legislature may, from time to time, increase or diminish the number of justices of the peace and constables to be elected in the several wards and election districts, as the wants and interests of the people may require. They shall be, by virtue of their offices, conservators of the peace in the said coun-

ties and city respectively, and shall have such duties and compensation as now exist, or may be provided for by law. In the event of a vacancy in the office of a justice of the peace, the governor shall appoint a person to serve as justice of the peace, until the next regular election of said officers, and in case of a vacancy in the office of constable, the county commissioners of the county, in which a vacancy may occur, or the mayor and city council of Baltimore, as the case may be, shall appoint a person to serve as constable until the next regular election thereafter for said officers. An appeal shall lie in all civil cases from the judgment of a justice of the peace to the circuit court, or to the court of common pleas of Baltimore city, as the case may be, and on all such appeals, either party shall be entitled to a trial by jury, according to the laws now existing, or which may be hereafter enacted. And the mayor and city council may provide, by ordinance, from time to time, for the creation and government of such temporary additional police, as they may deem necessary to preserve the public peace.

45.—15. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or where he shall have been of counsel in the case; and whenever any of the judges of the circuit courts, or of the courts for Baltimore city, shall be thus disqualified, or whenever, by reason of sickness, or any other cause, the said judges, or any of them, may be unable to sit in any cause, the parties may, by consent, appoint a proper person to try the said cause, or the judges, or any of them, shall do so when directed by law.

46.—16. The present chancellor and the register in chancery, and, in the event of any vacancy in their respective offices, their successors in office respectively, who are to be appointed as at present, by the governor and senate, shall continue in office, with the powers and compensation as at present established, until the expiration of two years after the adoption of this constitution by the people, and until the end of the session of the legislature next thereafter, after which the said offices of chancellor and register shall be abolished. The legislature shall, in the mean time, provide by law for the recording, safe-keeping, or other dispo-

sition, of the records, decrees, and other proceedings of the court of chancery, and for the copying and attestation thereof, and for the custody and use of the great seal of the state, when required, after the expiration of the said two years, and for transmitting to the said counties, and to the city of Baltimore, all the cases and proceedings in said court then undisposed of and unfinished, in such manner, and under such regulations as may be deemed necessary and proper: Provided, that no new business shall originate in the said court, nor shall any cause be removed to the same from any other court, from and after the ratification of this constitution.

47.—17. The first election of judges, clerks, registers of wills, and all other officers, whose election by the people is provided for in this article of the constitution, except justices of the peace and constables, shall take place throughout the state on the first Wednesday of November next after the ratification of this constitution by the people.

48.—18. In case of the death, resignation, removal, or other disqualification of a judge of any of the courts of law, the governor, by and with the advice and consent of the senate, shall thereupon appoint a person, duly qualified, to fill said office until the next general election for delegates thereafter; at which time an election shall be held as hereinbefore prescribed, for a judge, who shall hold the said office for ten years, according to the provisions of this constitution.

49.—19. In case of the death, resignation, removal, or other disqualification of the judge of an orphans' court, the vacancy shall be filled by the appointment of the governor, by and with the advice and consent of the senate.

50.—20. Whenever lands lie partly in one county, and partly in another, or partly in a county and partly in the city of Baltimore, or whenever persons proper to be made defendants to proceedings in chancery, reside some in one county and some in another, that court shall have jurisdiction in which proceedings shall have been first commenced, subject to such rules, regulations and alterations as may be prescribed by law.

51.—21. In all suits or actions at law, issues from the orphans' court or from any court sitting in equity, in petitions for freedom, and in all presentments and indictments now pending, or which may be pending at the time of the adoption of this constitution by

the people, or which may hereafter be instituted in any of the courts of law of this state, having jurisdiction thereof, the judge or judges thereof, upon suggestion in writing, if made by the state's attorney, or the prosecutor for the state, or upon suggestion in writing, supported by affidavit, made by any of the parties thereto, or other proper evidence, that a fair and impartial trial cannot be had in the court where such suit or action at law, issues or petitions, or presentment and indictment is depending, shall order and direct the record of proceedings in such suit or action, issues or petitions, presentment or indictment, to be transmitted to the court of any adjoining county; provided, that the removal in all civil causes be confined to an adjoining county within the judicial circuit, except as to the city of Baltimore, where the removal may be to an adjoining county, for trial, which court shall hear and determine the same in like manner as if such suit or action, issues or petitions, presentment or indictment, had been originally instituted therein; and provided also, that such suggestion shall be made as aforesaid, before or during the term in which the issue or issues may be joined in said suit or action, issues or petition, presentment or indictment, and that such further remedy in the premises may be provided by law, as the legislature shall from time to time direct and enact.

52.—22. All election of judges, and other officers provided for by this constitution, shall be certified, and the returns made by the clerks of the respective counties to the governor, who shall issue commissions to the different persons for the offices to which they shall have been respectively elected; and in all such elections, the person having the greatest number of votes, shall be declared to be elected.

53.—23. If, in any case of election for judges, clerks of the courts of law and registers of wills, the opposing candidates shall have an equal number of votes, it shall be the duty of the governor to order a new election; and in case of any contested election, the governor shall send the returns to the house of delegates, who shall judge of the election and qualification of the candidates at such election.

MASCULINE. That which belongs to the male sex.

2. The masculine sometimes includes the feminine, vide an example under the article *Man*, and see also the articles *Gender*,

Worthiest of blood; Poth. Intr. au titre 16, des Testamens et Donations Testamentaires, n. 170; Ayl. Pand. 57; 4 C. & P. 216; S. C. 19 E. C. L. R. 551; Fred. Code, pt. 1, b. 1, t. 4, s. 3; 3 Brev. R. 9.

MASSACHUSETTS. One of the original states of the United States of America. The colony or province of Massachusetts was included in a charter granted by James the First, by which its territories were extended in breadth from the 40th to the 48th degree of north latitude, and in length by all the breadth aforesaid throughout the mainland from sea to sea. This charter continued until 1684. Holmes' Annals, 412; 1 Story, Const. § 71. In 1691 William and Mary granted a new charter to the colony, and henceforth it became known as a province, and continued to act under this charter till after the Revolution. 1 Story, Const. § 71.

2. The constitution of Massachusetts was adopted by a convention begun and held at Cambridge, on the first of September, 1779, and continued, by adjournment, to the second of March, 1780.

3. The style and name of the state is *The Commonwealth of Massachusetts*. The government is distributed into a legislative, executive and judicial power.

4.—1st. The department of legislation is formed by two branches, a senate and house of representatives, each of which has a negative on the other, and both are styled *The General Court of Massachusetts*. Part 2, c. 1, s. 1.

5.—1. The *senate* is elected by the qualified electors, and is composed of forty persons to be counsellors and senators for the year ensuing their election. Part 2, c. 1, s. 2, art. 1.

6.—2. The *house of representatives* is composed of an indefinite number of persons elected by the towns in proportion to their population. Part 2, c. 1, s. 3, art. 2.

7.—2d. The *executive* power is vested in a governor, lieutenant governor and council.

8.—1. The supreme executive magistrate is styled *The Governor* of the Commonwealth of Massachusetts. He is elected yearly by the qualified electors. Part 2, c. 2, s. 1. He is invested with the veto power. Part 2, c. 1, s. 1, art. 2.

9.—2. The electors are required to elect annually a lieutenant governor. When the office of governor happens to be vacant he acts as governor, and at other times he is a member of the council. Part 2, c. 2, s. 2, art. 2 and 3.

10.—3. The council consists of nine persons chosen annually by the general court; they must be taken from those returned for counsellors and senators, unless they will not accept the said office, when they shall be chosen from the people at large. The council shall advise the governor in the executive part of the government. Part 2, c. 2, s. 3, art. 1 and 2.

11.—3d. The *judicial* power. The third chapter of part second of the constitution makes the following provisions in relation to the judiciary:

Art. 1. The tenure that all commissioned officers shall, by law, have in their office, shall be expressed in their respective commissions; all judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behaviour; excepting such concerning whom there is different provision made in this constitution; Provided, nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature.

12.—2. Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.

13.—3. In order that the people may not suffer from the long continuance in place of any justice of the peace, who shall fail of discharging the important duties of his office with ability or fidelity, all commissions of justices of the peace shall expire and become void in the term of seven years from their respective dates; and upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well-being of the commonwealth.

14.—4. The judges of probates of wills, and for granting letters of administration, shall hold their courts at such place or places, on fixed days, as the convenience of the people may require; and the legislature shall, from time to time hereafter, appoint such times and places: until which appointments, the said courts shall be holden at the times and places which the respective judges shall direct.

15.—5. All causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision.

MASTER. This word has several meanings. 1. Master is one who has control over a servant or apprentice. A master stands in relation to his apprentices, in loco parentis, and is bound to fulfil that relation, which the law generally enforces. He is also entitled to be obeyed by his apprentices, as if they were his children. Bouv. Inst. Index, h. t.

2.—2. Master is one who is employed in teaching children, known generally as a schoolmaster; as to his powers, see *Correction*.

3.—3. Master is the name of an officer: as, the ship Benjamin Franklin, whereof A B is master; the master of the rolls; master in chancery, &c.

4.—4. By master is also understood a principal who employs another to perform some act or do something for him. The law having adopted the maxim of the civil law, *qui facit per alium facit per se*; the agent is but an instrument, and the master is civilly responsible for the act of his agent, as if it were his own, when he either commands him to do an act, or puts him in a condition, of which such act is a result; or by the absence of due care and control, either previously in the choice of his agent, or immediately in the act itself, negligently suffers him to do an injury. Story, Ag. § 454, note; Noy's Max. c. 44; Salk. 282; 1 East. R. 106; 1 Bos. & Pul. 404; 2 H. Bl. 267; 5 Barn. & Cr. 547; 2 Taunt. R. 314; 4 Taunt. R. 649; Mass. 364, 385; 17 Mass. 479, 509; 1 Pick. 475; 4 Watts, 222; 2 Harr. & Gill, 316; 6 Cowen, 189; 8 Pick. 23; 5 Munf. 483. Vide *Agent*; *Agency*; *Driver*; *Servant*.

MASTER AT COMMON LAW, Eng. law. An officer of the superior courts of law, who has authority for taking affidavits sworn in court, and administering a variety of oaths; and also empowered to compute principal and interest on bills of exchange and other engagements, on which suit has been brought; he has also the power of an examiner of witnesses going abroad, and the like.

MASTER IN CHANCERY. An officer of the court of chancery.

2. The origin of these officers is thus accounted for. The chancellor from the first found it necessary to have a number of clerks, were it for no other purpose, than to perform the mechanical part of the business, the writing; these soon rose to the number of twelve. In process of time this number being found insufficient, these clerks contrived to have other clerks under them,

and then, the original clerks became distinguished by the name of *masters in chancery*. He is an assistant to the chancellor, who refers to him interlocutory orders for stating accounts, computing damages, and the like. Masters in chancery are also invested with other powers, by local regulations. Vide Blake's Ch. Pr. 26; 1 Madd. Pr. 3; 1 Smith's Ch. Pr. 9, 19.

8. In England there are two kinds of masters in chancery, the ordinary, and the extraordinary.

4.—1. The masters in ordinary execute the orders of the court, upon references made to them, and certify in writing in what manner they have executed such orders. 1 Sm. Ch. Pr. 9.

5.—2. The masters extraordinary perform the duty of taking affidavits touching any matter in or relating to the court of chancery, taking the acknowledgment of deeds to be enrolled in the said court, and taking such recognizances, as may by the tenor of the order for entering them, be taken before a master extraordinary. 1 Sm. Ch. Pr. 19. Vide, generally, 1 Harg. Law Tr. 203, a; Treatise of the Maister of the Chancerie.

MASTER OF THE ROLLS, Eng. law. An officer who bears this title, and who acts as an assistant to the lord chancellor, in the court of chancery.

2. This officer was formerly one of the clerks in chancery whose duty was principally confined to keeping the rolls; and when the clerks in chancery became *masters*, then this officer became distinguished as master of the rolls. Vide *Master in Chancery*.

MASTER OF A SHIP, mar. law. The commander or first officer of a ship; a captain. (q. v.)

2. His rights and duties have been considered under the article *Captain*. Vide also, 2 Bro. Civ. Adm. Law, 133; 3 Kent, Com. 121; Weak. Ins. 360; Park. on Ins. Index, h. t.; Com. Dig. Navigation, I 4.

MATE. The second officer on board of a merchant ship or vessel.

2. He has the right to sue in the admiralty as a common mariner for wages. 1 Pet. Adm. Dec. 246.

8. When, on the death of the master, the mate assumes the command, he succeeds to the rights and duties of the principal officer. 1 Sumn. 157; 3 Mason, 161; 4 Mason, 196; See 7 Conn. 239; 4 Mason, 541; 4 Wash. C. C. 338.

MATER FAMILIAS, civil law. The

mother of a family, and, by extension, the mistress of a family.

MATERIAL MEN. This name is given to persons who furnish materials for the purpose of constructing or erecting ships, houses, and other buildings.

2. By the common law material men have a lien on a foreign ship for supplies of materials furnished for such ship, which may be recovered in the admiralty. 9 Wheat. 409. But they have no lien for furnishing materials for repairs of domestic ships. 4 Wheat. 438.

3. In several of the states, laws have been enacted giving material men a lien on houses and other buildings when they have furnished materials for constructing the same.

MATERIALITY. That which is important; that which is not merely of form but of substance.

2. When a bill for discovery has been filed, for example, the defendant must answer every material fact which is charged in the bill, and the test in these cases seems to be that when, if the defendant should answer in the affirmative, his answer would be of use to the plaintiff, the answer would be material, and it must be made. 4 Price, R. 364; 13 Price, R. 291; 2 Y. & J. 385.

3. In order to convict a witness of a perjury, it is requisite to prove that the matter he swore to was material to the question then depending. Vide 3 Chit. Pr. 233; 3 Dowl. 104; 10 Bing. 340; *Perjury*.

MATERIALS. Everything of which anything is made.

2. When materials are furnished to a workman he is bound to use them according to his contract, as a tailor is bound to employ the cloth I furnish him with, to make me a coat that shall fit me, for if he so make it that I cannot wear it, it is not a proper employment of the materials. But if the undertaker use ordinary skill and care, he will not be responsible, although the materials may be injured; as, if a gem be delivered to a jeweler, and it is broken without any unskilfulness, negligence or rashness of the artizan, he will not be liable. Poth. Louage, n. 428.

3. The workman is to use ordinary diligence in the care of the materials entrusted with him, or to exercise that caution which a prudent man takes of his own affairs, and he is also bound to preserve them from any unexpected danger to which they may be exposed. 1 Gow. R. 30; 1 Camp. 138.

4. When there is no special contract between the parties, and the materials perish while in the possession of the workman or undertaker, without his default, either by inevitable casualty, by internal defect, by superior force, by robbery or by any peril not guarded against by ordinary diligence, he is not responsible. This is the case only when the material belongs to the employer, and the workman only undertakes to put his work upon it. But a distinction must be observed in the case when the employer has engaged a workman to make him an article out of his own materials, for in that case the employer has no property in it, until the work be completed, and the article be delivered to him; if, in the mean time, the thing perishes, it is the loss of the workman, who is wholly its owner, according to the maxim *res perit domino*. In the former case the employer is the owner; in the latter the workman; in the first case it is a bailment, in the second a sale of the thing in futuro. Domat. B. 1, t. 4, § 7, n. 3; Id. B. 1, t. 4, § 8, n. 10.

5. Another distinction must be made in the case when the thing given by the employer was to become the property of the workman, and an article was to be made out of similar materials, and before its completion it perished. In this case the title to the thing having passed to the workman, the loss must be his. 1 Blackf. 353; 7 Cowen, 752, 756, note; 21 Wend. 85; 3 Mason, 478; Dig. 19, 2, 31; 1 Bouv. Inst. n. 1006-7.

6. In some of the states by their laws persons who furnish materials for the construction of a building, have a lien against such building for the payment of the value of such materials. See *Lien of Mechanics*.

MATERNA MATERNIS. This expression is used in the French law to signify that in a succession the property coming from the mother of a deceased person, descends to his maternal relations.

MATERNAL. That which belongs to, or comes from the mother: as, maternal authority, maternal relation, maternal estate, maternal line. Vide *Line*.

MATERNAL PROPERTY. That which comes from the mother of the party, and other ascendants of the maternal stock. Domat. Liv. Prel. tit. 3, s. 2, n. 12.

MATERNITY. The state or condition of a mother.

2. It is either legitimate or natural. The former is the condition of the mother who has given birth to legitimate children, while the latter is the condition of her who has given birth to illegitimate children. Maternity is always certain, while the paternity (q. v.) is only presumed.

MATERTERA. Maternal aunt; the sister of one's mother. Inst. 3, 4, 3; Dig. 38, 10, 10, 14.

MATHEMATICAL EVIDENCE. That evidence which is established by a demonstration. It is used in contradistinction to moral evidence. (q. v.)

MATRICULA, civil law. A register in which are inscribed the names of persons who become members of an association or society. Dig. 50, 3, 1. In the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy; and *matricula pauperum*, a list of the poor to be relieved; hence to be entered in the university is to be matriculated.

MATRIMONIAL CAUSES. In the English ecclesiastical courts there are five kinds of causes which are classed under this head. 1. Causes for a malicious jactitation. 2. Suits for nullity of marriage, on account of fraud, incest, or other bar to the marriage. 2 Hagg. Cons. Rep. 423. 3. Suits for restitution of conjugal rights. 4. Suits for divorces on account of cruelty or adultery, or causes which have arisen since the marriage. 5. Suits for alimony.

MATRIMONIUM. By this word is understood the inheritance descending to a man, *ex parti matris*. It is but little used.

2. Among the Romans this word was employed to signify marriage; and it was so called because this conjunction was made with the design that the wife should become a mother. Inst. 1, 9, 1.

MATRIMONY. See *Marriage*.

MATRINA. A godmother.

MATRON. A married woman, generally an elderly married woman.

2. By the laws of England, when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is expected, then, upon the writ *de ventre inspiciendo*, a jury of women is to be impaneled to try the question, whether with child or not. Cro. Eliz. 566. So when a woman was sentenced to death, and she declared herself to be quick with child, a jury of matrons is impaneled to try whether she be or be not with child.

4 Bl. Com. 395. See *Pregnancy; Quick with child*.

MATTER. Some substantial or essential thing, opposed to form; facts.

MATTER IN PAYS. Literally, matter in the country; matter of fact, as distinguished from matter of law, or matter of record. Steph. Pl. 197. Vide *Country*.

MATTER IN DEED. Matter in deed is such matter as may be proved or established by a deed or specialty. In another sense it signifies matter of fact, in contradistinction to matter of law. Co. Litt. 320; Steph. Pl. 197.

MATTER OF FACT, pleading. Matter which goes in denial of a declaration, and not in avoidance of it. Bac. Ab. Pleas, &c. G 3; Hob. 127.

MATTER OF LAW, pleading. That which goes in avoidance of a declaration or other pleading, on the ground that the law does not authorize them. It does not deny the matter or fact contained in such pleading, but admitting them avoids them. Bac. Ab. Pleas, &c. G 3. Matter of law, is that which is referred to the decision of the court; matter of fact that which is submitted to the jury.

MATTER OF RECORD. Those facts which may be proved by the production of a record. It differs from matter in deed, which consists of facts which may be proved by specialty. Vide *Estoppel*.

MATTER, IMPERTINENT, equity pleading. That which is altogether irrelevant to the case, that does not appertain or belong to it; *id est, qui ad rem non pertinet*. 4 Bouv. Inst. n. 4163. See *Impertinent*.

MATTER, SCANDALOUS, equity pleading. A false and malicious statement of facts, not relevant to the cause. But nothing which is positively relevant, however harsh or gross the charge may be, can be considered scandalous. 4 Bouv. Inst. n. 4163.

2. A bill cannot by the general practice be referred for impertinence after the defendant has answered, or submitted to answer, but it may be referred for scandal at any time, and even upon the application of a stranger to the suit, for he has the right to prevent the records of the court from being made the vehicle of spreading slanders against himself. Id. n. 4164.

MATURITY. The time when a bill or note becomes due. In order to bind the endorsers such note or bill must be protested, when not paid, on the last day of grace. See *Days of grace*.

MAXIM. An established principle or proposition. A principle of law universally admitted, as being just and consonant with reason.

2. Maxims in law are somewhat like axioms in geometry. 1 Bl. Com. 68. They are principles and authorities, and part of the general customs or common law of the land; and are of the same strength as acts of parliament, when the judges have determined what is a maxim; which belongs to the judges and not the jury. Terms de Ley; Doot. & Stud. Dial. 1, c. 8. Maxims of the law are holden for law, and all other cases that may be applied to them shall be taken for granted. 1 Inst. 11. 67; 4 Rep. See 1 Com. c. 68; Plowd. 27, b.

3. The application of the maxim to the case before the court, is generally the only difficulty. The true method of making the application is to ascertain how the maxim arose, and to consider whether the case to which it is applied is of the same character, or whether it is an exception to an apparently general rule.

4. The alterations of any of the maxims of the common law are dangerous. 2 Inst. 210.

The following are some of the more important maxims.

A communi observantia non est recedendum. There should be no departure from common observance or usage. Co. Litt. 186.

Impossibile nul n'est tenu. No one is bound to do what is impossible. 1 Bouv. Inst. n. 601.

A verbis legis non est recedendum. From the words of the law there must be no departure. Broom's Max. 268; 5 Rep. 119; Wing. Max. 25.

Absentia ejus qui reipublica causa abest, neque ei, neque alii damnosa esse debet. The absence of him who is employed in the service of the state, ought not to be burdensome to him nor to others. Dig. 50, 17, 140.

Absoluta sententia expositore non indiget. An absolute unqualified sentence or proposition, needs no expositor. 2 Co. Inst. 533.

Abundans cautela non nocet. Abundant caution does no harm. 11 Co. 6.

Accessorius sequit naturam sui principalis. An accessory follows the nature of his principal. 3 Co. Inst. 349.

Accessorium non ducit sed sequitur suam principalem. The accessory does not lead, but follow its principal. Co. Litt. 152.

Accusare nemo debet se, nisi coram Deo. No one ought to accuse himself, unless before God. Hard. 139.

Actio exteriora indicant interiora secreta. External actions show internal secrets. 8 Co. R. 146.

Actio non datur non damnificato. An action is not given to him who has received no damages.

Actio personalis moritur cum persona. A personal action dies with the person. This must be understood of an action for a tort only.

Actor qui contra regulam quid adduxit, non est audiendus. He ought not to be heard who advances a proposition contrary to the rules of law.

Actor sequitur forum rei. The plaintiff must follow the forum of the thing in dispute.

Actors non probante reus absolvitur. When the plaintiff does not prove his case, the defendant is absolved.

Actus Dei nemini facit injuriam. The act of God does no injury; that is, no one is responsible for inevitable accidents. 2 Blacks. Com. 122. See *Act of God*.

Actus incaptus cujus perfectio pendet, ex voluntate partium, revocari potest; si autem pendet ex voluntate tertie personae, vel ex contingenti, revocari non potest. An act already begun, the completion of which depends upon the will of the parties, may be recalled; but if it depend on the consent of a third person, or of a contingency, it cannot be recalled. Bacon's Max. Reg. 20.

Actus me invito factus, non est meus actus. An act done by me against my will, is not my act.

Actus non reum facit, nisi mens sit rea. An act does not make a person guilty, unless the intention be also guilty. This maxim applies only to criminal cases; in civil matters it is otherwise. 2 Bouv. Inst. n. 2211.

Actus legitimi non recipiunt modum. Acts required by law to be done, admit of no qualification. Hob. 153.

Actus legis nemini facit injuriam. The act of the law does no one an injury. 5 Co. 116.

Ad proximum antecedens fiat relatio, nisi impediatur sententia. The antecedent bears relation to what follows next, unless it destroys the meaning of the sentence.

Ad questiones facti non respondent iudices; ad questiones legis non respondent juratores. The judges do not answer to questions of fact; the jury do not answer to questions of law. Co. Litt. 295.

Estimatio prateriti delicti ex postremo facto nunquam crescit. The estimation of a crime committed never increases from a subsequent fact. Bac. Max. Reg. 8.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur. A hidden ambiguity of the words is supplied by the verification, for whatever ambiguity arises concerning the deed itself is removed by the verification of the deed. Bacon's Max. Reg. 23.

Aqua cedit solo. The water yields or accompanies the soil. The grant of the soil or land carries the water.

Aqua currit et debet currere. Water runs and ought to run. 3 Rawle, 84, 88.

Equitas agit in personam. Equity acts upon the person. 4 Bouv. Inst. n. 3733.

Equitas sequitur legem. Equity follows the law. 1 Story, Eq. Jur. § 64; 3 Wooddes. Lect. 479, 482.

Equum et bonum, est lex legum. What is good and equal, is the law of laws. Hob. 224.

Affirmati, non neganti incumbit probatio. The proof lies upon him who affirms, not on him who denies.

Aliud est celare, aliud tacere. To conceal is one thing, to be silent another.

Alternativa petitio non est audienda. An alternate petition is not to be heard. 5 Co. 40.

Animus ad se omne jus ducit. It is to the intention that all law applies.

Animus hominis est anima scripti. The intention of the party is the soul of the instrument. 3 Bulstr. 67.

Apices juris non sunt jura. Points of law are not laws. Co. Litt. 304; 8 Scott, N. P. R. 773.

Arbitrium est judicium. An award is a judgment. Jenk Cent. 137.

Argumentum à majori ad minus negative non valet; valet è converso. An argument from the greater to the less is of no force negatively; conversely it is. Jenk. Cent. 281.

Argumentum à divisione est fortissimum in jure. An argument arising from a division is most powerful in law. 6 Co. 60.

Argumentum ab inconvenienti est validum in lege; quia lex non permittit aliquid inconvenientis. An argument drawn from what is inconvenient is good in law, because the law will not permit any inconvenience. Co. Litt. 258.

Argumentum ab impossibili plurimum valet in lege. An argument deduced from authority greatly avails in law. Co. Litt. 92.

Argumentum ab autoritate est fortissimum in lege. An argument drawn from authority is the strongest in law. Co. Litt. 254.

Argumentum à simili valet in lege. An argument drawn from a similar case, or analogy, avails in law. Co. Litt. 191.

Auspicia verborum sunt iudice indigna. A twisting of language is unworthy of a judge. Hob. 343.

Bona fides non patitur, ut bis idem exigatur. Natural equity or good faith do not allow us to demand twice the payment of the same thing. Dig. 50, 17, 57.

Boni iudicis est ampliare jurisdictionem. It is the part of a good judge to enlarge his jurisdiction; that is, his remedial authority. Chan. Prec. 329; 1 Wils. 264; 9 M. & Wels. 818.

Boni iudicis est causas litium derimere. It is the duty of a good judge to remove the cause of litigation. 2 Co. Inst. 304.

Bonum defendantis ex integrâ causâ, malum ex quolibet defectu. The good of a defendant arises from a perfect case, his harm from some defect. 11 Co. 68.

Bonum iudex secundum æquum et bonum iudicat, et æquitatem stricto juri præfert. A good judge decides according to justice and right, and prefers equity to strict law. Co. Litt. 24.

Bonum necessarium extra terminos necessitatis non est bonum. Necessary good is not good beyond the bounds of necessity. Hob. 144.

Casus fortuitus non est sperandus, et nemo tenetur decimare. A fortuitous event is not to be foreseen, and no person is held bound to divine it. 4 Co. 66.

Casus omisus et obliuione datus dispositioni communis juris relinquitur. A case omitted and given to oblivion is left to the disposal of the common law. 5 Co. 37.

Catalla justè possessa amitti non possunt. Chattels justly possessed cannot be lost. Jenk. Cent. 28.

Catalla reputantur inter minima in lege. Chattels are considered in law among the minor things. Jenk. Cent. 52.

Causa proxima, non remota spectatur. The immediate, and not the remote cause, is to be considered. Bac. Max Reg. 1.

Caveat emptor. Let the purchaser beware.

Cavendum est à fragmentis. Beware of fragments. Bacon, Aph. 26.

Cessante causa, cessat effectus. The cause ceasing, the effect must cease.

C'est le crime qui fait la honte, et non pas l'effa-faud. It is the crime which causes the shame, and not the scaffold.

Charta de non ente non valet. A charter or deed of a thing not in being, is not valid. Co. Litt. 38.

Chirographum apud debitorem repertum præsumitur solutum. A deed or bond found with the debtor is presumed to be paid.

Circuitus est evitandus. Circuitry is to be avoided. 5 Co. 31.

Clausula inconsuetæ semper inducunt suspicionem. Unusual clauses always induce a suspicion. 3 Co. 81.

Clausula quæ abrogationem excludit ab initio non valet. A clause in a law which precludes its abrogation, is invalid from the beginning. Bacon's Max. Reg. 19, p. 89.

Clausula vel dispositio inutilis per præsumptionem remotam vel causam, ex post facto non fulcitur. A useless clause or disposition is not supported by a remote presumption, or by a cause arising afterwards. Bacon's Max. Reg. 21.

Cogitationis poenam nemo patitur. No one is punished for merely thinking of a crime.

Commodum ex injuriâ suâ non habere debet. No man ought to derive any benefit of his own wrong. Jenk. Cent. 161.

Communis error facit jus. A common error makes law. What was at first illegal, being repeated many times, is presumed to have acquired the force of usage, and then it would be wrong to depart from it. The converse of this maxim is *communis error non facit jus*. A common error does not make law.

Confessio facta in judicio omni probatione major est. A confession made in court is of greater effect than any proof. Jenk. Cent. 102; 11 Co. 30.

Confirmare nemo potest priusquam jus ei acciderit. No one can confirm before the right accrues to him. 10 Co. 48.

Confirmatio est nulla, ubi donum precedens est invalidum. A confirmation is null where the preceding gift is invalid. Co. Litt. 295.

Conjunctio mariti et feminae est de jure naturæ. The union of a man and a woman is of the law of nature.

Consensus non concubitus facit nuptiam. Consent, not lying together, constitutes marriage.

Consensus facit legem. Consent makes the law. A contract is a law between the parties, which can acquire force only by consent.

Consensus tollit errorem. Consent removes or obviates a mistake. Co. Litt. 126.

Consentientes et agentes pari pœna plectentur. Those consenting and those perpetrating are embraced in the same punishment. 5 Co. 80.

Consequentia non est consequentia. A consequence ought not to be drawn from another consequence. Bacon, De Aug. Sci. Aph. 16.

Consilii, non fraudulentum, nulla est obligatio. Advice, unless fraudulent, does not create an obligation.

Constructio contra rationem introducta, potius usurpatio quam consuetudo appellari debet. A custom introduced against reason ought rather to be called an usurpation than a custom. Co. Litt. 113.

Constructio legis non facit injuriam. The construction of law works not an injury. Co. Litt. 183; Broom's Max. 259.

Consuetudo debet esse certa. A custom ought to be certain. Dav. 33.

Consuetudo est optimus interpret legum. Custom is the best expounder of the law. 2 Co. Inst. 18; Dig. 1, 3, 37; Jenk. Cent. 273.

Consuetudo est altera lex. Custom is another law. 4 Co. 21.

Consuetudo loci observanda est. The custom of the place is to be observed. 6 Co. 67.

Consuetudo præscripta et legitima vincit legem. A prescriptive and legitimate custom overcomes the law. Co. Litt. 113.

Consuetudo semel reprobata non potest amplius induci. Custom once disallowed cannot again be produced. Dav. 33.

Consuetudo voluntis ducit, lex nolentes trahit. Custom leads the willing, law compels or draws the unwilling. Jenk. Cent. 274.

Contestatio litis eget terminos contradictorios. An issue requires terms of contradiction; that is, there can be no issue without an affirmative on one side and a negative on the other.

Contemporanea expositio est optima et fortissima in lege. A contemporaneous exposition is the best and most powerful in the law. 2 Co. Inst. 11.

Contrà negantem principia non est disputandum. There is no disputing against or denying principles. Co. Litt. 43.

Contrà non volentem agere nulla currit præscriptio. No prescription runs against a person unable to act. Broom's Max. 398.

Contrà veritatem lex nunquam aliquid permittit. The law never suffers anything contrary to truth. 2 Co. Inst. 252. But sometimes it allows a conclusive presumption in opposition to truth. See 3 Bouv. Inst. n. 3061.

Contractus legem ex conventionione accipiunt. The agreement of the parties makes the law of the contract. Dig. 16, 3, 1, 6.

Contractus ex turpi causâ, vel contrà bonos mores nullus est. A contract founded on a base and unlawful consideration, or against good morals, is null. Hob. 167; Dig. 2, 14, 27, 4.

Conventio vincit legem. The agreement of the parties overcomes or prevails against the law. Story, Ag. § 368. See Dig. 16, 3, 1, 6.

Copulatio verborum indicat acceptionem in eodem sensu. Coupling words together shows that they ought to be understood in the same sense. Bacon's Max. in Reg. 3.

Corporalis injuria non recipit æstimationem de futuro. A personal injury does not receive satisfaction from a future course of proceeding. Bacon's Max. Reg. 6.

Cuiuslibet in arte sua herito credendum est. Every one should be believed skilful in his own art. Co. Litt. 125. Vide *Experts; Opinion*.

Cujus est commodum ejus debet esse incommodum. He who receives the benefit should also bear the disadvantage.

Cujus est dare ejus est disponere. He who has a right to give, has the right to dispose of the gift.

Cujus per errorem dati repetitio est, ejus consulto dati donatio est. Whoever pays by mistake what he does not owe, may recover it back; but he who pays, knowing he owes nothing; is presumed to give. Dig. 50, 17, 53.

Cujus est solum, ejus est usque ad cælum. He

who owns the soil, owns up to the sky. Co. Litt. 4 a; Broom's Max. 172; Shep. To. 90; 2 Bouv. Inst. n. 15, 70.

Cujus est divisio alterius est electio. Which ever of two parties has the division, the other has the choice. Co. Litt. 166.

Cujusque rei potissima pars principium est. The principal part of everything is the beginning. Dig. 1, 2, 1; 10 Co. 49.

Culpa tenet suos auctores. A fault finds its own authors.

Culpa est immiscere se rei ad se non pertinenti. It is a fault to meddle with what does not belong to or does not concern you. Dig. 50, 17, 36.

Culpa pœna par esto. Let the punishment be proportioned to the crime.

Culpa lata æquiparatur dolo. A concealed fault is equal to a deceit.

Cui pater est populus non habet ille patrem. He to whom the people is father, has not a father. Co. Litt. 123.

Cum confitente sponte mitius est agendum. One making a voluntary confession, is to be dealt with more mercifully. 4 Co. Inst. 66.

Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est. When two things repugnant to each other are found in a will, the last is to be confirmed. Co. Litt. 112.

Cum legitima nuptiæ facta sunt, patrem liberi sequuntur. Children born under a legitimate marriage follow the condition of the father.

Cum adsunt testimonia rerum quid opus est verbis. When the proofs of facts are present, what need is there of words. 2 Buls. 53.

Curiosa et captiosa interpretatio in lege reprobatur. A curious and captious interpretation in the law is to be reprobated. 1 Buls. 6.

Currit tempus contra desides et sui juris contemptores. Time runs against the slothful and those who neglect their rights.

Cursus curiæ est lex curiæ. The practice of the court is the law of the court. 3 Buls. 53.

De fide et officio judicis non recipitur questio; sed de scientia, sive error sit juris sive facti. Of the credit and duty of a judge, no question can arise; but it is otherwise respecting his knowledge, whether he be mistaken as to the law or fact. Bacon's Max. Reg. 17.

De jure judices, de facto juratores, respondent. The judges answer to the law, the jury to the facts.

De minimis non curat lex. The law does not notice or care for trifling matters. Broom's Max. 333; Hob. 88; 5 Hill, N. Y. Rep. 170.

De morte hominis nulla est cunctatio longa. When the death of a human being may be the consequence, no delay is long. Co. Litt. 134. When the question is on the life or death of a man, no delay is too long to admit of inquiring into facts.

De non apparentibus et non existentibus eadem est ratio. The reason is the same respecting things which do not appear, and those which do not exist.

De similibus ad similia eadem ratione procedendum est. From similars to similars, we are to proceed by the same rule.

De similibus idem est judicium. Concerning similars the judgment is the same. 7 Co. 18.

Debet esse finis litium. There ought to be an end of law suits. Jenk. Cent. 61.

Debet quis juri subjacere ubi delinquit. Every

one ought to be subject to the law of the place where he offends. 3 Co. Inst. 34.

Debile fundamentum, fallit opus. Where there is a weak foundation, the work falls. 2 Bouv. Inst. n. 2068.

Debita sequuntur personam debitoris. Debts follow the person of the debtor. Story, Conf. of Laws, § 362.

Debitor non presumitur donare. A debtor is not presumed to make a gift. See 1 Kames' Eq. 212; Dig. 50, 16, 108.

Debitum et contractus non sunt nullius loci. Debt and contract are of no particular place.

Delegata potestas non potest delegari. A delegated authority cannot be again delegated. 2 Co. Inst. 597; 5 Bing. N. C. 310; 2 Bouv. Inst. n. 1300.

Delegatus non potest delegare. A delegate or deputy cannot appoint another. 2 Bouv. Inst. n. 1336; Story, Ag. § 13.

Derivata potestas non potest esse major primitiva. The power which is derived cannot be greater than that from which it is derived.

Derogatur legi, cum pars detrahatur; abrogatur legi, cum prorsus tollitur. To derogate from a law is to enact something contrary to it; to abrogate a law, is to abolish it entirely. Dig. 50, 16, 102. See 1 Bouv. Inst. n. 91.

Designatio unius est exclusio alterius, et expressum facit cessare tacitum. The appointment or designation of one is the exclusion of another; and that expressed makes that which is implied cease. Co. Litt. 210.

Dies dominicus non est juridicus. Sunday is not a day in law. Co. Litt. 135 a; 2 Saund. 291. See Sunday.

Dies inceptus pro completo habetur. The day of undertaking or commencement of the business is held as complete.

Dies incertus pro conditione habetur. A day uncertain is held as a condition.

Dilationes in lege sunt odiosae. Delays in law are odious.

Disparata non debent jungi. Unequal things ought not to be joined. Jenk. Cent. 24.

Dispensatio est vulnus, quod vulnerat jus commune. A dispensation is a wound which wounds a common right. Dav. 69.

Dissimilum dissimilis est ratio. Of dissimilars the rule is dissimilar. Co. Litt. 191.

Divinatio non interpretatio est, quae omnino recedit a litera. It is a guess not interpretation which altogether departs from the letter. Bacon's Max. in Reg. 3, p. 47.

Dolosus versatur generalibus. A deceiver deals in generals. 2 Co. 34.

Dolus auctoris non nocet successor. The fraud of a possessor does not prejudice the successor.

Dolus circuitu non purgatur. Fraud is not purged by circuitry. Bacon's Max. in Reg. 1.

Domus sua cuique est tutissimum refugium. Every man's house is his castle. 5 Rep. 92.

Domus tutissimum cuique refugium atque receptaculum. The habitation of each one is an inviolable asylum for him. Dig. 2, 4, 18.

Donatio perficitur possessione accipientis. A gift is rendered complete by the possession of the receiver. See 1 Bouv. Inst. n. 712; 2 John. 52; 2 Leigh, 337.

Donatio non presumitur. A gift is not presumed. *Donatur nunquam desinit possidere antequam do-*

narius incipiat possidere. He that gives never ceases to possess until he that receives begins to possess. Dyer, 281.

Dormiunt aliquando leges, nunquam moriuntur. The laws sometimes sleep, but never die. 2 Co. Inst. 161.

Dos de dote peti non debet. Dower ought not to be sought from dower. 4 Co. 122.

Duas uxores eodem tempore habere non potest. It is not lawful to have two wives at one time. Inst. 1, 10, 6.

Duo non possunt in solido unam rem possidere. Two cannot possess one thing each in entirety. Co. Litt. 368.

Duplicationem possibilitatis lex non patitur. It is not allowed to double a possibility. 1 Roll. R. 321.

Ea est accipienda interpretatio, qui vitio curet. That interpretation is to be received, which will not intend a wrong. Bacon's Max. Reg. 3, p. 47.

Ei incumbit probatio qui dicit, non qui negat. The burden of the proof lies upon him who affirms, not he who denies. Dig. 22, 3, 2; Tait on Ev. 1; 1 Phil. Ev. 194; 1 Greenl. Ev. § 74; 3 Louis. R. 83; 2 Dan. l'r. 408; 4 Bouv. Inst. n. 4411.

Ei nihil turpe, cui nihil satis. To whom nothing is base, nothing is sufficient. 4 Co. Inst. 53.

Ejus est non nolle, qui potest velle. He who may consent tacitly, may consent expressly. Dig. 50, 17, 8.

Ejus est periculum cujus est dominium aut commodum. He who has the risk has the dominion or advantage.

Electi una via, non datur recursus ad alteram. When there is concurrence of means, he who has chosen one cannot have recourse to another. 10 Toull. n. 170.

Electio semel facta, et placitum testatum, non patitur regressum. Election once made, and plea witnessed, suffers not a recall. Co. Litt. 146.

Electiones fiant rite et libere sine interruptione aliqua. Elections should be made in due form and freely, without any interruption. 2 Co. Inst. 169.

Enumeratio infirmat regulam in casibus non enumeratis. Enumeration affirms the rule in cases not enumerated. Bac. Aph. 17.

Equality is equity. Francis' Max., Max. 3; 4 Bouv. Inst. n. 3725.

Equity suffers not a right without a remedy. 4 Bouv. Inst. n. 3726.

Equity looks upon that as done, which ought to be done. 4 Bouv. Inst. n. 3729; 1 Fonbl. Eq. b. 1, ch. 6, s. 9, note; 3 Wheat. 563.

Error fucatus nuda veritate in multis est probabilior; et saepenumero rationibus vincit veritatem error. Error artfully colored is in many things more probable than naked truth; and frequently error conquers truth and reasoning. 2 Co 73.

Error juris nocet. Error of law is injurious. See 4 Bouv. Inst. n. 3828.

Error qui non resistitur, approbatur. An error not resisted is approved. Doct. & Stud. c. 70.

Error scribentis nocere non debet. An error made by a clerk ought not to injure; a clerical error may be corrected.

Errores ad sua principia referre, est refellere. To refer errors to their origin is to refute them. 3 Co. Inst. 15.

Est autem vis legem simulans. Violence may also put on the mask of law.

Est boni iudicis ampliare jurisdictionem. It is the part of a good judge to extend the jurisdiction.

Ex antecedentibus et consequentibus fit optima interpretatio. The best interpretation is made from antecedents and consequents. 2 Co. Inst. 317.

Ex diuturnitate temporis, omnia præsumentur solemniter esse acta. From length of time, all things are presumed to have been done in due form. Co. Litt. 6; 1 Greenl. Ev. § 20.

Ex dolo malo non oritur actio. Out of fraud no action arises. Cowper, 343; Broom's Max. 349.

Ex facto jus oritur. Law arises out of fact; that is, its application must be to facts.

Ex malificio non oritur contractus. A contract cannot arise out of an act radically wrong and illegal. Broom's Max. 851.

Ex multitudine signorum, colligitur identitas vera. From the great number of signs true identity may be ascertained. Bacon's Max. in Reg. 25.

Ex nudo pacto non oritur actio. No action arises on a naked contract without a consideration. See *Nudum Pactum*.

Ex tota materia emergat resolutio. The construction or resolution should arise out of the whole subject matter. Wingate's Max. 238.

Ex turpi causa non oritur actio. No action arises out of an immoral consideration.

Ex turpi contractu non oritur actio. No action arises on an immoral contract.

Ex uno disces omnes. From one thing you can discern all.

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. A wrong in capital cases is excused or palliated which would not be so treated in civil matters. Bacon's Max. Reg. 7.

Exceptio ejus rei cuius petitur dissolutio nulla est. There can be no plea of that thing of which the dissolution is sought. Jenk. Cent. 37.

Exceptio falsi omnium ultima. A false plea is the basest of all things.

Exceptio firmat regulam in contrarium. The exception affirms the rule in contrary cases. Bac. Aph. 17.

Exceptio firmat regulam in casibus non exceptis. The exception affirms the rule in cases not excepted. Bac. Aph. 17.

Exceptio nulla est versus actionem quæ exceptionem perimit. There can be no plea against an action which entirely destroys the plea. Jenk. Cent. 106.

Exceptio probat regulam de rebus non exceptis. An exception proves the rule concerning things not excepted. 11 Co. 41.

Exceptio quoque regulam declarat. The exception also declares the rule. Bac. Aph. 17.

Exceptio semper ultima ponenda est. An exception is always to be put last. 9 Co. 53.

Executio est finis et fructus legis. An execution is the end and the fruit of the law. Co. Litt. 269.

Executio juris non habet injuriam. The execution of the law causes no injury. 2 Co. Inst. 482; Broom's Max. 57.

Exempla illustrent non restringunt legem. Examples illustrate and do not restrict the law. Co. Litt. 24.

Expedit reipublica ut sit finis litium. It is for the public good that there be an end of litigation. Co. Litt. 303.

Expressa nocent, non expressa non nocent. Things expressed may be prejudicial; things not expressed are not. See Dig. 50, 17, 195.

Expressio eorum quæ tacite insunt nihil operatur. The expression of those things which are tacitly implied operates nothing.

Expressio unius est exclusio alterius. The expression of one thing is the exclusion of another.

Expressum facit cessare tacitum. What is expressed renders what is implied silent.

Extra legem positus est civiliter mortuus. One out of the pale of the law, (an outlaw,) is civilly dead.

Extra territorium jus dicenti non paratur impune. One who exercises jurisdiction out of his territory is not obeyed with impunity.

Facta sunt potentiora verbis. Facts are more powerful than words.

Factum à judice quod ad ejus officium non spectat, non ratum est. An act of a judge which does not relate to his office, is of no force. 10 Co. 76.

Factum negantis nulla probatio. Negative facts are not proof.

Factum non dicitur quod non perseverat. It cannot be called a deed which does not hold out or persevere. 5 Co. 96.

Factum unius alteri nocere non debet. The deed of one should not hurt the other. Co. Litt. 152.

Facultas probationum non est angustanda. The faculty or right of offering proof is not to be narrowed. 4 Co. Inst. 279.

Falsa demonstratio non nocet. A false or mistaken description does not vitiate. 6 T. R. 676; see 2 Story's Rep. 291; 1 Greenl. Ev. § 301.

Falsa orthographia, vice falsa grammatica, non vitiat concessionem. False spelling or false grammar do not vitiate a grant. 9 Co. 48; Sheph. To. 55.

Falsus in uno, falsus in omnibus. False in one thing, false in everything. 1 Sumn. 356.

Fiat justitia ruat cælum. Let justice be done, though the heavens should fall.

Felonia implicatur in quolibet prodicione. Felony is included or implied in every treason. 3 Co. Inst. 15.

Festinatio justitiæ est nocera infortunii. The hurrying of justice is the stepmother of misfortune. Hob. 97.

Fiat prout, fieri consuevit, nil temere norandum. Let it be done as formerly, let nothing be done rashly. Jenk. Cent. 116.

Fictio est contra veritatem, sed pro veritate habetur. Fiction is against the truth, but it is to have truth.

Finis rei attendendus est. The end of a thing is to be attended to. 3 Co. Inst. 51.

Finis suum litibus imponit. The end puts an end to litigation. 3 Inst. 78.

Finis unius diei est principium alterius. The end of one day is the beginning of another. 2 Buls. 305.

Firmior est potentior est operatio legis quam dispositio hominis. The disposition of law is firmer and more powerful than the will of man. Co. Litt. 102.

Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est. Rivers and ports are public, therefore the right of fishing there is common to all.

Famula ab omnibus officiis civilibus vel publicis

remota sunt. Women are excluded from all civil and public charges or offices. Dig. 50, 17, 2.

Forma legalis forma essentialis. Legal form is essential form. 10 Co. 100.

Forma non observata, infertur annullatio actus. When form is not observed a nullity of the act is inferred. 12 Co. 7.

Forstallarius est pauperum depressor, et totius communitatis et patrie publicus inimicus. A fore-staller is an oppressor of the poor, and a public enemy to the whole community and the country. 3 Co. Inst. 196.

Fortior est custodia legis quam hominis. The custody of the law is stronger than that of man. 2 Roll. R. 325.

Fortior et potentior est dispositio legis quam hominis. The disposition of the law is stronger and more powerful than that of man. Co. Litt. 234.

Fraus est celare fraudem. It is a fraud to conceal a fraud. 1 Vern. 270.

Fraus est odiosa et non præsumentia. Fraud is odious and not to be presumed. Cro. Car. 550.

Fraus et dolus nemini patrocinari debent. Fraud and deceit should excuse no man. 3 Co. 78.

Fraus et jus nunquam cohabitant. Fraud and justice never agree together. Wing. 680.

Fraus laet in generalibus. Fraud lies hid in general expressions.

Fraus meretur fraudem. Fraud deserves fraud. Plow. 100. This is very doubtful morality.

Fructus pendentes pars fundi videntur. Hanging fruits make part of the land. Dig. 6, 1, 44; 2 Bouv. Inst. n. 1578. See *Larceny*.

Fructus perceptos villa non esse constat. Gathered fruits do not make a part of the house. Dig. 19, 1, 17, 1; 2 Bouv. Inst. n. 1578.

Frustra est potentia qua nunquam venit in actum. The power which never comes to be exercised is vain. 2 Co. 51.

Frustra feruntur legis nisi subditis et obedientibus. Laws are made to no purpose unless for those who are subject and obedient. 7 Co. 13.

Frustra legis auxilium quaerit qui in legem committit. Vainly does he who offends against the law, seek the help of the law.

Frustra petis quod statim alteri reddere cogaris. Vainly you ask that which you will immediately be compelled to restore to another, Jenk. Cent. 256.

Frustra probatur quod probatum non relevat. It is vain to prove that which if proved would not aid the matter in question.

Furiosus absentis loco est. The insane is compared to the absent. Dig. 50, 17, 24, 1.

Furiosus solo furore punitur. A madman is punished by his madness alone. Co. Litt. 247.

Furtum non est ubi initium habet detentionis per dominum rei. It is not theft where the commencement of the detention arises through the owner of the thing. 3 Co. Inst. 107.

Generale tantum valet in generalibus, quantum singulare singulis. What is general prevails or is worth as much among things general, as what is particular among things particular. 11 Co. 59.

Generale dictum generaliter est interpretandum. A general expression is to be construed generally. 8 Co. 116.

Generale nihil certum implicat. A general expression implies nothing certain. 2 Co. 34.

Generalia sunt præponenda singularibus. General things are to be put before particular things.

Generalia verba sunt generaliter intelligenda. General words are understood in a general sense. 3 Co. Inst. 76.

Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. A general clause does not extend to those things which are previously provided for specially. 8 Co. 154.

Hæredem Deus facit, non homo. God and not man, makes the heir.

Hæredem est nomen collectivum. Heir is a collective name.

Hæris est nomen juris, filius est nomen naturæ. Heir is a term of law, son one of nature.

Hæres est aut jure proprietatis aut jure representationis. An heir is either by right of property or right of representation. 3 Co. 40.

Hæres est alter ipse, et filius est pars patris. An heir is another self, and a son is a part of the father.

Hæres est eadem persona cum antecessore. The heir is the same person with the ancestor. Co. Litt. 22.

Hæres hæredis mei est meus hæres. The heir of my heir is my heir.

Hæres legitimus est quem nuptiæ demonstrant. He is the lawful heir whom the marriage demonstrates.

He who has committed iniquity, shall not have equity. Francis' Max., Max. 2.

He who will have equity done to him, must do equity to the same person. 4 Bouv. Inst. n. 3723.

Hominum causæ jure constitutum est. Law is established for the benefit of man.

Id quod nostrum est, sine facto nostro ad alium transferri non potest. What belongs to us cannot be transferred to another without our consent. Dig. 50, 17, 11. But this must be understood with this qualification, that the government may take property for public use, paying the owner its value. The title to property may also be acquired, without the consent of the owner, by a judgment of a competent tribunal.

Id certum est quod certum reddi potest. That is certain which may be rendered certain. 1 Bouv. Inst. n. 929; 2 Bl. Com. 143; 4 Kent, Com. 462; 4 Pick. 179.

Idem agens et patiens esse non potest. One cannot be agent and patient, in the same matter. Jenk. Cent. 40.

Idem est facere, et nolle prohibere cum possis. It is the same thing to do a thing as not to prohibit it when in your power. 3 Co. Inst. 158.

Idem est non probari et non esse; non deficit jus, sed probatio. What does not appear and what is not is the same; it is not the defect of the law, but the want of proof.

Idem est nihil dicere et insufficienter dicere. It is the same thing to say nothing and not to say it sufficiently. 2 Co. Inst. 178.

Idem est scire aut scire debet aut potuisse. To be able to know is the same as to know. This maxim is applied to the duty of every one to know the law.

Idem non esse et non apparere. It is the same thing not to exist and not to appear. Jenk. Cent. 207.

Idem semper antecedenti proximo refertur. The

same is always referred to its next antecedent. Co. Litt. 385.

Identitas vera colligitur ex multitudine signorum. True identity is collected from a number of signs.

Id perfectum est quod ex omnibus suis partibus constat. That is perfect which is complete in all its parts. 9 Co. 9.

Id possumus quod de jure possumus. We may do what is allowed by law. Lane, 116.

Ignorantia excusatur, non juris sed facti. Ignorance of fact may excuse, but not ignorance of law. See *Ignorance*.

Ignorantia legis neminem excusat. Ignorance of law never excuses. See *Ignorance*; 4 Bouv. Inst. n. 3828.

Ignorantia facti excusat, ignorantia juris non excusat. Ignorance of facts excuses, ignorance of law does not excuse. 1 Co. 177; 4 Bouv. Inst. n. 3828. See *Ignorance*.

Ignorantia judicii est calamitas innocentis. The ignorance of the judge is the misfortune of the innocent. 2 Co. Inst. 591.

Ignorantia terminis ignoratur et ars. An ignorance of terms is to be ignorant of the art. Co. Litt. 2.

Illud quod alias licitum non est necessitas facit licitum, et necessitas inducit privilegium quod jure privat. That which is not otherwise permitted, necessity allows, and necessity makes a privilege which supercedes the law. 10 Co. 61.

Imperitia culpe annumeratur. Ignorance, or want of skill, is considered a negligence, for which one who professes skill is responsible. Dig. 50, 17, 132; 1 Bouv. Inst. n. 1004.

Impersonalitas non concludit nec ligat. Impersonality neither concludes nor binds. Co. Litt. 352.

Impotentia excusat legem. Impossibility excuses the law. Co. Litt. 29.

Impunitas continuum affectum tribuit delinquenti. Impunity offers a continual bait to a delinquent. 4 Co. 45.

In alternativis electio est debitoris. In alternatives there is an election of the debtor.

In aedificiis lapis male positus non est removendus. A stone badly placed in a building is not to be removed. 11 Co. 69.

In equali jure melior est conditio possidentis. When the parties have equal rights, the condition of the possessor is the better. Mitf. Eq. Pl. 215; Jer. Eq. Jur. 285; 1 Madd. Ch. Pr. 170; Dig. 50, 17, 128. Plowd. 296.

In commodo hac pactio, ne dolus praestetur, rata non est. If in a contract for a loan there is inserted a clause that the borrower shall not be answerable for fraud, such clause is void. Dig. 13, 6, 17.

In conjunctivis oportet utramque partem esse veram. In conjunctives each part ought to be true. Wing. 13.

In consimili casu consimile debet esse remedium. In similar cases the remedy should be similar. Hard. 65.

In contractibus, benigna; in testamentis, benignior; in restitutionibus, benignissima interpretatio facienda est. In contracts, the interpretation or construction should be liberal; in wills, more liberal; in restitutions, most liberal. Co. Litt. 112.

In conventibus contrahensium voluntatem potius quam verba spectari placuit. In the agreements of the contracting parties, the rule is to regard the intention rather than the words. Dig. 50, 16, 219.

In criminalibus, probationes debent esse luce clariores. In criminal cases, the proofs ought to be clearer than the light. 3 Co. Inst. 210.

In criminalibus sufficit generalis malitia intentionis cum facto paris gradus. In criminal cases a general intention is sufficient, when there is an act of equal or corresponding degree. Bacon's Max. Reg. 15.

In disjunctivis sufficit alteram partem esse veram. In disjunctives, it is sufficient if either part be true. Wing. 13.

In dubiis magis dignum est accipiendum. In doubtful cases the more worthy is to be taken. Branch's Prin. h. t.

In dubiis non praesumitur pro testamento. In doubtful cases there is no presumption in favor of the will. Cro. Car. 51.

In dubio hac legis constructio quam verba ostendunt. In a doubtful case, that is the construction of the law which the words indicate. Br. Pr. h. t.

In dubio pars melior est sequenda. In doubt, the gentler course is to be followed.

In dubio, sequendum quod tutius est. In doubt, the safer course is to be adopted.

In eo quod plus sit, semper inest et minus. The less is included in the greater. 50, 17, 110.

In facto quod se habet ad bonum et malum magis de bono quam de malo lex intendit. In a deed which may be considered good or bad, the law looks more to the good than to the bad. Co. Litt. 78.

In favorabilibus magis attenditur quod prodest quam quod nocet. In things favored what does good is more regarded than what does harm. Bac. Max. in Reg. 12.

In fictione juris, semper subsistit aequitas. In a fiction of law, equity always subsists. 11 Co. 51.

In judiciis minori aetati recurritur. In judicial proceedings, infancy is aided or favored.

In iudicio non creditur nisi juratis. In law none is credited unless he is sworn. All the facts must when established, by witnesses, be under oath or affirmation. Cro. Car. 64.

In iure non remota causa, sed proxima spectatur. In law the proximate, and not the remote cause, is to be looked to. Bacon's Max. Reg. 1.

In maiore summa continetur minor. In the greater sum is contained the less. 5 Co. 115.

In maleficio rati habitio mandato comparatur. He who ratifies a bad action is considered as having ordered it. Dig. 50, 17, 152, 2.

In mercibus illicitis non sit commercium. No commerce should be in illicit goods. 3 Kent, Com. 262, n.

In maxima potentia minima licentia. In the greater power is included the smaller license. Hob. 159.

In obscuris, quod minimum est, sequitur. In obscure cases, the milder course ought to be pursued. Dig. 50, 17, 9.

In odium spoliatoris omnia praesumuntur. All things are presumed in odium of a despoiler. 1 Vern. 19.

In omni re nascitur res qua ipsam rem exterminat. In everything, the thing is born which destroys the thing itself. 2 Co. Inst. 15.

In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur. In every contract, whether nominate or innominate, there is implied a consideration.

In omnibus quidem, maxime tamen in jure, aequitas spectanda sit. In all affairs, and principally in those

which concern the administration of justice, the rules of equity ought to be followed. Dig. 50, 17, 90.

In omnibus obligationibus, in quibus dies non ponitur, presentis die debetur. In all obligations when no time is fixed for the payment, the thing is due immediately. Dig. 50, 17, 14.

In presentia majoris potestatis, minor potestas cessat. In the presence of the superior power, the minor power ceases. Jenk. Cent. 214.

In pari causa possessor potior haberi debet. When two parties have equal rights, the advantage is always in favor of the possessor. Dig. 50, 17, 128.

In pari causa possessor potior est. In an equal case, better is the condition of the possessor. Dig. 50, 17, 128; Poth. Vente, n. 320; 1 Bouv. Inst. n. 952.

In pari delicto melior est conditio possidentis. When the parties are equally in the wrong, the condition of the possessor is better. 11 Wheat. 258; 3 Cranch, 244; Cowp. 341; Broom's Max. 325; 4 Bouv. Inst. n. 3724.

In propria causa nemo iudex. No one can be judge in his own cause.

In quo quis delinquit, in eo de jure est puniendus. In whatever thing one offends, in that he is rightfully to be punished. Co. Litt. 233.

In re propria iniquum admodum est alicui licentiam tribuere sententie. It is extremely unjust that any one should be judge in his own cause.

In re dubia magis inficiatio quam affirmatio intelligenda. In a doubtful matter, the negative is to be understood rather than the affirmative. Godb. 37.

In republica maxime conservanda sunt jura belli. In the state the laws of war are to be greatly preserved. 2 Co. Inst. 58.

In restitutionem, non in penam heres succedit. The heir succeeds to the restitution not the penalty. 2 Co. Inst. 198.

In restitutionibus benignissima interpretatio facienda est. The most favorable construction is made in restitutions. Co. Litt. 112.

In suo quisque negotio habetior est quam in alieno. Every one is more dull in his own business than in that of another. Co. Litt. 377.

In toto et pars continetur. A part is included in the whole. Dig. 50, 17, 113.

In traditionibus scriptorum non quod dictum est, sed quod gestum est, inspicitur. In the delivery of writing, not what is said, but what is done is to be considered. 9 Co. 137.

Incerta pro nullius habentur. Things uncertain are held for nothing. Dav. 33.

Incerta quantitas vitiat actum. An uncertain quantity vitiates the act. 1 Roll. R. 465.

In civile est nisi tota sententia inspecta, de aliqua parte judicare. It is improper to pass an opinion on any part of a sentence, without examining the whole. Hob. 171.

Inclusio unius est exclusio alterius. The inclusion of one is the exclusion of another. 11 Co. 58.

Incommodum non solvit argumentum. An inconvenience does not solve an argument.

Indefinitum aequipolet universali. The undefined is equivalent to the whole. 1 Vent. 368.

Indefinitum supplet locum universalis. The undefined supplies the place of the whole. Br. Pr. h. t.

Independenter se habet assicuratio a viaggio navis. The voyage insured is an independent or distinct thing from the voyage of the ship. 3 Kent, Com. 318, n.

Index animi sermo. Speech is the index of the mind.

Inesse potest donationi, modus, conditio sive causa; ut modus est; si conditio; quia causa. In a gift there may be manner, condition and cause; as, (ut), introduces a manner; if, (si), a condition; because, (quia), a cause. Dy. 138.

Infinium in jure reprobatum. That which is infinite or endless is reprehensible in law. 9 Co. 45.

Iniquum est alios permittere, alios inhibere mercaturam. It is inequitable to permit some to trade, and to prohibit others. 8 Co. Inst. 181.

Iniquum est aliquem rei sui esse judicem. It is against equity for any one to be judge in his own cause. 12 Co. 13.

Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem. It is against equity to deprive freemen of the free disposal of their own property. Co. Litt. 223. See 1 Bouv. Inst. n. 455, 460.

Injuria non presumitur. A wrong is not presumed. Co. Litt. 232.

Injuria propria non cadet in beneficium facientis. One's own wrong shall not benefit the person doing it.

Injuria fit ei cui convicium dictum est, vel de eo factum carmen famosum. It is a slander of him of whom a reproachful thing is said, or concerning whom an infamous song is made. 9 Co. 60.

Intentio ceca, mala. A hidden intention is bad. 2 Buls. 179.

Intentio inservire debet legibus, non leges intentioni. Intentions ought to be subservient to the laws, not the laws to intentions. Co. Litt. 314.

Intentio mea imponit nomen operi meo. My intent gives a name to my act. Hob. 123.

Interest reipublice ne maleficia remaneant impunita. It concerns the commonwealth that crimes do not remain unpunished. Jenk. Cent. 30, 31.

Interest reipublice res judicatas non rescindi. It concerns the commonwealth that things adjudged be not rescinded. Vide Res judicata.

Interest reipublica quod homines conserventur. It concerns the commonwealth that we be preserved. 12 Co. 62.

Interest reipublica ut qualibet re sua bene utatur. It concerns the commonwealth that every one use his property properly. 6 Co. 37.

Interest reipublica ut carceres sint in tuto. It concerns the commonwealth that prisons be secure. 2 Co. Inst. 589.

Interest reipublica suprema hominum testamenta rata haberi. It concerns the commonwealth that men's last wills be sustained. Co. Litt. 236.

Interest reipublica ut sit finis litium. It concerns the commonwealth that there be an end of law suits. Co. Litt. 303.

Interpretare et concordare leges legibus est optimus interpretandi modus. To interpret and reconcile laws so that they harmonize is the best mode of construction. 8 Co. 169.

Interpretatio stenda est ut res magis valeat quam pereat. That construction is to be made so that the subject may have an effect rather than none. Jenk. Cent. 198.

Interpretatio talis in ambiguis semper stenda, ut evitetur inconueniens et absurdum. In ambiguous things, such a construction is to be made, that what is inconvenient and absurd is to be avoided. 4 Co. Inst. 328.

Interruptio multiplex non tollit prescriptionem semel oblatam. Repeated interruptions do not defeat a prescription once obtained. 2 Co. Inst. 654.

Inutilis labor, et sine fructu, non est effectus legis. Useless labor and without fruit, is not the effect of law. Co. Litt. 127.

Inuito beneficium non datur. No one is obliged to accept a benefit against his consent. Dig. 50, 17, 69. But if he does not dissent he will be considered as assenting. Vide *Assenti*.

Ipsa legis cupiunt ut jure regantur. The laws themselves require that they should be governed by right. Co. Litt. 174.

Judex ante oculos aequitatem semper habere debet. A judge ought always to have equity before his eyes. Jenk. Cent. 58.

Judex aequitatem semper spectare debet. A judge ought always to regard equity. Jenk. Cent. 45.

Judex bonus nihil ex arbitrio suo faciat, nec propositione domestica voluntatis, sed juxta legis et jura pronunciet. A good judge should do nothing from his own judgment, or from the dictates of his private wishes; but he should pronounce according to law and justice. 7 Co. 27.

Judex debet judicare secundum allegata et probata. The judge ought to decide according to the allegation and the proof.

Judex est lex loquens. The judge is the speaking law. 7 Co. 4.

Judex non potest esse testis in propria causa. A judge cannot be a witness in his own cause. 4 Co. Inst. 279.

Judex non potest injuriam sibi datum punire. A judge cannot punish a wrong done to himself. 12 Co. 113.

Judex damnatur cum nocens absolvitur. The judge is condemned when the guilty are acquitted.

Judex non reddat plus quam quod petens ipse requirit. The judge does demand more than the plaintiff demands. 2 Inst. 286.

Judici officium suum excedenti non paretur. To a judge who exceeds his office or jurisdiction no obedience is due. Jenk. Cent. 139.

Judici satis pena est quod Deum habet ultorem. It is punishment enough for a judge that he is responsible to God. 1 Leon. 295.

Judicia in deliberationibus crebro maturescunt, in accelerato processu nunquam. Judgments frequently become matured by deliberation, never by hurried process. 3 Co. Inst. 210.

Judicia posteriora sunt in lege fortiora. The latter decisions are stronger in law. 8 Co. 97.

Judicia sunt tanquam juris dicta, et pro veritate accipiuntur. Judgments are, as it were, the dicta or sayings of the law, and are received as truth. 2 Co. Inst. 573.

Judiciis posterioribus fides est adhibenda. Faith or credit is to be given to the last decisions. 13 Co. 14.

Judicis est in pronuntiando sequi regulam, exceptione non probata. The judge in his decision ought to follow the rule, when the exception is not made apparent.

Judicis est judicare secundum allegata et probata. A judge ought to decide according to the allegations and proofs. Dyer, 12.

Judicium a non suo jadicе datum nullius est momenti. A judgment given by an improper judge is of no moment. 11 Co. 76.

Judicium non debet esse illusorium, suum effectum habere debet. A judgment ought not to be illusory, it ought to have its consequence. 2 Inst. 341.

Judicium redditur in invitum, in presumptione legis. In presumption of law, a judgment is given against inclination. Co. Litt. 248.

Judicium semper pro veritate accipitur. A judgment is always taken for truth. 2 Co. Inst. 380.

Jura sanguinis nullo jure civili dirimi possunt. The right of blood and kindred cannot be destroyed by any civil law. Dig. 50, 17, 9; Bacon's Max. Reg. 11.

Jura natura sunt immutabilia. The laws of nature are unchangeable.

Jura eodem modo destruuntur quo constituuntur. Laws are abrogated or repealed by the same means by which they are made.

Juramentum est indivisibile, et non est admittendum in parte verum et in parte falsam. An oath is indivisible, it cannot be in part true and in part false.

Jurato creditur in judicio. He who makes oath is to be believed in judgment.

Jurare est Deum in testum vocare, et est actus divini cultus. To swear is to call God to witness, and is an act of religion. 3 Co. Inst. 165. Vide 3 Bouv. Inst. n. 3180, note; 1 Benth. Rat. of Jud. Ev. 376, 371, note.

Juratores sunt judices facti. Juries are the judges of the facts. Jenk. Cent. 58.

Juris effectus in executione consistit. The effect of a law consists in the execution. Co. Litt. 289.

Jus accrescendi inter mercatores locum non habet, pro beneficio commercii. The right of survivorship does not exist among merchants for the benefit of commerce. Co. Litt. 182; 1 Bouv. Inst. n. 682.

Jus accrescendi preferitur oneribus. The right of survivorship is preferred to incumbrances. Co. Litt. 185.

Jus accrescendi preferitur ultimæ voluntati. The right of survivorship is preferred to a last will. Co. Litt. 185b.

Jus descendit et non terra. A right descends, not the land. Co. Litt. 345.

Jus est ars boni et aequi. Law is the science of what is good and evil. Dig. 1, 1, 1, 1.

Jus et fraudem nunquam cohabitant. Right and fraud never go together.

Jus ex injuria non oritur. A right cannot arise from a wrong. 4 Bing. 639.

Jus publicum privatorum pactis mutari non potest. A public right cannot be changed by private agreement.

Jus respicit aequitatem. Law regards equity. Co. Litt. 24.

Jus superveniens auctori accessit successori. A right growing to a possessor accrues to a successor.

Justitia est virtus excellens et altissimo complacens. Justice is an excellent virtue and pleasing to the Most High. 4 Inst. 58.

Justitia nemine neganda est. Justice is not to be denied. Jenk. Cent. 178.

Justitia non est neganda, non differenda. Justice is not to be denied nor delayed. Jenk. Cent. 93.

Justitia non novit patrem nec matrem, solum veritatem spectat justitia. Justice knows neither father nor mother, justice looks to truth alone. 1 Buls. 199.

La conscience est la plus changeante des regles. Conscience is the most changeable of rules.

Lata culpa dolo æquiparatur. Gross negligence is equal to fraud.

Le contrat fait la loi. The contract makes the law.

Legatos violare contra jus gentium est. It is contrary to the law of nations to violate the rights of ambassadors.

Legatum morte testatoris tantum confirmatur, sicut donatio inter vivos traditione solâ. A legacy is confirmed by the death of the testator, in the same manner as a gift from a living person is by delivery alone. Dyer, 143.

Leges posteriores priores contrarias abrogant. Subsequent laws repeal those before enacted to the contrary. 2 Rol. R. 410; 11 Co. 626, 630.

Leges humana nascuntur, vivunt et moriuntur. Human laws are born, live and die. 7 Co. 25.

Leges non verbis sed rebus sunt impositæ. Laws, not words, are imposed on things. 10 Co. 101.

Legibus sumptis disinentibus, lege naturæ utendum est. When laws imposed by the state fail, we must act by the law of nature. 2 Roll. R. 298.

Legis constructio non facit injuriam. The construction of law does no wrong. Co. Litt. 183.

Legis figendi et refigendi consuetudo periculosissima est. The custom of fixing and refixing (making and annulling) laws is most dangerous. 4 Co. Ad. Lect.

Legis interpretatio legis vim obtinet. The construction of law obtains the force of law.

Legislatorum est viva vox, rebus et non verbis, legem imponere. The voice of legislators is a living voice, to impose laws on things and not on words. 10 Co. 101.

Legis minister non tenetur, in executione officii sui fugere aut retrocedere. The minister of the law is not bound, in the execution of his office, neither to fly nor retreat. 6 Co. 68.

Legitime imperanti parere necesse est. One who commands lawfully must be obeyed. Jenk. Cent. 120.

Les fictions naissent de la loi, et non la loi des fictions. Fictions arise from the law, and not law from fictions.

Lex aliquando sequitur æquitatem. The law sometimes follows equity. 3 Wils. 119.

Lex æquitate gaudet; appetit perfectum; est norma recti. The law delights in equity; it covets perfection; it is a rule of right. Jenk. Cent. 36.

Lex beneficiæ rei consimili remedium præstat. A beneficial law affords a remedy in a similar case. 2 Co. Inst. 689.

Lex citius tolerare vult privatum damnum quam publicum malum. The law would rather tolerate a private wrong than a public evil. Co. Litt. 152.

Lex de futuro, judex de præterito. The law provides for the future, the judge for the past.

Lex deficere non potest in justitiâ exhibendâ. The law ought not to fail in dispensing justice. Co. Litt. 197.

Lex dilaciones semper exhorret. The law always abhors delay. 2 Co. Inst. 240.

Lex est ab æterno. The law is from everlasting.

Lex est dictamen rationis. Law is the dictate of reason. Jenk. Cent. 117.

Lex est norma recti. Law is a rule of right.

Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet. Law is the perfection of reason, which commands what is useful and necessary and forbids the contrary. Co. Litt. 319.

Lex est sanctio sancta, jubens honesta, et prohibens contraria. Law is a sacred sanction, commanding what is right and prohibiting the contrary. 2 Co. Inst. 587.

Lex favet doli. The law favors dower.

Lex fingit ubi subsistit æquitas. Law feigns where equity subsists. 11 Co. 90.

Lex intendit vicinum vicini facta scire. The law presumes that one neighbor knows the actions of another. Co. Litt. 78.

Lex judicat de rebus necessario faciendis quæ ipse facit. The law judges of things which must necessarily be done, as if actually done.

Lex necessitatis est lex temporis, i. e. instantis. The law of necessity is the law of time, that is, time present. Hob. 159.

Lex neminem cogit ad vana seu inutilia peragenda. The law forces no one to do vain or useless things.

Lex nemini facit injuriam. The law does wrong to no one.

Lex nemini operatur iniquum, nemini facit injuriam. The law never works an injury, or does him a wrong. Jenk. Cent. 22.

Lex nil facit frustra, nil jubet frustra. The law does nothing and commands nothing in vain. 3 Buls. 279; Jenk. Cent. 17.

Lex non cogit impossibilia. The law requires nothing impossible. Co. Litt. 231, b; 1 Bouv. Inst. n. 951.

Lex non curat de minimis. The law does not regard small matters. Hob. 88.

Lex non cogit ad impossibilia. The law forces not to impossibilities. Hob. 96.

Lex non præcipit inutilia, quia inutilis labor stultus. The law commands not useless things, because useless labor is foolish. Co. Litt. 197.

Lex non deficit in justitiâ exhibenda. The law does not fail in showing justice.

Lex non intendit aliquid impossibile. The law intends not anything impossible. 12 Co. 89.

Lex non requirit verificare quod apparet curiæ. The law does not require that to be proved, which is apparent to the court. 9 Co. 54.

Lex plus laudatur quando ratione probatur. The law is the more praised when it is consonant to reason.

Lex prospicit, non respicit. The law looks forward, not backward.

Lex punit mendacium. The law punishes falsehood.

Lex rejicit superflua, pugnantia, incongrua. The law rejects superfluous, contradictory and incongruous things.

Lex reprobât moram. The law dislikes delay.

Lex semper dabit remedium. The law always gives a remedy. 3 Bouv. Inst. n. 2411.

Lex spectat naturæ ordinem. The law regards the order of nature. Co. Litt. 197.

Lex succurrit ignorantibus. The laws succor the ignorant.

Lex semper intendit quod convenit ratione. The law always intends what is agreeable to reason. Co. Litt. 78.

Lex uno ore omnes alloquitur. The law speaks to all with one mouth. 2 Inst. 184.

Libertas inestimabilis res est. Liberty is an inestimable good. Dig. 50, 17, 106.

Libertus corpus æstimationem non recipit. The body of a freeman does not admit of valuation.

Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ fortius

effectum interveniente novo actu. Although the grant of a future interest be inoperative, yet a declaration precedent may be made, which may take effect, provided a new act intervene. Bacon's Max. Reg. 14.

Licita bene miscentur, formula nisi juris obstat. Things permitted should be well contrived, lest the form of the law oppose. Bacon's Max. Reg. 24.

Linea recta semper praeferitur transversali. The right line is always preferred to the collateral. Co. Litt. 10.

Locus contractus regit actum. The place of the contract governs the act.

Longa possessio est pacis jus. Long possession is the law of peace. Co. Litt. 6.

Longa possessio parit jus possidendi, et tollit actionem vero domino. Long possession produces the right of possession, and takes away from the true owner his action. Co. Litt. 110.

Longum tempus, et longus usus qui excedit memoria hominum, sufficit pro jure. Long time and long use, beyond the memory of man, suffices for right. Co. Litt. 115.

Loquendum ut vulgus, sentiendum ut docti. We speak as the common people, we must think as the learned. 7 Co. 11.

Magister rerum usus; magistra rerum experientia. Use is the master of things; experience is the mistress of things. Co. Litt. 69, 229.

Magna negligentia culpa est, magna culpa dolus est. Gross negligence is a fault, gross fault is a fraud. Dig. 50, 16, 226.

Magna culpa dolus est. Great neglect is equivalent to fraud. Dig. 50, 16, 226; 2 Spears, R. 256; 1 Bouv. Inst. n. 646.

Maheum est inter crimina majora minimum, et inter minora maximum. Mayhem is the least of great crimes, and the greatest of small. Co. Litt. 127.

Maheum est homicidium inchoatum. Mayhem is incipient homicide. 3 Inst. 118.

Major hereditas venit unicuique nostrum a jure et legibus quam a parentibus. A greater inheritance comes to every one of us from right and the laws than from parents. 2 Co. Inst. 56.

Major numerus in se continet minorem. The greater number contains in itself the less.

Major pars affectus quam legibus statuta est, non est infamia. One affected with a greater punishment than is provided by law, is not infamous. 4 Co. Inst. 66.

Majori continet in se minus. The greater includes the less. 19 Vin. Abr. 379.

Majus dignum trahit in se minus dignum. The more worthy or the greater draws to it the less worthy or the lesser. 5 Vin. Abr. 584, 586.

Majus est delictum seipsum occidere quam alium. It is a greater crime to kill one's self than another.

Mala grammatica non vitiant chartam; sed in expositione instrumentorum mala grammatica quoad fieri possit vitanda est. Bad grammar does not vitiate a deed; but in the construction of instruments, bad grammar, as far as it can be done, is to be avoided. 6 Co. 39.

Maledicta est expositio quae corrumpit textum. It is a bad construction which corrupts the text. 4 Co. 35.

Maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinquenti.

Evil deeds ought not to remain unpunished, for impunity affords continual excitement to the delinquent. 4 Co. 45.

Malificia propositus distinguuntur. Evil deeds are distinguished from evil purposes. Jenk. Cent. 290.

Malitia est acida, est mali animi affectus. Malice is sour, it is the quality of a bad mind. 2 Buls. 49.

Malitia supplet aetatem. Malice supplies age. Dyer, 104. See *Malice*.

Malum hominum est obviandum. The malice of men is to be avoided. 4 Co. 15.

Malum non praesumitur. Evil is not presumed. 4 Co. 72.

Malum quo communius eo pejus. The more common the evil, the worse.

Malus usus est abolendus. An evil custom is to be abolished. Co. Litt. 141.

Mandata licita recipiunt strictam interpretationem, sed illicita lata et extensam. Lawful commands receive a strict interpretation, but unlawful, a wide or broad construction. Bacon's Max. Reg. 16.

Mandatarius terminos sibi positos transgredi non potest. A mandatarary cannot exceed the bounds of his authority. Jenk. Cent. 53.

Mandatum nisi gratuitum nullum est. Unless a mandate is gratuitous it is not a mandate. Dig. 17, 1, 4; Inst. 3, 27; 1 Bouv. Inst. n. 1070.

Manifesta probatione non indigent. Manifest things require no proof. 7 Co. 40.

Maris et feminae conjunctio est de jure natura. The union of husband and wife is founded on the law of nature. 7 Co. 13.

Matrimonia debent esse libera. Marriages ought to be free.

Matrimonium subsequens tollit peccatum praecedens. A subsequent marriage cures preceding criminality.

Maxime ita dicta quia maxima ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur. A maxim is so called because its dignity is chiefest, and its authority the most certain, and because universally approved by all. Co. Litt. 11.

Maxime paci sunt contraria, vis et injuria. The greatest enemies to peace are force and wrong. Co. Litt. 161.

Melior est justitia vere praeveniens quam severe puniens. That justice which justly prevents a crime, is better than that which severely punishes it.

Melior est conditio possidentis et rei quam actoris. Better is the condition of the possessor and that of the defendant than that of the plaintiff. 4 Co. Inst. 180.

Melior est causa possidentis. The cause of the possessor is preferable. Dig. 50, 17, 126, 2.

Melior est conditio possidentis, ubi neuter jus habet. Better is the condition of the possessor, where neither of the two has a right. Jenk. Cent. 118.

Meliores conditionem suam facere potest minor, deteriorem nequaquam. A minor can improve or make his condition better, but never worse. Co. Litt. 337.

Melius est omnia mala pati quam malo consentire. It is better to suffer every wrong or ill, than to consent to it. 3 Co. Inst. 23.

Melius est recurrere quam malo currere. It is better to recede than to proceed in evil. 4 Inst. 176.

Melius est in tempore occurrere, quam post causam

vulneratum remedium querere. It is better to restrain or meet a thing in time, than to seek a remedy after a wrong has been inflicted. 2 Inst. 299.

Mens testatoris in testamentis spectanda est. In wills, the intention of the testator is to be regarded. Jenk. Cent. 277.

Mentiri est contra mentem ire. To lie is to go against the mind. 8 Buls. 260.

Merx est quicquid vendi potest. Merchandise is whatever can be sold. 3 Metc. 365. Vide *Merchandise*.

Mercis appellatio ad res mobiles tantum pertinet. The term merchandise belongs to movable things only. Dig. 50, 16, 66.

Minima pena corporalis est major qualibet pecuniaria. The smallest bodily punishment is greater than any pecuniary one. 2 Inst. 220.

Minime mutanda sunt quae certum habuerint interpretationem. Things which have had a certain interpretation are to be altered as little as possible. Co. Litt. 365.

Minor ante tempus agere non potest in casu proprietatis, nec etiam convenire. A minor before majority cannot act in a case of property, nor even agree. 2 Inst. 291.

Minor minorem custodire non debet, alios enim presumitur male regere qui seipsum regere nescit. A minor ought not to be guardian of a minor, for he is unfit to govern others who does not know how to govern himself. Co. Litt. 88.

Miseria est servitus, ubi jus est vagum aut incertum. It is a miserable slavery where the law is vague or uncertain. 4 Co. Inst. 246.

Militis imperanti melius paretur. The more mildly one commands the better is he obeyed. 3 Co. Inst. 24.

Mobilia personam sequuntur, immobilia situm. Movable things follow the person, immovable their locality.

Modica circumstantia facti jus mutat. The smallest circumstance may change the law.

Modus et conventio vincunt legem. Manner and agreement overrule the law. 2 Co. 73.

Modus legem dat donationi. The manner gives law to a gift. Co. Litt. 19 a.

Moneta est justum medium et mensura rerum commutabilium, nam per medium moneta fit omnium rerum conveniens, et justa estimatio. Money is the just medium and measure of all commutable things, for, by the medium of money, a convenient and just estimation of all things is made. Dav. 18. See 1 Bouv. Inst. n. 922.

Mora reprobat in lege. Delay is disapproved of in law.

Mors dicitur ultimum supplicium. Death is denominated the extreme penalty. 3 Inst. 212.

Mors omnia solvit. Death dissolves all things.

Mortuus citius non est exitus. To be dead born is not to be born. Co. Litt. 29. See 2 Paige, 35; Domat, liv. pré. t. 2, s. 1, n. 4, 6; 2 Bouv. Inst. n. 1721 and 1935.

Multa conceduntur per obliquum quae non conceduntur de directo. Many things are conceded indirectly which are not allowed directly. 6 Co. 47.

Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt. Many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason. Co. Litt. 70; Broom's

Max. 67; 2 Co. R. 75. See 3 T. R. 146; 7 T. R. 252.

Multa multo exercitatione facilius quam regulis percipies. You will perceive many things more easily by practice than by rules. 4 Co. Inst. 50.

Mulla non velat lex, quae tamen tacite damnavit. The law forbids many things, which yet it has silently condemned.

Mulla transeunt cum universitate quae non per se transeunt. Many things pass as a whole which would not pass separately.

Mulli mulla, non omnia novit. Many men know many things, no one knows everything. 4 Co. Inst. 348.

Multiplex et indistinctum parit confusionem; et quaestiones quo simpliciores, eo lucidiores. Multiplicity and indistinctness produce confusion; the more simple questions are the more lucid. Hob. 335.

Multiplicitas transgressionis crescat parva infictio. The increase of punishment should be in proportion to the increase of crime. 2 Co. Inst. 479.

Multitudo errantium non parit errori patrocinium. The multitude of those who err is no excuse for error. 11 Co. 75.

Multitudo imperitorum perdit curiam. A multitude of ignorant practitioners destroys a court. 2 Co. Inst. 219.

Natura appetit perfectum, ita et lex. Nature aspires to perfection, and so does the law. Hob. 144.

Natura non facit saltum, ita nec lex. Nature makes no leap, nor does the law. Co. Litt. 238.

Natura non facit vacuum, nec lex supervacuum. Nature makes no vacuum, the law no supervacuum. Co. Litt. 79.

Natura vis maxima, natura bis maxima. The force of nature is greatest; nature is doubly great. 2 Co. Inst. 564.

Necessarium est quod non potest aliter se habere. That is necessary which cannot be dispensed with.

Necessitas est lex temporis et loci. Necessity is the law of a particular time and place. 8 Co. 69; H. H. P. C. 54.

Necessitas excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. Necessity excuses or extenuates delinquency in capital cases, but not in civil. Vide *Necessity*.

Necessitas facit licitum quod alias non est licitum. Necessity makes that lawful which otherwise is unlawful. 10 Co. 61.

Necessitas inducit privilegium quoad jura privata. Necessity gives a preference with regard to private rights. Bacon's Max. Reg. 5.

Necessitas non habet legem. Necessity has no law. Plowd. 18. See *Necessity*, and 15 Vin. Ab. 534; 22 Vin. Ab. 540.

Necessitas publica major est quam privata. Public necessity is greater than private. Bacon's Max. in Reg. 5.

Necessitas quod cogit, defendit. Necessity defends what it compels. H. H. P. C. 54.

Necessitas vincit legem. Necessity overcomes the law. Hob. 144.

Negatio conclusionis est error in lege. The negative of a conclusion is error in law. Wing. 268.

Negatio destruit negationem, et amba faciunt affirmativum. A negative destroys a negative, and both make an affirmative. Co. Litt. 146.

Negatio duplex est affirmatio. A double negative is an affirmative.

Negligentia semper habet infortuniam comitem. Negligence has misfortune for a companion. Co. Litt. 246.

Neminem oportet esse sapientiores legibus. No man ought to be wiser than the law. Co. Litt. 97.

Nemo admittendus est inhabilitare seipsum. No one is allowed to incapacitate himself. Jenk. Cent. 40. Sed vide *To stultify*, and 5 Whart. 371.

Nemo agit in seipsum. No man acts against himself; Jenk. Cent. 40; therefore no man can be a judge in his own cause.

Nemo allegans suam turpitudinem, audiendus est. No one alleging his own turpitude is to be heard as a witness. 4 Inst. 279.

Nemo bis puniatur pro eodem delicto. No one can be punished twice for the same crime or misdemeanor. See *Non bis in idem*.

Nemo cogitur rem suam vendere, etiam justo pretio. No one is bound to sell his property, even for a just price. Sed vide *Eminent Domain*.

Nemo contra factum suum venire potest. No man can contradict his own deed. 2 Inst. 66.

Nemo damnum facit, nisi qui id fecit quod facere jus non habet. No one is considered as committing damages, unless he is doing what he has no right to do. Dig. 50, 17, 151.

Nemo dat qui non habet. No one can give who does not possess. Jenk. Cent. 250.

Nemo de domo sua extrahi debet. A citizen cannot be taken by force from his house to be conducted before a judge or to prison. Dig. 50, 17, 103. This maxim in favor of Roman liberty is much the same as that every man's house is his castle.

Nemo debet bis puniri pro uno delicto. No one ought to be punished twice for the same offence. 4 Co. 43.

Nemo debet esse iudex in propria causa. No one should be judge in his own cause. 12 Co. 113.

Nemo debet ex aliena jactura lucrari. No one ought to gain by another's loss.

Nemo debet immiscere se rei alienae ad se nihil pertinenti. No one should interfere in what no way concerns him.

Nemo debet rem suam sine facto aut defectu suo amittere. No one should lose his property without his act or negligence. Co. Litt. 263.

Nemo est heres viventes. No one is an heir to the living. 2 Bl. Com. 107; 1 Vin. Ab. 104, tit. Abeyance; Merl. Rép. verbo Abeyance; Co. Litt. 342; 2 Bouv. Inst. n. 1694, 1832.

Nemo ex suo delicto meliorem suam conditionem facere potest. No one can improve his condition by a crime. Dig. 50, 17, 137.

Nemo ex alterius facto praegravari debet. No man ought to be burdened in consequence of another's act.

Nemo ex consilio obligatur. No man is bound for the advice he gives.

Nemo in propria causa testis esse debet. No one can be a witness in his own cause. But to this rule there are many exceptions.

Nemo inauditus condemnari debet, si non sit contumax. No man ought to be condemned unheard, unless he be contumacious.

Nemo nascitur artifex. No one is born an artist. Co. Litt. 97.

Nemo patriam in qua natus est exuere, nec lige-

antia debitum ejurare possit. No man can renounce the country in which he was born, nor abjure the obligation of his allegiance. Co. Litt. 129. Sed vide *Allegiance*; *Expatriation*; *Naturalization*.

Nemo plus iuris ad alienum transferre potest, quam ipse habet. One cannot transfer to another a right which he has not. Dig. 50, 17, 54; 10 Pet. 161, 175.

Nemo præsens nisi intelligat. One is not present unless he understands. See *Presence*.

Nemo potest contra recordum verificare per patriam. No one can verify by the country against a record. The issue upon a record cannot be tried by a jury.

Nemo potest esse tenens et dominus. No man can be at the same time tenant and landlord of the same tenement.

Nemo potest facere per alium quod per se non potest. No one can do that by another which he cannot do by himself.

Nemo potest sibi debere. No one can owe to himself. See *Confusion of rights*.

Nemo præsuntur alienam posteritatem sua prætulisse. No one is presumed to have preferred another's posterity to his own.

Nemo præsuntur donare. No one is presumed to give.

Nemo præsuntur esse immemor suae aeternae salutis, et maxime in articulo mortis. No man is presumed to be forgetful of his eternal welfare, and particularly at the point of death. 6 Co. 76.

Nemo præsuntur malus. No one is presumed to be bad.

Nemo præsuntur ludere in extremis. No one is presumed to trifle at the point of death.

Nemo prohibetur plures negotiationibus uti. No one is restrained from exercising several kinds of business or arts. 11 Co. 54.

Nemo prohibetur pluribus defensionibus uti. No one is restrained from using several defences. Co. Litt. 304.

Nemo prudens punit ut præterita revocentur, sed ut futura preveniantur. No wise one punishes that things done may be revoked, but that future wrongs may be prevented. 3 Buls. 173.

Nemo puniatur pro alieno delicto. No one is to be punished for the crime or wrong of another.

Nemo puniatur sine injuria, facto, seu defaulto. No one is punished unless for some wrong, act or default. 2 Co. Inst. 287.

Nemo, qui condemnare potest, absolvere non potest. He who may condemn may acquit. Dig. 50, 17, 37.

Nemo tenetur seipsum accusare. No one is bound to accuse himself.

Nemo tenetur ad impossibile. No one is bound to an impossibility.

Nemo tenetur armare adversarium contra se. No one is bound to arm his adversary.

Nemo tenetur divinare. No one is bound to foretell. 4 Co. 28.

Nemo tenetur informare qui nescit, sed quisquis scire quod informat. No one is bound to inform about a thing he knows not, but he who gives information is bound to know what he says. Lane, 110.

Nemo tenetur jurare in suam turpitudinem. No one is bound to testify to his own baseness.

Nemo tenetur seipsam infortunis et periculis exponere. No one is bound to expose himself to misfortune and dangers. Co. Litt. 253.

Nemo tenetur seipsum accusare. No man is bound to accuse himself.

Nemo videtur fraudare eos qui sciunt, et consentiunt. One cannot complain of having been deceived when he knew the fact and gave his consent. Dig. 50, 17, 145.

Nihil dat qui non habet. He gives nothing who has nothing.

Nihil de re accrescit ei qui nihil in re quando jus accresceret habet. Nothing accrues to him, who, when the right accrues, has nothing in the subject matter. Co. Litt. 188.

Nihil facit error nominis cum de corpore constat. An error in the name is nothing when there is certainty as to the person. 11 Co. 21.

Nihil habet forum ex scind. The court has nothing to do with what is not before it.

Nihil infra regnum subditos magis conservat in tranquillitate et concordia quam debita legum administratio. Nothing preserves in tranquillity and concord those who are subjected to the same government better than a due administration of the laws. 2 Co. Inst. 158.

Nihil in lege intolerabilius est, eandem rem diverso jure censi. Nothing in law is more intolerable than to apply the law differently to the same cases. 4 Co. 93.

Nihil magis justum est quam quod necessarium est. Nothing is more just than what is necessary. Dav. 12.

Nihil perfectum est dum aliquid restat agendum. Nothing is perfect while something remains to be done. 9 Co. 9.

Nihil possumus contra veritatem. We can do nothing against truth. Doct. & Stu. Dial. 2, c. 6.

Nihil quod est contra rationem est licitum. Nothing against reason is lawful. Co. Litt. 97.

Nihil quod inconveniens est licitum est. Nothing inconvenient is lawful.

Nihil simul inventum est et perfectum. Nothing is invented and perfected at the same moment. Co. Litt. 230.

Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est. It is very natural that an obligation should not be dissolved but by the same principles which were observed in contracting it. Dig. 50, 17, 35. See 1 Co. 100; 2 Co. Inst. 359.

Nihil tam conveniens est naturali equitati, quam voluntatem domini voluntis rem suam in alium transferre, ratam haberi. Nothing is more conformable to natural equity, than to confirm the will of an owner who desires to transfer his property to another. Inst. 2, 1, 40; 1 Co. 100.

Nil tamere novandum. Nothing should be rashly changed. Jenk. Cent. 163.

Nil facit error nominis, si de corpore constat. An error in the name is immaterial, if the body is certain.

Nimia subtilitas in jure reprobat. Too much subtlety is reprobat in law.

Nimium altercando veritas amittitur. By too much altercation truth is lost. Hob. 344.

No man is presumed to do anything against nature. 22 Vin. Ab. 154.

No man shall take by deed but parties, unless in remainder.

No man can hold the same land immediately of two several landlords. Co. Litt. 152.

No man shall set up his infamy as a defence. 2 W. Bl. 364

Necessity creates equity.

No one may be judge in his own cause.

Nobiliores et benigniores presumptiones in dubiis sunt praeferendae. When doubts arise the most generous and benign presumptions are to be preferred.

Nomen est quasi rei notamen. A name is, as it were, the note of a thing. 11 Co. 20.

Nomen non sufficit si res non sit de jure aut de facto. A name does not suffice if there be not a thing by law or by fact. 4 Co. 107.

Nomina si nescit perit cognitio rerum. If you know not the names of things, the knowledge of things themselves perishes. Co. Litt. 86.

Nomina sunt nota rerum. Names are the notes of things. 11 Co. 20.

Nomina sunt mutabilia, res autem immobiles. Names are mutable, but things immutable. 6 Co. 66.

Nomina sunt symbola rerum. Names are the symbols of things.

Non accipi debent verba in demonstrationem falsam, quae competunt in limitationem veram. Words ought not to be accepted to import a false demonstration which have effect by way of true limitation. Bacon's Max. Reg. 13.

Non alio modo puniatur aliquis, quam secundum quod se habet condemnatio. A person may not be punished differently than according to what the sentence enjoins. 3 Co. Inst. 217.

Non concedantur citationes priusquam exprimat super qua ne fieri debet citatio. Summonses or citations should not be granted before it is expressed under the circumstances whether the summons ought to be made. 12 Co. 47.

Non audire perire volens. One who wishes to perish ought not to be heard. Best on Evidence, § 385.

Non consentit qui errat. He who errs does not consent. 1 Bouv. Inst. n. 581.

Non debet, cui plus licet, quod minus est, non licere. He who is permitted to do the greater, may with greater reason do the less. Dig. 50, 17, 21.

Non decipitur qui scit se decipi. He is not deceived who knows himself to be deceived. 5 Co. 60.

Non definitur in jure quid sit conatus. What an attempt is, is not defined in law. 6 Co. 42.

Non differunt quae concordant re, tametsi non in verbis iisdem. Those things which agree in substance though not in the same words, do not differ. Jenk. Cent. 70.

Non efficit affectus nisi sequatur effectus. The intention amounts to nothing unless some effect follows. 1 Roll. R. 226.

Non est artius vinculum inter homines quam iuramentum. There is no stronger link among men than an oath. Jenk. Cent. 126.

Non est disputandum contra principia negantem. There is no disputing against a man denying principles. Co. Litt. 343.

Non est recedendum a communi observantia. There is no departing from a common observance. 2 Co. 74.

Non est regula quin fallat. There is no rule but what may fail. Off. Ex. 212.

Non est certandum de regulis juris. There is no disputing about rules of law.

Non faciat malum, ut inde veniat bonum. You are not to do evil that good may come of it. 11 Co. 74.

Non impedit clausula derogatoria; quo minus ab eadem potestate res dissolvantur a quibus constituntur. A derogatory clause does not prevent things or acts from being dissolved by the same power, by which they were originally made. Bacon's Max. Reg. 19.

Non in legendo sed in intelligendo leges consistunt. The laws consist not in being read, but in being understood. 8 Co. 167.

Non licet quod dispendio licet. That which is permitted only at a loss, is not permitted to be done. Co. Litt. 127.

Non nasci, et natum mori, pari sunt. Not to be born, and to be dead born, is the same.

Non obligat lex nisi promulgata. A law is not obligatory unless it be promulgated.

Non observata forma, infertur annullatio actus. When the form is not observed, it is inferred that the act is annulled. 12 Co. 7.

Non omne quod licet honestum est. Everything which is permitted is not becoming. Dig. 50, 17, 144.

Non omne damnum inducit injuriam. Not every loss produces an injury. See 3 Bl. Com. 219; 1 Smith's Lead. Cas. 131; Broom's Max. 93; 2 Bouv. Inst. n. 2211.

Non omnium quae a majoribus nostris constituta sunt ratio reddi potest. A reason cannot always be given for the institutions of our ancestors. 4 Co. 78.

Non potest adduci exceptio ejusdem rei cujus petitur dissolutio. A plea of the same matter, the dissolution of which is sought by the action, cannot be brought forward. Bacon's Max. Reg. 2. When an action is brought to annul a proceeding, the defendant cannot plead such proceeding in bar.

Non praestat impedimentum quod de jure non sortitur effectum. A thing which has no effect in law, is not an impediment. Jenk. Cent. 162.

Non quod dictum est, sed quod factum est, inspicitur. Not what is said, but what is done, is to be regarded. Co. Litt. 36.

Non refert an quis assensum suum praefert verbis, an rebus ipsis et factis. It is immaterial whether a man gives his assent by words or by acts and deeds. 10 Co. 52.

Non refert quid ex aequipollentibus fiat. What may be gathered from words of tantamount meaning, is of no consequence when omitted. 5 Co. 122.

Non refert quid notum sit iudice si notum non sit in forma iudici. It matters not what is known to the judge, if it is not known to him judicially. 3 Buls. 115.

Non refert verbis an factis sit revocatio. It matters not whether a revocation be by words or by acts. Cro. Car. 49.

Non solum quid licet, sed quid est conveniens considerandum, quia nihil quod inconvenientis est licitum. Not only what is permitted, but what is proper, is to be considered, because what is improper is illegal. Co. Litt. 66.

Non sunt longa ubi nihil est quod demere possis. There is no prolixity where nothing can be omitted. Vaugh. 133.

Non temere credere, est nervus sapientiae. Not to believe rashly is the nerve of wisdom. 5 Co. 114.

Non videtur quisquam id capere, quod ei necesse est alii restituere. One is not considered as ac-

quiring property in a thing which he is bound to restore. Dig. 50, 17, 51.

Non videntur qui errant consentire. He who errs is not considered as consenting. Dig. 50, 17, 116.

Non videtur consensum retinuisse si quis ex praescripto minantis aliquid immutavit. He does not appear to have retained his consent, if he have changed anything through the means of a party threatening. Bacon's Max. Reg. 22.

Novatio non praesumitur. A novation is not presumed. See *Novation*.

Novitas non tam utilitate prodest quam novitate perturbat. Novelty benefits not so much by its utility, as it disturbs by its novelty. Jenk. Cent. 167.

Novum iudicium non dat novum jus, sed declarat antiquum. A new judgment does not make a new law, but declares the old. 10 Co. 42.

Nul ne doit s'enrichir aux dépens des autres. No one ought to enrich himself at the expense of others.

Nul prendra avantage de son tort demeene. No one shall take advantage of his own wrong.

Nulla impossibilia aut inhonesta sunt praesumenda. Impossibilities and dishonesty are not to be presumed. Co. Litt. 78.

Nulle regle sans faute. There is no rule without a fault.

Nulli enim res sua servit jure servitutis. No one can have a servitude over his own property. Dig. 8, 2, 26; 17 Mass. 443; 2 Bouv. Inst. n. 1600.

Nullum exemplum est idem omnibus. No example is the same for all purposes.

Nullum iniquum praesumendum in jure. Nothing unjust is presumed in law. 4 Co. 72.

Nullum simile est idem. No simile is the same. Co. Litt. 3.

Nullus commodum capere potest de injuriis sua propria. No one shall take advantage of his own wrong. Co. Litt. 148.

Nullus recedat e curia cancellaria sine remedio. No one ought to depart out of the court of chancery without a remedy.

Nunquam fictio sine lege. There is no fiction without law.

Nuptias non concubitas, sed consensus facit. Co-habitation does not make the marriage, it is the consent of the parties. Dig. 50, 17, 30; 1 Bouv. Inst. n. 239. Co. Litt. 33.

Obedientia est legis essentia. Obedience is the essence of the law. 11 Co. 100.

Obtemperandum est consuetudini rationabili tanquam legi. A reasonable custom is to be obeyed like law. 4 Co. 38.

Officers may not examine the judicial acts of the court.

Officia magistratus non debent esse venalia. The offices of magistrates ought not to be sold. Co. Litt. 234.

Officia judicialia non concedantur antequam vacent. Judicial offices ought not to be granted before they are vacant. 11 Co. 4.

Officium conatus si effectus sequatur. The attempt becomes of consequence, if the effect follows.

Officium nemini debet esse damnosum. An office ought to be injurious to no one.

Omissio eorum quae tacite insunt nihil operatur. The omission of those things which are silently expressed is of no consequence.

Omne actum ab intentione agentis est judicandum. Every act is to be estimated by the intention of the doer.

Omne crimen ebrietas et incendit et detegit. Drunkenness inflames and produces every crime. Co. Litt. 247.

Omne magis dignum trahit ad se minus dignum sit antiquius. Every worthier thing draws to it the less worthy, though the latter be more ancient. Co. Litt. 355.

Omne magnum exemplum habet aliquid ex iniurio, quod publica utilitate compensatur. Every great example has some portion of evil, which is compensated by its public utility. Hob. 279.

Omne majus continet in se minus. The greater contains in itself the less. Co. Litt. 43.

Omne majus minus in se complectitur. Always the greater is embraced in the minor. Jenk. Cent. 208.

Omne testamentum morte consummatum est. Every will is consummated by death. 3 Co. 29.

Omne sacramentum debet esse de certa scientia. Every oath ought to be founded on certain knowledge. 4 Co. Inst. 279.

Omnia delicta in aperto leviora sunt. All crimes committed openly are considered lighter. 8 Co. 127.

Omnia presumuntur contra spoliatores. All things are presumed against a wrong doer.

Omnia presumuntur legitime facta donec probetur in contrarium. All things are presumed to be done legitimately, until the contrary is proved. Co. Litt. 232.

Omnia presumuntur rite esse acta. All things are presumed to be done in due form.

Omnia presumuntur solemniter esse acta. All things are presumed to be done solemnly. Co. Litt. 6.

Omnia quæ sunt uxoris sunt ipsius viri. All things which are of the wife, belong to the husband. Co. Litt. 112.

Omnis actio est loquela. Every action is a complaint. Co. Litt. 292.

Omnis conclusio boni et veri judicii sequitur ex bonis et veris præmissis et dictis juratorem. Every conclusion of a good and true judgment arises from good and true premises, and the sayings of jurors. Co. Litt. 226.

Omnis consensus tollit errorem. Every consent removes error. 2 Inst. 123.

Omnia definitio in jure periculosa est; parum est enim ut non subverti posset. Every definition in law is perilous, and but a little may reverse it. Dig. 50, 17, 202.

Omnis exceptio est ipsa quoque regula. An exception is, in itself, a rule.

Omnis innovatio plus novitate perturbat quam utilitate prodest. Every innovation disturbs more by its novelty than it benefits by its utility.

Omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietates amoveantur. The interpretation of instruments is to be made, if they will admit of it, so that all contradictions may be removed. Jenk. Cent. 96.

Omnis interpretatio vel declarat, vel extendit, vel restringit. Every interpretation either declares, extends or restrains.

Omnia regula suas patitur exceptiones. All rules of law are liable to exceptions.

Omnia privatio presupponit habitum. Every pri-

vation presupposes former enjoyment. Co. Litt. 339.

Omnis ratihabitio retro trahitur et mandato equiparatur. Every consent given to what has already been done, has a retrospective effect and equals a command. Co. Litt. 207.

Once a fraud, always a fraud. 13 Vin. Ab. 539.

Once a mortgage always a mortgage.

Once a recompense always a recompense. 19 Vin. Ab. 277.

One should be just before he is generous.

One may not do an act to himself.

Oportet quod certa res deducatur in judicium. A thing, to be brought to judgment, must be certain or definite. Jenk. Cent. 84.

Oportet quod certa sit res venditur. A thing, to be sold, must be certain or definite.

Optima est lex, quæ minimum relinquit arbitrio judicis. That is the best system of law which confides as little as possible to the discretion of the judge. Bac. De Aug. Sci. Aph. 46.

Optimam esse legem, quæ minimum relinquit arbitrio judicis; id quod certitudo ejus præstat. That law is the best which leaves the least discretion to the judge; and this is an advantage which results from certainty. Bacon, De Aug. Sc. Aph. 8.

Optimus judex, qui minimum sibi. He is the best judge who relies as little as possible on his own discretion. Bac. De Aug. Sci. Aph. 46.

Optimus interpretandi modus est sic legis interpretare ut leges legibus accordant. The best mode of interpreting laws is to make them accord. 8 Co. 169.

Optimus interpret rerum usus. Usage is the best interpreter of things. 2 Inst. 262.

Optimus legum interpret consuetudo. Custom is the best interpreter of laws. 4 Inst. 75.

Ordine placitandi servato, servatur et jus. The order of pleading being preserved, the law is preserved. Co. Litt. 303.

Origo rei inspicere debet. The origin of a thing ought to be inquired into. 1 Co. 99.

Paci sunt maxime contraria, vis et injuria. Force and wrong are greatly contrary to peace. Co. Litt. 161.

Pacta privata juri publico derogare non possunt. Private contracts cannot derogate from the public law. 7 Co. 23.

Pacto aliquod licitum est, quid sine pacto non admittitur. By a contract something is permitted, which, without it, could not be admitted. Co. Litt. 166.

Par in parem imperium non habet. An equal has no power over an equal. Jenk. Cent. 174. Example: One of two judges of the same court cannot commit the other for contempt.

Paria copulantur paribus. Things unite with similar things.

Paribus sententiis reus absolvitur. When opinions are equal, a defendant is acquitted. 4 Inst. 64.

Parte quacunque integrantia sublata, tollitur totum. An integral part being taken away, the whole is taken away. 3 Co. 41.

Partus ex legitimo thoro non certius noscitur matrem quam genitorem suam. The offspring of a legitimate bed knows not his mother more certainly than his father. Fortes. c. 42.

Partus sequitur ventrem. The offspring follow the condition of the mother. This is the law in

the case of slaves and animals; 1 Bouv. Inst. n. 167, 502; but with regard to freemen, children follow the condition of the father.

Parum differunt quæ re concordant. Things differ but little which agree in substance. 2 Buls. 86.

Parum est lalam esse sententiam, nisi mandetur executioni. It is not enough that sentence should be given unless it is put into execution. Co. Litt. 289.

Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum. It avails little to know what ought to be done, if you do not know how it is to be done. 2 Co. Inst. 503.

Patria potestas in pietate debet, non in atrocitate consistere. Paternal power should consist in affection, not in atrocity.

Pater est quem nuptiæ demonstrant. The father is he whom the marriage points out. 1 Bl. Com. 446; 7 Mart. N. S. 548, 553; Dig. 2, 4, 5; 1 Bouv. Inst. n. 273, 304, 322.

Peccata contra naturam sunt gravissima. Offences against nature are the heaviest. 3 Co. Inst. 20.

Peccatum peccato addit qui culpæ quam facit patrocinium defensionis adiungit. He adds one offence to another, who, when he commits a crime, joins to it the protection of a defence. 5 Co. 49.

Per rerum naturam, factum negantis nulla probatio est. It is in the nature of things that he who denies a fact is not bound to prove it.

Per varios actus, legem experientia facit. By various acts experience framed the law. 4 Co. Inst. 50.

Perfectum est cui nihil deest secundum suæ perfectionis vel naturæ modum. That is perfect which wants nothing in addition to the measure of its perfection or nature. Hob. 151.

Perculosum est res novas et inusitatas inducere. It is dangerous to introduce new and dangerous things. Co. Litt. 379.

Perculum rei venditæ, nondum traditæ, est emptoris. The purchaser runs the risk of the loss of a thing sold, though not delivered. 1 Bouv. Inst. n. 939; 4 B. & C. 941; 4 B. & C. 481.

Perpetua lex est, nullam legem humanam ac positivam perpetuam esse; et clausula quæ abrogationem excludit initio non valet. It is a perpetual law that no human or positive law can be perpetual; and a clause in a law which precludes the power of abrogation is void ab initio. Bacon's Max. in Reg. 19.

Perpetuities are odious in law and equity.

Persona conjuncta æquiparatur interesse proprio. A person united equal one's own interest. Bacon's Max. Reg. 18. This means that a personal connexion, as nearness of blood or kindred, may in some cases, raise a use.

Perspiciua vera non sunt probanda. Plain truths need not be proved. Co. Litt. 16.

Pirata est hostis humani generis. A pirate is an enemy of the human race. 3 Co. Inst. 113.

Pluralis numerus est duobus contentus. The plural number is contained in two. 1 Roll. R. 476.

Pluralities are odious in law.

Plures coheredes sunt quasi unum corpus, propter unitatem juris quod habent. Several co-heirs are as one body, by reason of the unity of right which they possess. Co. Litt. 163.

Plures participes sunt quasi unum corpus, in eo

quod unum jus habent. Several partners are as one body, by reason of the unity of their rights. Co. Litt. 164.

Plus exempla quam peccata nocent. Examples hurt more than offences.

Plus peccat auctor quam actor. The instigator of a crime is worse than he who perpetrates it. 5 Co. 99.

Plus valet unus oculus testis, quam auris decem. One eye witness is better than ten ear ones. 4 Inst. 279.

Pœna ad paucos, metus ad omnes perveniat. A punishment inflicted on a few, causes a dread to all. 22 Vin. Ab. 550.

Pœna ex delicto defuncti, hæres tenere non debet. The heir is not bound in a penalty inflicted for the crime of the ancestor. 2 Inst. 198.

Pœna non potest, culpa perennis erit. Punishment may have an end, crime is perpetual. 21 Vin. Ab. 271.

Pœna ad paucos, metus ad omnes. Punishment to few, dread or fear to all.

Pœnæ potius molliendæ quam exasperandæ sunt. Punishments should rather be softened than aggravated. 3 Co. Inst. 220.

Posito uno oppositorum negatur alterum. One of two opposite positions being affirmed, the other is denied. 3 Roll. R. 422.

Possessio est quasi pedis positio. Possession is, as it were, the position of the foot. 3 Co. 42.

Possession of the term, possession of the reversioner.

Possession is a good title, where no better title appears. 20 Vin. Ab. 278.

Possessor has right against all men but him who has the very right

Possibility cannot be on a possibility.

Posteriora derogant prioribus. Posterior laws derogate former ones. 1 Bouv. Inst. n. 90.

Potentia non est nisi ad bonum. Power is not conferred, but for the public good.

Potentia debet sequi justiciam, non antecedere. Power ought to follow, not to precede justice. 3 Buls. 199.

Potentia inutilis frustra est. Useless power is vain.

Potest quis renunciare pro se, et suis, juri quod pro se introductum est. A man may relinquish, for himself and his heirs, a right which was introduced for his own benefit. See 1 Bouv. Inst. n. 83.

Potestas strictè interpretatur. Power should be strictly interpreted.

Potestas suprema seipsum dissolvere potest, ligare non potest. Supreme power can dissolve, but cannot bind itself.

Potior est conditio defendentis. Better is the condition of the defendant, than that of the plaintiff.

Potior est conditio possidentis. Better is the condition of the possessor.

Præpropera consilia, raro sunt prospera. Hasty counsels are seldom prosperous. 4 Inst. 57.

Præstat cautela quam medela. Prevention is better than cure. Co. Litt. 304.

Præsumptio violenta, plena probatio. Strong presumption is full proof.

Præsumptio violenta valet in lege. Strong presumption avails in law.

Prætextu liciti non debet admitti illicitum. Under pretext of legality, what is illegal ought not to be admitted. 10 Co. 88.

Praxis judicum est interpret legum. The practice of the judges is the interpreter of the laws. Hob. 96.

Precedents that pass sub silentio are of little or no authority. 16 Vin. 499.

Precedents have as much law as justice.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis. The presence of the body cures the error in the name; the truth of the name cures an error in the description. Bacon's Max. Reg. 25.

Pretium succedit in locum rei. The price stands in the place of the thing sold. 1 Bouv. Inst. n. 939.

Prima pars æqualitatis æqualitas. The radical element of justice is equality.

Principia data sequuntur concomitantia. Given principles follow their concomitants.

Principia probant, non probantur. Principles prove, they are not proved. 3 Co. 40. See *Principles*.

Principiorum non est ratio. There is no reasoning of principles. 2 Buls. 239. See *Principles*.

Principium est potissima pars cujusque rei. The principle of a thing is its most powerful part. 10 Co. 49.

Prior tempore, potior jure. He who is before in time, is preferred in right.

Privatorum conventio juri publico non derogat. Private agreements cannot derogate from public law. Dig. 50, 17, 45, 1.

Privatum commodum publico cedit. Private yields to public good.

Privatum incommodum publico bono pensatur. Private inconvenience is made up for by public benefit.

Privilegium est beneficium personale et extinguitur cum persona. A privilege is a personal benefit and dies with the person. 3 Buls. 8.

Privilegium est quasi privata lex. A privilege is, as it were, a private law. 2 Buls. 189.

Probandi necessitas incumbit illi qui agit. The necessity of proving lies with him who makes the charge.

Probationes debent esse evidentes, id est, perspicuæ et faciles intelligi. Proofs ought to be made evident, that is, clear and easy to be understood. Co. Litt. 283.

Probatis extremis, præsumitur media. The extremes being proved, the intermediate proceedings are presumed. 1 Greenl. Ev. § 20.

Processus legis est gravis vexatio, executio legis coronat opus. The process of the law is a grievous vexation; the execution of the law crowns the work. Co. Litt. 289.

Prohibetur ne quis faciat in suo quod nocere possit alieno. It is prohibited to do on one's own property that which may injure another's. 9 Co. 59.

Propinquior excludit propinquum; propinquus remotum; et remotus remotiorem. He who is nearer excludes him who is near; he who is near, him who is remote; he who is remote, him who is more remote. Co. Litt. 10.

Proprietas verborum est salus proprietatum. The propriety of words is the safety of property.

Protectio trahit subjectionem, subjectio projectionem. Protection draws to it subjection, subjection, protection. Co. Litt. 65.

Provisio est providere præsentia et futura, non præterita. A proviso is to provide for the present and the future, not the past. 2 Co. 72.

Proximus est cui nemo antecedit; supremus est quem nemo sequitur. He is next whom no one precedes; he is last whom no one follows.

Prudentur agit qui præcepto legis obtemperat. He acts prudently who obeys the commands of the law. 5 Co. 49.

Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum. Children are of the blood of their parents, but the father and mother are not of the blood of their children. 3 Co. 40.

Purchaser without notice not obliged to discover to his own hurt. See 4 Bouv. Inst. n. 4336.

Quæ ab hostibus capiuntur, statim capientium fiunt. Things taken from public enemies immediately become the property of the captors. See *Infra præsidia*.

Quæ ad unum finem loquuta sunt; non debent ad alium delorqueri. Words spoken to one end, ought not to be perverted to another. 4 Co. 14.

Quæ coherent personæ à personâ separari nequeunt. Things which belong to the person ought not to be separated from the person. Jenk. Cent. 28.

Quæ communī legi derogant strictè interpretantur. Laws which derogate from the common law ought to be strictly construed. Jenk. Cent. 221.

Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam. Things introduced contrary to the reason of the law, ought not to be drawn into precedents. 12 Co. 75.

Quæ dubitationis causâ tollendâ inseruntur communem legem non lædunt. Whatever is inserted for the purpose of removing doubt, does not hurt or affect the common law. Co. Litt. 205.

Quæ incontinenti vel certo fiunt in esse videntur. Whatever is done directly and certainly, appears already in existence. Co. Litt. 236.

Quæ in curiâ acta sunt rite agi præsumuntur. Whatever is done in court is presumed to be rightly done. 3 Buls. 43.

Quæ in partes dividi nequeunt solida, à singulis præstantur. Things which cannot be divided into parts are rendered entire severally. 6 Co. 1.

Quæ inter alios acta sunt nemini nocere debent, sed prodesse possunt. Transactions between strangers may benefit, but cannot injure, persons who are parties to them. 6 Co. 1.

Quæ mala sunt inchoata in principio vix bono peragantur exitu. Things bad in the commencement seldom end well. 4 Co. 2.

Quæ non valeant singula, juncta juvant. Things which do not avail singly, when united have an effect. 3 Buls. 132.

Quæ præter consuetudinem et morem majorum fiunt, neque placent, neque recta videntur. What is done contrary to the custom of our ancestors, neither pleases nor appears right. 4 Co. 78.

Quæ rerum naturâ prohibentur, nullâ lege confirmata sunt. What is prohibited in the nature of things, cannot be confirmed by law. Finch's Law, 74.

Quæcunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. Whatever appears within the reason of the law, ought to be considered within the law itself. 2 Co. Inst. 689.

Qualibet concessio fortissime contra donatorem interpretanda est. Every grant is to be taken most strongly against the grantor. Co. Litt. 183.

Qualibet jurisdictionis cancellos suos habet. Every jurisdiction has its bounds.

Quælibet pæna corporalis, quam vis minima, major est quælibet pæna pecuniaria. Every corporal punishment, although the very least, is greater than pecuniary punishment. 3 Inst. 220.

Queræ de dubiis, legem bene discere si vis. Inquire into doubtful points if you wish to understand the law well.

Querere dat sapere quæ sunt legitima verè. To inquire into them, is the way to know what things are really true. Litt. § 443.

Qualitas quæ inesse debet, facile præsumitur. A quality which ought to form a part, is easily presumed.

Quam longum debet esse rationabile tempus, non definitur in lege, sed pendet ex discretione iusticiarii. What is reasonable time, the law does not define; it is left to the discretion of the judges. Co. Litt. 56. See 11 Co. 44.

Quamvis aliquid per se non sit malum, tamen si sit mali exempli, non est faciendum. Although, in itself, a thing may not be bad, yet, if it holds out a bad example, it is not to be done. 2 Co. Inst. 584.

Quamvis lex generaliter loquitur, restringenda tamen est, ut cessante ratione et ipsa cessat. Although the law speaks generally, it is to be restrained when the reason on which it is founded fails. 4 Co. Inst. 330.

Quando abest provisio partis, adest provisio legis. A defect in the provision of the party is supplied by a provision of the law. 6 Vin. A. 49.

Quando aliquid prohibetur ex directo, prohibetur et per obliquum. When anything is prohibited directly, it is prohibited indirectly. Co. Litt. 223.

Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quæ clausulæ generali sunt consentanea interpretanda est charta secundum verba specialia. When a deed contains a general clause, and afterwards descends to special words, consistent with the general clause, the deed is to be construed according to the special words. 8 Co. 154.

Quando de una et eadem re, duo onerabiles existunt, unus, pro insufficientia alterius, de integro onerabitur. When two persons are liable on a joint obligation, if one makes default the other must bear the whole. 2 Co. Inst. 277.

Quando dispositio referri potest ad duas res, ita quod secundum relationem unam vitatur et secundum alteram utilis sit, tum facienda est relatio ad illam ut valeat dispositio. When a disposition may be made to refer to two things, so that according to one reference, it would be vitiated, and by the other it would be made effectual, such a reference must be made to the disposition which is to have effect. 6 Co. 78.

Quando diversi considerantur actus ad aliquem statum perficiendum, plus respicitur lex actum originalem. When two different acts are required to the formation of an estate, the law chiefly regards the original act. 10 Co. 49.

Quando duo juro concurrunt in una personâ, æquum est ac si essent in diversis. When two rights concur in one person, it is the same as if they were in two separate persons. 4 Co. 118.

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest. When the law gives anything, it gives the means of obtaining it. 5 Co. 47.

Quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur. When the law gives

anything, it gives tacitly what is incident to it. 2 Co. Inst. 326; Hob. 234.

Quando lex est specialis, ratio autem generalis, generaliter lex est intelligenda. When the law is special, but its reason is general, the law is to be understood generally. 2 Co. Inst. 83; 10 Co. 101.

Quando licet id quod majus, videtur licere id quod minus. When the greater is allowed, the less seems to be allowed also.

Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. When more is done than ought to be done, that shall be considered as performed, which should have been performed; as, if a man having a power to make a lease for ten years, make one for twenty years, it shall be void only for the surplus. Broom's Max. 76; 8 Co. 85.

Quando verba et mens congruunt, non est interpretationi locus. When the words and the mind agree, there is no place for interpretation.

Quem admodum ad questionem facti non respondent iudices, ita ad questionem juris non respondent juratores. In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law. Co. Litt. 295.

Qui accusat integræ famæ sit et non criminosis. Let him who accuses be of a clear fame, and not criminal. 3 Co. Inst. 26.

Qui admittit medium, dirimit finem. He who takes away the means, destroys the end. Co. Litt. 161.

Qui aliquid statuerit parte inaudita altera, æquum licet dixerit, haud æquum facit. He who decides anything, a party being unheard, though he should decide right, does wrong. 6 Co. 52.

Qui bene interrogat, bene docet. He who questions well, learns well. 3 Buls. 227.

Qui bene distinguit, bene docet. He who distinguishes well, learns well. 2 Co. Inst. 470.

Qui concedit aliquid, concedere videtur et id sine quo concessio est irrita, sine quo res ipsa esse non potuit. He who grants anything, is considered as granting that, without which his grant would be idle, without which the thing itself could not exist. 11 Co. 52.

Qui confirmat nihil dat. He who confirms does not give. 2 Bouv. Inst. n. 2069.

Qui contemnit præceptum, contemnit præcipientem. He who contemns the precept, contemns the party giving it. 12 Co. 96.

Qui cum alio contrahit, vel est, vel debet esse non ignarus conditio ejus. He who contracts, knows, or ought to know, the quality of the person with whom he contracts, otherwise he is not excusable. Dig. 50, 17, 19; 2 Hagg. Consist. Rep. 61.

Qui destruit medium, destruit finem. He who destroys the means, destroys the end. 11 Co. 51; Shep. To. 342.

Qui doit inheriter al père, doit inheriter al fils. He who ought to inherit from the father, ought to inherit from the son.

Qui ex dammato coitu nascuntur, inter liberos non computantur. He who is born of an illicit union, is not counted among the children. Co. Litt. 8. See 1 Bouv. Inst. n. 289.

Qui evertit causam, evertit causatum futurum. He who overthrows the cause, overthrows its future effects. 10 Co. 51.

Qui facit per alium facit per se. He who acts by or through another, acts for himself. 1 Bl. Com. 429; Story, Ag. § 440; 2 Bouv. Inst. n. 1273, 1335, 1336; 7 Man. & Gr. 32, 33.

Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi. He who has jurisdiction to loosen, has jurisdiction to bind. 12 Co. 59.

Qui haeret in litera, haeret in cortice. He who adheres to the letter, adheres to the bark. Co. Litt. 289.

Qui ignorat quantum solvere debeat, non potest improbus videre. He who does not know what he ought to pay, does not want probity in not paying. Dig. 50, 17, 99.

Qui in utero est, pro jam nato habetur quoties de ejus commodum quaeritur. He who is in the womb, is considered as born, whenever it is for his benefit.

Qui jure suo utitur, nemini facit injuriam. He who uses his legal rights, harms no one.

Qui jussu judicis aliquid fuerit non videtur dolo malo fecisse, quia parere necesse est. He who does anything by command of a judge, will not be supposed to have acted from an improper motive, because it was necessary to obey. 10 Co. 76.

Qui male agit, odit lucem. He who acts badly, hates the light. 7 Co. 66.

Qui melius probat, melius habet. He who proves most, recovers most. 9 Vin. Ab. 235.

Qui molitur insidias in patriam, id facit quod insanus nauia perforans navem in qua vehitur. He who betrays his country, is like the insane sailor who bores a hole in the ship which carries him. 3 Co. Inst. 36.

Qui nascitur sine legitimo matrimonio, matrem sequitur. He who is born out of lawful matrimony, follows the condition of the mother.

Qui non cadunt in constantem virem, vani timores sunt estimandi. Those are vain fears which do not affect a man of a firm mind. 7 Co. 27.

Qui non habet in aere luit in corpore, ne quis peccatur impuni. He who cannot pay with his purse, must suffer in his person, lest he who offends should go unpunished. 2 Co. Inst. 173; 4 Bl. Com. 20.

Qui non improbat, approbat. He who does not disapprove, approves. 3 Co. Inst. 27.

Qui non libere veritatem pronunciat, proditor est veritatis. He who does not willingly speak the truth, is a betrayer of the truth.

Qui non obstat quod obstatere potest facere videtur. He who does not prevent what he can, seems to commit the thing. 2 Co. Inst. 146.

Qui non prohibet quod prohibere potest assentire videtur. He who does not forbid what he can forbid, seems to assent. 2 Inst. 305.

Qui non propulsat injuriam quando potest, infert. He who does not repel a wrong when he can, induces it. Jenk. Cent. 271.

Qui obstruit aditum, destruit commodum. He who obstructs an entrance, destroys a convenience. Co. Litt. 161.

Qui omne dicit, nihil excludit. He who says all, excludes nothing. 4 Inst. 81.

Qui parci nocentibus, innocentibus punit. He who spares the guilty, punishes the innocent.

Qui peccat ebrius, luit sobrius. He who offends drunk, must be punished when sober. Car. R. 133.

Qui per alium facit per seipsum facere videtur. He who does anything through another, is considered as doing it himself. Co. Litt. 258.

Qui per fraudem agit, frustra agit. He who acts fraudulently acts in vain. 2 Roll. R. 17.

Qui potest et debet vetare, jubet. He who can and ought to forbid, and does not, commands.

Qui primum peccat ille facit rixam. He who first offends, causes the strife.

Qui prior est tempore, potior est jure. He who is first or before in time, is stronger in right. Co. Litt. 14 a; 1 Story, Eq. Jur. § 64 d; Story, Bailm. § 312; 1 Bouv. Inst. n. 952; 4 Bouv. Inst. n. 3728.

Qui providet sibi, providet heredibus. He who provides for himself, provides for his heirs.

Qui rationem in omnibus quarunt, rationem subvertunt. He who seeks a reason for everything, subverts reason. 2 Co. 75.

Qui semel actionem renunciaverit, amplius repetere non potest. He who renounces his action once, cannot any more repeat it. 8 Co. 59. See *Retrazil*.

Qui semel malus, semper praesumitur esse malus in eodem genere. He who is once bad, is presumed to be always so in the same degree. Cro. Car. 317.

Qui sentit commodum, sentire debet et onus. He who derives a benefit from a thing, ought to feel the disadvantages attending it. 2 Bouv. Inst. n. 1433.

Qui tacet consentire videtur. He who is silent appears to consent. Jenk. Cent. 32.

Qui tardius solvit, minus solvit. He who pays tardily, pays less than he ought. Jenk. Cent. 38.

Qui timent, cavent et vitant. They who fear, take care and avoid. Off. Ex. 162.

Qui vult decipi, decipiatur. Let him who wishes to be deceived, be deceived.

Quicquid acquiritur servo, acquiritur domino. Whatever is acquired by the servant, is acquired for the master. 15 Vin. Ab. 327.

Quicquid plantatur solo, solo cedit. Whatever is affixed to the soil belongs to it. Went. Off. Ex. 145.

Quicquid plantatur solo, solo cedit. Whatever is affixed to the soil or the realty, thereby becomes a parcel. See Amb. 113; 3 East, 51; and article *Fixtures*.

Quicquid est contra normam recti est injuria. Whatever is against the rule of right, is a wrong. 3 Buls. 313.

Quicquid in excessu actum est, lege prohibetur. Whatever is done in excess is prohibited by law. 2 Co. Inst. 107.

Quicquid judicis auctoritati subijcitur, novitati non subijcitur. Whatever is subject to the authority of a judge, is not subject to novelty. 4 Co. Inst. 66.

Quicquid solvitur, solvitur secundum modum solventis. Whatever is paid, is paid according to the manner of the payor. 2 Vern. 606. See *Appropriation*.

Quilibet potest renunciare juri pro se inducto. Any one may renounce a law introduced for his own benefit. To this rule there are some exceptions. See 1 Bouv. Inst. n. 83.

Quisquis est qui velit juris consultus haberi, continuet studium, veluti a quocunque doceri. Whoever wishes to be a lawyer, let him continually study, and desire to be taught everything.

Quod ab initio non valet, in tractu temporis non convalescere. What is not good in the beginning cannot be rendered good by time. Merl. Rép. verbo *Regle de Droit*. This, though true in general, is not universally so.

Quod ad jus naturale attinet, omnes homines aequales sunt. All men are equal before the natural law. Dig. 50, 17, 32.

Quod alias bonum et justum est, si per vim vel fraudem pelatur, malum et injustum efficitur. What is otherwise good and just, if sought by force or fraud, becomes bad and unjust. 3 Co. 78.

Quod constat clare, non debet verificari. What is clearly apparent need not be proved.

Quod constat curia opere testium non indiget. What appears to the court needs not the help of witnesses. 2 Inst. 662.

Quod contra legem fit, pro infecto habetur. What is done contrary to the law, is considered as not done. 4 Co. 31. No one can derive any advantage from such an act.

Quod contra juris rationem receptum est, non est producendum ad consequentias. What has been admitted against the spirit of the law, ought not to be heard. Dig. 50, 17, 141.

Quod demonstrandi causâ additur rei satis demonstratæ, frustra fit. What is added to a thing sufficiently palpable, for the purpose of demonstration, is vain. 10 Co. 113.

Quod dubitas, ne feceris. When you doubt, do not act.

Quod est ex necessitate nunquam introducitur, nisi quando necessarium. What is introduced of necessity, is never introduced except when necessary. 2 Roll. R. 512.

Quod est inconveniens, aut contra rationem non permixtum est in lege. What is inconvenient or contrary to reason, is not allowed in law. Co. Litt. 178.

Quod est necessarium est licitum. What is necessary is lawful.

Quod factum est, cum in obscuro sit, ex affectione cujusque capiti interpretationem. Doubtful and ambiguous clauses ought to be construed according to the intentions of the parties. Dig. 50, 17, 168, 1.

Quod fieri non debet, factum valet. What ought not to be done, when done, is valid. 5 Co. 38.

Quod inconsulto fecimus, consilium revocemus. What is done without consideration or reflection, upon better consideration we should revoke or undo.

Quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori. What avails in the less, will avail in the greater; and what will not avail in the greater, will not avail in the less. Co. Litt. 260.

Quod in uno similium valet, valebit in altere. What avails in one of two similar things, will avail in the other. Co. Litt. 191.

Quod initio vitiosum est, non potest tractu temporis convalescere. Time cannot render valid an act void in its origin. Dig. 50, 17, 29.

Quod meum est sine me auferri non potest. What is mine cannot be taken away without my consent. Jenk. Cent. 251. Sed vide *Eminent Domain*.

Quod necessarie intelligitur id non deest. What is necessarily understood is not wanting. 1 Buls. 71.

Quod necessitas cogit, defendit. What necessity forces, it justifies. Hal. Pl. Cr. 54.

Quod non apparet non est, et non apparet judicialiter ante judicium. What appears not does not exist, and nothing appears judicially before judgment. 2 Co. Inst. 479.

Quod non habet principium non habet finem. What has no beginning has no end. Co. Litt. 345.

Quod non legitur, non creditur. What is not read, is not believed. 4 Co. 304.

Quod non valet in principalia, in accessoria seu consequentia non valebit; et quod non valet in magis propinquo, non valebit in magis remoto. What is not good in its principal, will not be good as to accessories or consequences; and what is not of force as regards things near, will not be of force as to things remote. 8 Co. 78.

Quod nullius est id ratione naturali occupanti conceditur. What belongs to no one, naturally belongs to the first occupant. Inst. 2, 1, 12; 1 Bouv. Inst. n. 491.

Quod nullius esse potest, id ut alicujus fieret nulla obligatio valet efficere. Those things which cannot be acquired as property, cannot be the object of an agreement. Dig. 50, 17, 182.

Quod pendet, non est pro eo, quasi sit. What is in suspense is considered as not existing. Dig. 50, 17, 169, 1.

Quod per me non possum, nec per alium. What I cannot do in person, I cannot do by proxy. 4 Co. 24.

Quod per recordum probatum, non debet esse negatum. What is proved by the record, ought not to be denied.

Quod populus postremum jussit, id jus ratum esto. What the people have last enacted, let that be the established law.

Quod prius est verius est; et quod prius est tempore potius est jure. What is first is truest; and what comes first in time, is best in law. Co. Litt. 347.

Quod pro minore licitum est, et pro majore licitum est. What is lawful in the less, is lawful in the greater. 8 Co. 43.

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. He who suffers a damage by his own fault, has no right to complain. Dig. 50, 17, 203.

Quod quisquis norat in hoc se exerceat. Let every one employ himself in what he knows. 11 Co. 10.

Quod remedio destituitur ipsa re valet si culpa absit. What is without a remedy is valid by the thing itself. Bacon's Max. Reg. 9.

Quod semel meum est amplius meum esse non potest. Co. Litt. 49; Shep. To. 212.

Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem. That which is granted or reserved under a certain form, is not to be drawn into a valuation. Bacon's Max. Reg. 4.

Quod solo inædificatur solo cedit. Whatever is built on the soil is an accessory of the soil. Inst. 2, 1, 29; 16 Mass. 449; 2 Bouv. Inst. n. 1571.

Quod taciti intelligitur deesse non videtur. What is tacitly understood does not appear to be wanting. 4 Co. 22.

Quod vanum et inutile est, lex non requirit. The law does not require what is vain and useless. Co. Litt. 319.

Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit. Whenever there is a doubt between liberty and slavery, the decision must be in favor of liberty. Dig. 50, 17, 20.

Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est. When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Co. Litt. 147.

Ratihabito mandato equiparatur. Ratification is equal to a command. Dig. 46, 3, 12, 4.

Ratio est formalis causa consuetudinis. Reason is the formal cause of custom.

Ratio est legis anima, mutata legis ratione mutatur et lex. Reason is the soul of the law; the reason of the law being changed, the law is also changed.

Ratio est radius divini luminis. Reason is a ray of divine light. Co. Litt. 232.

Ratio et auctoritas duo clarissima mundi lumina. Reason and authority are the two brightest lights in the world. 4 Co. Inst. 320.

Ratio in jure equitas integra. Reason in law is perfect equity.

Ratio legis est anima legis. The reason of the law is the soul of the law.

Ratio non clauditur loco. Reason is not confined to any place.

Ratio potest allegari deficiente lege, sed vera et legalis et non apparens. Reason may be alleged when the law is defective, but it must be true and legal reason, and not merely apparent. 6 Co. Litt. 191.

Re, verbis, scripto, consensu, traditione, junctura vestes, sumere pacta solent. Compacts are accustomed to be clothed by the thing itself, by words, by writing, by consent, by delivery. Plow. 161.

Receditur a placitis juris, potius quam injuria et delicta maneant impunita. Positive rules of law will be receded from, rather than crimes and wrongs should remain unpunished. Bacon's Max. Reg. 12. This applies only to such maxims as are called *placita juris*; these will be dispensed with rather than crimes should go unpunished, *quia salus populi suprema lex*, because the public safety is the supreme law.

Recorda sunt vestigia vetustatis et veritatis. Records are vestiges of antiquity and truth. 2 Roll. R. 296.

Recurrendum est ad extraordinarium quando non valet ordinarium. We must have recourse to what is extraordinary, when what is ordinary fails.

Regula pro lege, si deficit lex. In default of the law, the maxim rules.

Regulariter non valet pactum dare mea non alienanda. Regularly a contract not to alienate my property is not binding. Co. Litt. 223.

Rei turpis nullum mandatum est. A mandate of an illegal thing is void. Dig. 17, 1, 6, 3.

Reipublice interest voluntates defunctorum effectum sortiri. It concerns the state that the wills of the dead should have their effect.

Relatio est fictio juris et intenta ad unum. Reference is a fiction of law, and intent to one thing. 3 Co. 28.

Relatio semper fiat ut valeat dispositio. Reference should always be had in such a manner that a disposition in a will should avail. 6 Co. 76.

Relation never defeats collateral acts. 18 Vin. Ab. 292.

Relation shall never make good a void grant or devise of the party. 18 Vin. Ab. 292.

Relatorum cognitio uno, cognoscitur et alterum. Of things relating to each other, one being known, the other is known. Cro. Jac. 539.

Remainder can depend upon no estate but what beginneth at the same time the remainder doth.

Remainder must vest at the same instant that the particular estate determines.

Remainder to a person not of a capacity to take at the time of appointing it, is void. Plowd. 27.

Remedies ought to be reciprocal.

Remedies for rights are ever favorably extended. 18 Vin. Ab. 521.

Remissus imperanti melius paretur. A man commanding not too strictly is best obeyed. 3 Co. Inst. 233.

Remoto impedimento, emergit actio. The impediment being removed the action arises. 5 Co. 76.

Rent must be reserved to him from whom the state of the land moveth. Co. Litt. 143.

Repellitur a sacramento infamis. An infamous person is repelled or prevented from taking an oath. Co. Litt. 158.

Reprobata pecunia liberat solventem. Money refused liberates the debtor. 9 Co. 79. But this must be understood with a qualification. See *Tender*.

Reputatio est vulgaris opinio ubi non est veritas. Reputation is a vulgar opinion where there is no truth. 4 Co. 107. But see *Character*.

Rerum ordo confunditur, si unicuique jurisdictio non servetur. The order of things is confounded if every one preserves not his jurisdiction. 4 Co. Inst. Proem.

Rerum progressus ostendunt multa, quae in initio praecaveri seu praevideri non possunt. The progress of time shows many things, which at the beginning could not be guarded against, or foreseen. 6 Co. 40.

Rerum suarum quilibet est moderator et arbiter. Every one is the manager and disposer of his own. Co. Litt. 223.

Res denominatur a principaliori parte. A thing is named from its principal part. 5 Co. 47.

Res est misera ubi jus est vagum et incertum. It is a miserable state of things where the law is vague and uncertain. 2 Salk. 512.

Res, generalem habet significationem, quia tam corporea, quam incorporea, cujuscunque sunt generis, naturae sive speciei, comprehendit. The word things has a general signification, which comprehends corporeal and incorporeal objects, of whatever nature, sort or specie. 3 Co. Inst. 482; 1 Bouv. Inst. n. 415.

Res inter alios acta alteri nocere non debet. Things done between strangers ought not to injure those who are not parties to them. Co. Litt. 152.

Res judicata pro veritate accipitur. A thing adjudged must be taken for truth. Co. Litt. 103; Dig. 50, 17, 207. See *Res judicata*.

Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum. A thing adjudged makes what was white, black; what was black, white; what was crooked, straight; what was straight, crooked. 1 Bouv. Inst. n. 840.

Res per pecuniam aestimatur, et non pecunia per res. The value of a thing is estimated by its worth in money, and the value of money is not estimated by reference to the thing. 9 Co. 76; 1 Bouv. Inst. n. 922.

Res perit domino suo. The destruction of the thing is the loss of its owner. 2 Bouv. Inst. n. 1456, 1466.

Reservatio non debet esse de proficuis ipsis quia ea conceduntur, sed de redditu nova extra proficua. A reservation ought not to be of the profits themselves, because they are granted, but from the new rent out of the profits. Co. Litt. 142.

Resignatio est juris proprii spontanea refutatio. Resignation is the spontaneous relinquishment of one's own right. Godb. 284.

Respondeat superior. Let the principal answer. 4 Co. Inst. 114; 2 Bouv. Inst. n. 1337; 4 Bouv. Inst. n. 3586.

Responsio unius non omnino auditur. The answer of one witness shall not be heard at all. 1 Greenl. Ev. § 260. This is a maxim of the civil law, where everything must be proved by two witnesses.

Rights never die.

Reus læsæ majestatis puniatur, ut pereat unus ne pereant omnes. A traitor is punished, that, by the death of one, all may not perish. 4 Co. 124.

Sacramentum habet in se tres comites, veritatem, justitiam et iudicium; veritas habenda est in iurato; justitia et iudicium in iudice. An oath has in it three component parts—truth, justice and judgment; truth in the party swearing; justice and judgment in the judge administering the oath. 3 Co. Inst. 160.

Sacramentum si falsum fuerit, licet falsum, tamen non committit perjurium. A foolish oath, though false, makes not perjury. 2 Co. Inst. 167.

Sape viatorem nova non vetus orbita fallit. Often it is the new road, not the old one, which deceives the traveller. 4 Co. Inst. 34.

Sapenumero ubi proprietas verborem attenditur, sensus veritatis amittitur. Frequently where the propriety of words is attended to, the meaning of truth is lost. 7 Co. 27.

Salus populi est suprema lex. The safety of the people is the supreme law. Bacon's Max. in Reg. 12; Broom's Max. 1.

Salus ubi multi consiliarii. In many counsellors there is safety. 4 Co. Inst. 1.

Sapiens incipit a fine, et quod primum est in intentione, ultimum est in executione. A wise man begins with the last, and what is first in intention is last in execution. 10 Co. 25.

Sapiens omnia agit cum consilio. A wise man does everything advisedly. 4 Co. Inst. 4.

Sapientia legis nummario pretio non est aestimanda. The wisdom of the law cannot be valued by money.

Sapientis iudicis est cogitare tantum sibi esse permissum, quantum commissum et creditum. A wise man should consider as much what he promises as what he commits and believes. 4 Co. Inst. 163.

Satisfaction should be made to that fund which has sustained the loss. 4 Bouv. Inst. n. 3731.

Satius est petere fontes quam sectari rivulos. It is better to search the fountain than to cut rivulets. 10 Co. 118. It is better to drink at the fountain than to sip in the streams.

Scientia sciorum est mixta ignorantia. The knowledge of smatterers is mixed ignorance. 8 Co. 159.

Scientia et volunti non fit injuria. A wrong is not done to one who knows and wills it.

Scientia utrimque per pares contrahentes facit. Equal knowledge on both sides makes the contracting parties equal.

Scire leges, non hoc est verba eorum tenere, sed vim et potestatem. To know the laws, is not to observe their mere words, but their force and power. Dig. 1, 3, 17.

Scire proprie est, rem ratione et per causam cognoscere. To know properly is to know the reason and cause of a thing. Co. Litt. 163.

Scire debes cum quo contrahis. You ought to know with whom you deal.

Scrivere est agere. To write is to act. 2 Roll. R. 89.

Scriptæ obligationes scriptis tolluntur, et nudæ consensus obligatio, contrario consensu dissolvitur. Written obligations are dissolved by writing, and obligations of naked assent by similar naked assent.

Secundum naturam est, commodum cuiusque rei cum sequi, quem sequuntur incommoda. It is natural that he who bears the charge of a thing, should receive the profits. Dig. 50, 17, 10.

Securius expediuntur negotia commissa pluribus, et plus vident oculi quam oculus. Business entrusted to several speeds best, and several eyes see more than one eye. 4 Co. 46.

Semel malus semper præsumitur esse malus in eodem genere. Whatever is once bad, is presumed to be so always in the same degree. Cro. Car. 317.

Semper ita fiat relatio ut valeat dispositio. Let the reference always be so made that the disposition may avail. 6 Co. 76.

Semper necessitas probandi incumbit qui agit. The claimant is always bound to prove: the burden of proof lies on him.

Semper præsumitur pro legitimatione puerorum, et filiation non potest probari. Children are always presumed to be legitimate, for filiation cannot be proved. Co. Litt. 126. See 1 Bouv. Inst. n. 303.

Semper præsumitur pro sententiâ. Presumption is always in favor of the sentence. 3 Buls. 43.

Semper specialia generalibus insunt. Special clauses are always comprised in general ones. Dig. 50, 17, 147.

Sensus verborum est anima legis. The meaning of words is the spirit of the law. 5 Co. 2.

Sensus verborum ex causa dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam. The sense of words is to be taken from the occasion of speaking them, and discourses are always to be interpreted according to the subject-matter. 4 Co. 14.

Sententia facit jus, et legis interpretatio legis vim obtinet. The sentence gives the right, and the interpretation has the force of law.

Sententia interlocutoria revocari potest, definitiva non potest. An interlocutory sentence or order may be revoked, but not a final.

Sententia non fertur de rebus non liquidis. Sentence is not given upon a thing which is not clear.

Sequi debet potentia justitiam, non præcedere. Power should follow justice, not precede it. 2 Co. Inst. 454.

Sermo index animi. Speech is an index of the mind. 5 Co. 118.

Sermo relatus ad personam, intelligi debet de conditione persone. A speech relating to the person, is to be understood as relating to his condition. 4 Co. 16.

Si a jure discedas vagus eris, et erunt omnia omnibus incerta. If you depart from the law, you will wander without a guide, and everything will be in a state of uncertainty to every one. Co. Litt. 227.

Si assuetis mederi possis nova non sunt tentanda. If you can be relieved by accustomed remedies, new ones should not be tried. 10 Co. 142.

Si iudicas, cognosce. If you judge, understand. *Si meliores sunt quos ducit amor, plures sunt quos*

corrigit timor. If many are better led by love, more are corrected by fear. Co. Litt. 392.

Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu. If there be no conjecture which leads to a different result, words are to be understood, according to their proper meaning, not in a grammatical, but in a popular and ordinary sense. 2 Kent, Com. 555.

Si quis custos fraudem pupillo fecerit, a tutela removendus est. If a guardian behave fraudulently to his ward, he shall be removed from the guardianship. Jenk. Cent. 39.

Si quis prægnantem uxorem reliquit, non videtur sine liberis decessisse. If a man dies, leaving his wife pregnant, he shall not be considered as having died childless.

Si suggestio non sit vera, literæ patentes vacuæ sunt. If the suggestion of a patent is false, the patent itself is void. 10 Co. 113.

Si quid universitate debetur singulis non debetur, nec quod debet, universitas singuli debent. If anything is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes. Dig. 3, 4, 7.

Sic interpretandum est ut verba accipiantur cum effectu. Such an interpretation is to be made, that the words may have an effect.

Sic utere tuo ut alienum non lædas. So use your own as not to injure another's property. 1 Bl. Com. 306; Broom's Max. 160; 4 McCord, 472; 2 Bouv. Inst. n. 2379.

Sicut natura nil facit per saltum, ita nec lex. As nature does nothing by a bound or leap, so neither does the law. Co. Litt. 238.

Silent leges inter arma. Laws are silent amidst arms. 4 Co. Inst. 70.

Simplicitas est legibus amica. Simplicity is favorable to the law. 4 Co. 8.

Sine possessione usucapio procedere non potest. There can be no prescription without possession.

Solemnitas juris sunt observanda. The solemnities of law are to be observed. Jenk. Cent. 13.

Solo cedit quod solo inædificatur. Whatever is built on the soil belongs to the soil. Inst. 2, 1, 29. See 1 Mackeld. Civ. Law, § 268; 2 Bouv. Inst. n. 1571.

Solo cedit quod solo implantatur. What is planted in the soil belongs to the soil. Inst. 2, 1, 32; 2 Bouv. Inst. n. 1572.

Solus Deus heredem facit. God alone makes the heir.

Solutio pretii, emptiones loco habetur. The payment of the price stands in the place of a sale.

Spes est vigilantis somnium. Hope is the dream of the vigilant. 4 Co. Inst. 203.

Spes impunitatis continuum affectum tribuit delinquendi. The hope of impunity holds out a continual temptation to crime. 3 Co. Inst. 236.

Spoiliatus debet ante omnia restitui. Spoil ought to be restored before anything else. 2 Co. Inst. 714.

Spondet peritiam artis. He promises to use the skill of his art. Poth. Louage, n. 425; Jones, Bailm. 22, 53, 62, 97, 120; Domat, liv. 1, t. 4, s. 8, n. 1; 1 Story, Bailm. § 431; 1 Bell's Com. 459, 5th ed.; 1 Bouv. Inst. n. 1004.

Stabilis præsumptio donec probetur in contrarium. A presumption will stand good until the contrary is proved. Hob. 297.

Statuta pro publico commodo late interpretantur. Statutes made for the public good ought to be liberally construed. Jenk. Cent. 21.

Statutum affirmativum non derogat communi legi. An affirmative statute does not take from the common law. Jenk. Cent. 24.

Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis. When the words of a statute are special, but the reason of it general, it is to be understood generally. 10 Co. 101.

Statutum speciale statuto speciali non derogat. One special statute does not take away from another special statute. Jenk. Cent. 199.

Sublatâ causâ tollitur effectus. Remove the cause and the effect will cease. 2 Bl. Com. 203.

Sublatâ veneratione magistratuum, respublica ruat. The commonwealth perishes, if respect for magistrates be taken away.

Sublato fundamento cadit opus. Remove the foundation, the structure or work falls.

Sublato principali tollitur adjunctum. If the principal be taken away, the adjunct is also taken away. Co. Litt. 389.

Summum jus, summa injuria. The rigor or height of law, is the height of wrong. Hob. 125; 1 Chan. Rep. 4.

Superflua non nocent. Superfluities do no injury. *Surplusagium non nocet.* Surplusage does no harm. 3 Bouv. Inst. n. 2949.

Tacita quædam habentur pro expressis. Things silent are sometimes considered as expressed. 8 Co. 40.

Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illusorium. Interpretation is always to be made in such a manner, that what is absurd and inconvenient is to be avoided, so that the judgment be not nugatory. 1 Co. 52.

Talis non est eadem, nam nullum simile est idem. What is like is not the same, for nothing similar is the same. 4 Co. 18.

Tantum bona valent, quantum vendi possunt. Things are worth what they will sell for. 3 Co. Inst. 305.

Terminus annorum certus debet esse et determinatus. A term of years ought to be certain and determinate. Co. Litt. 45.

Terra transit cum onere. Land passes with the incumbrances. Co. Litt. 231.

Testamenta latissimam interpretationem habere debent. Wills ought to have the broadest interpretation.

Testamentum omne morte consummatum. Every will is completed by death. Co. Litt. 232.

Testatoris ultima voluntas est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his real intention. Co. Litt. 232.

Testibus deponentibus in pari numero dignioribus est credendum. When the number of witnesses is equal on both sides, the more worthy are to be believed. 4 Co. Inst. 279.

Testis de visu præponderat aliis. An eye witness outweighs others. 4 Co. Inst. 470.

Testis nemo in sua causâ esse potest. No one can be a witness in his own cause.

Testis oculatus unus plus valet quam auritis decem. One eye witness is worth ten ear witnesses. See 3 Bouv. Inst. n. 3154.

Timores vani sunt estimandi qui non cadunt in constantem virum. Fears, which have no fixed persons for their object, are vain. 7 Co. 17.

That which I may defeat by my entry, I make good by my confirmation. Co. Litt. 300.

The fund which has received the benefit should make the satisfaction. 4 Bouv. Inst. n. 3730.

Things shall not be void which may possibly be good.

Trusts survive.

Totum preferitur uni cuique parte. The whole is preferable to any single part. 3 Co. 41.

Tout ce que la loi ne defend pas est permis. Everything is permitted, which is not forbidden by law.

Toute exception non surveillée tend à prendre la place du principe. Every exception not watched tends to assume the place of the principle.

Tractent fabrilia fabri. Let smiths perform the work of smiths. 3 Co. Epist.

Traditio loqui facit chartam. Delivery makes the deed speak. 5 Co. 1.

Transgressionem multiplicata, crescat pena infliccio. When transgression is multiplied, let the infliction of punishment be increased. 2 Co. Inst. 479.

Triatio ibi semper debet fieri, ubi iuratores meliorem possunt habere notitiam. Trial ought always to be had where the jury have the best knowledge. 7 Co. 1.

Turpis est pars qua non convenit cum suo toto. That part is bad which accords not with the whole. Plow. 161.

Tuta est custodia que sibi met creditur. That guardianship is secure which trusts to itself alone.

Tutus erratur ex parte mitiori. It is safer to err on the side of mercy. 3 Inst. 220.

Ubi aliquid impeditur propter unum, eo remoto, tollitur impedimentum. When anything is impeded by one single cause, if that be removed the impediment is removed. 7 Co. 77.

Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium. When a common remedy ceases to be of service, recourse must be had to an extraordinary one. 4 Co. 93.

Ubi culpa est ibi pena subesse debet. Where there is culpability, there punishment ought to be.

Ubi eadem ratio, ibi idem lex. Where there is the same reason, there is the same law. 7 Co. 18.

Ubi damna dantur, victus victori in expensis condemnari debet. Where damages are given, the losing party should pay the costs of the victor. 2 Inst. 289.

Ubi factum nullum ibi sortia nulla. Where there is no deed committed, there can be no consequence. 4 Co. 43.

Ubi ius, ibi remedium. Where there is a right, there is a remedy. 1 T. R. 512; Co. Litt. 197, b; 3 Bouv. Inst. n. 2411; 4 Bouv. Inst. n. 3726.

Ubi ius incertum, ibi ius nullum. Where the law is uncertain, there is no law.

Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima. Where the law compels a man to show cause, the cause ought to be just and legal. 2 Co. Inst. 289.

Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est. Where the law is special and the reason of it is general, it ought to be taken as being general. 2 Co. Inst. 43.

Ubi lex non distinguit, nec nos distinguere debemus. Where the law does not distinguish, we ought not to distinguish. 7 Co. 5.

Ubi major pars est, ibi totum. Where is the greater part, there is the whole. Moor, 578.

Ubi non adest norma legis, omnia quasi pro suspectis habenda sunt. When the law fails to serve as a rule, almost everything ought to be suspected. Bacon, De Aug. Sci. Aph. 25.

Ubi non est condendi auctoritas, ibi non est parendi necessitas. Where there is no authority to enforce, there is no authority to obey. Dav. 69.

Ubi non est directu lex, standum est arbitrio iudicis, vel procedendum ad similia. Where there is no direct law, the opinion of the judges ought to be taken, or reference made to similar cases.

Ubi non est lex, non est transgressio quoad mundum. Where there is no law there is no transgression, as it regards the world.

Ubi non est principalis non potest esse accessorius. Where there is no principal there is no accessory. 4 Co. 43.

Ubi nullum matrimonium ibi nullum dos. Where there is no marriage there is no dower. Co. Litt. 32.

Ubi periculum, ibi et lucrum collocatur. He at whose risk a thing is, should receive the profits arising from it.

Ubi quid generatiter conceditur, in est hæc exceptio, si non aliquid sit contra jus fasque. Where a thing is conceded generally, this exception arises, that there shall be nothing contrary to law and right. 10 Co. 78.

Ubi quis delinquit ibi punietur. Let a man be punished when he commits the offence. 6 Co. 47.

Ubiqunque est injuria, ibi damnum sequitur. Wherever there is a wrong, there damages follow. 10 Co. 116.

Ultima voluntas testatoris est perscrutanda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 322.

Ultra posse non est esse, et vice versa. What is beyond possibility cannot exist, and the reverse, what cannot exist is not possible.

Una persona vix potest supplere vices duorum. One person can scarcely supply the place of two. 4 Co. 118.

Universalia sunt notoria singularibus. Things universal are better known than things particular. 2 Roll. R. 294.

Universitas vel corporatio non dicitur aliquid facere nisi id sit collegialiter deliberatum, etiamsi major pars id faciat. An university or corporation is not said to do anything unless it be deliberated upon collegiately, although the majority should do it. Dav. 48.

Uno absurdo dato, infinita sequuntur. One absurdity being allowed, an infinity follow. 1 Co. 102.

Unusquodque eodem modo quo colligatum est dissolvitur. In the same manner in which a thing is bound, it is loosened. 2 Roll. Rep. 39.

Unusquodque est id quod est principalis in ipso. That which is the principal part of a thing is the thing itself. Hob. 123.

Unusquodque dissolvatur eo modo quo colligatur. Everything is dissolved by the same mode in which it is bound together.

Usury is odious in law.

Ut pana ad paucos, metus ad omnes perveniat. That by the punishment of a few, the fear of it may affect all. 4 Inst. 63.

Ut res magis valeat quam pereat. That the thing may rather have effect than be destroyed.

Utile per inutile non vitiatur. What is useful is not vitiated by the useless. 3 Bouv. Inst. n. 2949, 3293; 2 Wheat. 221; 2 S. & R. 298; 17 S. & R. 297; 6 Mass. 303.

Valent quantum valere potest. It shall have effect as far as it can have effect.

Vana est illa potentia quæ nunquam venit in actum. Vain is that power which is never brought into action. 2 Co. 51.

Vani timores sunt astimandi, qui non cadunt in constantem virum. Vain are those fears which affect not a valiant man. 7 Co. 27.

Vendens eandem rem duobus falsarius est. It is fraudulent to sell the same thing twice. Jenk. Cent. 107. See *Stationat*.

Venia facilitas incontinentiam est delinquendi. Facility of pardon is an incentive to crime. 3 Inst. 236.

Verba aliquid operari debent, verba cum effectu sunt accipienda. Words are to be taken so as to have effect. Bacon's Max. Reg. 3, p. 47. See 1 Duer on Ins. 210, 211, 216.

Verba æquivoca ac in dubio sensu posita, intelliguntur digniori et potentiiori sensu. Equivocal words and those in a doubtful sense are to be taken in their best and most effective sense. 6 Co. 20.

Verba currentis moneta, tempus solutionis designat. The words current money, refer to the time of payment. Dav. 20.

Verba dicta de persona, intelligi debent de conditione persone. Words spoken of the person are to be understood of the condition of the person. 2 Roll. R. 72.

Verba fortius accipiuntur contra proferentem. Words are to be taken most strongly against him who uses them. Bacon's Max. Reg. 3; 1 Bouv. Inst. n. 661.

Verba generalia generaliter sunt intelligenda. General words are to be generally understood. 3 Co. Inst. 76.

Verba generalia restringuntur ad habilitatem rei vel aptitudinem persone. General words must be restricted to the nature of the subject matter or the aptitude of the person. Bacon's Max. in reg. 10.

Verba generalia restringuntur ad habilitatem rei vel persone. General words must be confined or restrained to the nature of the subject or the aptitude of the person. Bacon's Max. Reg. 10.

Verba intentioni, non e contra, debent inservire. Words ought to be made subservient to the intent, not contrary to it. 8 Co. 94.

Verba ita sunt intelligenda, ut res magis valeat quam pereat. Words are to be so understood that the subject-matter may be preserved, rather than destroyed. Bacon's Max. in Reg. 3.

Verba nihil operandi melius est quam absurde. It is better that words should have no operation, than to operate absurdly.

Verba posteriora propter certitudinem addita, ad priora quæ certitudine indigent, sunt referenda. Words added for the purpose of certainty are to be referred to preceding words, in which certainty is wanting.

Verba relata hac maximi operantur per referentiam ut in eis in esse videntur. Words referred to other words operate chiefly by the reference which appears to be implied towards them. Co. Litt. 859.

Veredictum, quasi dictum veritas; ut iudicium, quasi juris dictum. A verdict is, as it were, the

saying of the truth, in the same manner that a judgment is the saying of the law. Co. Litt. 226.

Veritas demonstrationis tollit errorem nominis. The truth of the demonstration removes the error of the name. Ld. Raym. 303. See *Legatee*.

Veritas nihil veretur nisi abscondi. Truth fears nothing but concealment. 9 Co. 20.

Veritas nimium altercando amittitur. By too much altercation truth is lost. Hob. 344.

Veritatem qui non libere pronunciat, proditor est veritatis. He who does not speak the truth, is a traitor to the truth.

Vicarius non habet vicarium. A deputy cannot appoint a deputy. Branch's Max. 38; Broom's Max. 384; 2 Bouv. Inst. n. 1300.

Vigilantibus et non dormientibus serviunt leges. The laws serve the vigilant, not those who sleep upon their rights. 2 Bouv. Inst. n. 2327. See *Laches*.

Viperina est expositio quæ corrodit viscera textus. That is a viperous exposition which gnaws or eats out the bowels of the text. 11 Co. 34.

Vir et uxor consentur in lege una persona. Husband and wife are considered one person in law. Co. Litt. 112.

Vis legibus est inimica. Force is inimical to the laws. 3 Co. Inst. 176.

Vitium clerici nocere non debet. Clerical errors ought not to hurt.

Voluit sed non dixit. He willed but did not say.

Voluntas testatoris ambulatoria est usque ad mortem. The will of a testator is ambulatory until his death; that is, he may change it at any time. See 1 Bouv. Inst. n. 83.

Voluntas in delictis non exitus spectatur. In offences, the will and not the consequences are to be looked to. 2 Co. Inst. 27.

Voluntas reputabatur pro facto. The will is to be taken for the deed. 3 Co. Inst. 69.

Volunt non fit injuria. He who consents cannot receive an injury. 2 Bouv. Inst. n. 2279, 2327; 4 T. R. 657; Shelf. on Mar. & Div. 449.

What a man cannot transfer, he cannot bind by articles.

When the common law and statute law concur, the common law is to be preferred. 4 Co. 71.

When many join in one act, the law says it is the act of him who could best do it; and things should be done by him who has the best skill. Noy's Max. h. t.

When the law presumes the affirmative, the negative is to be proved. 1 Roll. R. 83; 3 Bouv. Inst. n. 3063, 3090.

When no time is limited, the law appoints the most convenient.

When the law gives anything, it gives a remedy for the same.

When the foundation fails, all fails.

Where two rights concur, the more ancient shall be preferred.

Where there is equal equity, the law must prevail. 4 Bouv. Inst. n. 3727.

Vide, generally, Dig. 50, 17; 1 Ayl. Pand. b. 1, t. 6; Merl. Répert. Regles de Droit; Pow. Mint. Index, h. t.; Dane's Ab. Index, h. t.; Wooddes. Lect. lxxi. note; and collections of Bacon, Noy, Francis, Branch and Heath; Duval, Le Droit dans ses Maximes.

MAY. To be permitted; to be at liberty; to have the power.

2. Whenever a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as *shall*. For example, the 23 H. VI. says, the sheriff may take bail, that is construed he *shall*, for he is compellable to do so. Carth. 293; Salk. 609; Skin. 370.

3. The words *shall* and *may* in general acts of the legislature or in private constitutions, are to be construed imperatively; 3. Atk. 166; but the construction of those words in a deed depends on circumstances. 3 Atk. 282. See 1 Vern. 152, case 142; 9 Porter, R. 390.

MAYHEM, crimes. The act of unlawfully and violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or annoy his adversary; and therefore the cutting or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, are held to be mayhemms. But cutting off the ear or nose or the like, are not held to be mayhemms at common law. 4 Bl. Com. 205.

2. These and other severe personal injuries are punished by the Coventry act, (q. v.) which has been reenacted in several of the states; Ryan's Med. Jurispr. 191, Philad. ed. 1832; and by congress. Vide act of April 30, 1790, s. 13, 1 Story's Laws U. S. 85; act of March 3, 1825, s. 22, 3 Story's L. U. S. 2006.

MAYHEMAVIT. Maimed. This is a term of art which cannot be supplied in pleadings by any other word; as, *mutilavit*, *truncavit*, &c. 3 Tho. Co. Litt. 548.

MAYOR, officer. The chief or executive magistrate of a city who bears this title.

2. It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers, such as constables, watchmen and the like. But the power and authority which mayors possess being given to them by local regulations, vary in different places.

MAYOR'S COURT. The name of a court usually established in cities, composed of a mayor, recorder and aldermen, generally having jurisdiction of offences committed within the city, and of other matters specially given them by the statute.

MEASURE. That which is used as a rule to determine a quantity. A certain

quantity of something, taken for a unit, and which expresses a relation with other quantities of the same thing.

2. The constitution of the United States gives power to congress to "fix the standard of weights and measures." Art. 1, s. 8. Hitherto this has remained as a dormant power, though frequently brought before the attention of congress.

3. The states, it seems, possess the power to legislate on this subject, or, at least, the existing standards at the adoption of the constitution remain in full force. 3 Sto. Const. 21; Rawle on the Const. 102.

4. By a resolution of congress, of the 14th of June, 1836, the secretary of the treasury is directed to cause a complete set of all weights and measures adopted as standards, and now either made or in the progress of manufacture, for the use of the several custom-houses and for other purposes, to be delivered to the governor of each state in the Union, or to such person as he may appoint, for the use of the states respectively, to the end that an uniform standard of weights and measures may be established throughout the United States.

5. Measures are either, 1. Of length. 2. Of surface. 3. Of solidity or capacity. 4. Of force or gravity, or what is commonly called weight. (q. v.) 5. Of angles. 6. Of time. The measures now used in the United States, are the same as those of England, and are as follows:—

1. MEASURES OF LENGTH.

12 inches=1 foot

3 feet=1 yard

5½ yards=1 rod or pole

40 poles=1 furlong

8 furlongs=1 mile

69⅓ miles=1 degree of a great circle of the earth.

An inch is the smallest lineal measure to which a name is given, but subdivisions are used for many purposes. Among mechanics, the inch is commonly divided into eighths. By the officers of the revenue and by scientific persons, it is divided into tenths, hundredths, &c. Formerly it was made to consist of twelve parts called lines, but these have fallen into disuse.

Particular measures of length.

1st. Used for measuring cloth of all kinds.

1 nail=2½ inches

1 quarter=4 inches

1 yard=4 quarters
1 ell=5 quarters.

2d. used for the height of horses.

1 hand=4 inches.

3d. Used in measuring depths.

1 fathom=6 feet.

4th. Used in land measure, to facilitate computation of the contents, 10 square chains being equal to an acre.

1 link=7²/₁₀₀ inches
1 chain=100 links.

6.—2. MEASURES OF SURFACE.

144 square inches=1 square foot
9 square feet=1 square yard
30¹/₄ square yards=1 perch or rod
40 perches=1 rood
4 roods or 160 perches=1 acre
640 acres=1 square mile.

7.—3. MEASURES OF SOLIDITY AND CAPACITY.

1st. Measures of solidity.

1728 cubic inches=1 cubic foot
27 cubic feet=1 cubic yard.

2d. Measures of capacity for all liquids, and for all goods, not liquid, except such as are comprised in the next division.

4 gills=1 pint=34¹/₂ cubic inches nearly.
2 pints=1 quart=69¹/₂ " "
4 quarts=1 gallon=277¹/₂ " "
2 gallons=1 peck=554¹/₂ " "
8 gallons=1 bushel=2218¹/₂ " "
8 bushels=1 quarter=10¹/₂ cubic feet "
5 quarters=1 load=51¹/₂ " "

The last four denominations are used only for goods, not liquids. For liquids, several denominations have heretofore been adopted, namely, for beer, the firkin of 9 gallons, the kilderkin of 18, the barrel of 36, the hogshead of 54, and the butt of 108 gallons. For wine or spirits there are the anker, runlet, tierce, hogshead, puncheon, pipe, butt, and tun; these are, however, rather the names of the casks, in which the commodities are imported, than as expressing any definite number of gallons. It is the practice to gauge all such vessels, and to charge them according to their actual contents.

3d. Measures of capacity, for coal, lime, potatoes, fruit, and other commodities, sold by heaped measure.

2 gallons=1 peck=704 cubic in. nearly.
8 gallons=1 bushel=2815¹/₂ " "
8 bushels=1 sack=4¹/₂ cubic feet "
12 sacks=1 chaldron=58¹/₂ " "

8.—4. MEASURES OF WEIGHTS.

See art. *Weights*.

9.—5. ANGULAR MEASURE; OR, DIVISION OF THE CIRCLE.

60 seconds=1 minute
60 minutes=1 degree
30 degrees=1 sign
90 degrees=1 quadrant
360 degrees, or 12 signs=1 circumference.

Formerly the subdivisions were carried on by sixties; thus, the second was divided into 60 thirds, the third into sixty fourths, &c. At present, the second is more generally divided decimally into tens, hundreds, &c. The degree is frequently so divided.

or 10.—6. MEASURE OF TIME.

60 seconds=1 minute
60 minutes=1 hour
24 hours=1 day
7 days=1 week
28 days, or 4 weeks=1 lunar month
28, 29, 30, or 31 days=1 calendar month
12 calendar months=1 year
365 days=1 common year
366 days=1 leap year.

The second of time is subdivided like that of angular measure.

FRENCH MEASURES.

11. As the French system of weights and measures is the most scientific plan known, and as the commercial connexions of the United States with France are daily increasing, it has been thought proper here to give a short account of that system.

12. The fundamental, invariable, and standard measure, by which all weights and measures are formed, is called the *mètre*, a word derived from the Greek, which signifies measure. It is a lineal measure, and is equal to 3 feet, 0 inches, 11¹/₁₆₀ lines, Paris measure, or 3 feet, 3 inches, ¹⁷⁹/₁₀₀₀, English. This unit is divided into ten

parts; each tenth, into ten hundredths; each hundredth, into ten thousandths, &c. These divisions, as well as those of all other measures, are infinite. As the standard is to be invariable, something has been sought, from which to make it, which is not variable or subject to any change. The fundamental base of the *mètre* is the quarter of the terrestrial meridian, or the distance from the pole to the equator, which has been divided into ten millions of equal parts, one of which is the length of the *mètre*. All the other measures are formed from the *mètre*, as follows:

2. MEASURE OF CAPACITY.

13. The *litre*. This is the *décimètre*; or one-tenth part of the cubic *mètre*; that is, if a vase be made of a cubic form, of a *décimètre* every way, it would be of the capacity of a *litre*. This is divided by tenths, as the *mètre*. The measures which amount to more than a single *litre*, are counted by tens hundreds, thousands, &c., of litres.

3. MEASURES OF WEIGHTS.

14. The *gramme*. This is the weight of a cubic *centimètre* of distilled water, at the temperature of zero; that is, if a vase be made of a cubic form, of a hundredth part of a *mètre* every way, and it be filled with distilled water, the weight of that water will be that of the *gramme*.

4. MEASURES OF SURFACES.

15. The *are*, used in surveying. This is a square, the sides of which are of the length of ten *mètres*, or what is equal to one hundred square *mètres*. Its divisions are the same as in the preceding measures.

5. MEASURES OF SOLIDITY.

16. The *stère*, used in measuring fire-wood. It is a cubic *mètre*. Its subdivisions are similar to the preceding. The term is used only for measuring fire-wood. For the measure of other things, the term *cube mètre*, or cubic *mètre* is used, or the tenth, hundredth, &c., of such a cube.

6. MONEY.

17. The *franc*. It weighs five grammes. It is made of nine-tenths of silver, and one-tenth of copper. Its tenth part is called a *decime*, and its hundredth part a *centime*.

18. One measure being thus made the standard of all the rest, they must be all equally invariable; but, in order to make this certainty perfectly sure, the following precautions have been adopted. As the temperature was found to have an influence on bodies, the term zero, or melting ice, has been selected in making the models or standard of the *mètre*. Distilled water has been chosen to make the standard of the *gramme*, as being purer, and less encumbered with foreign matter than common water. The temperature having also an influence on a determinate volume of water, that with which the experiments were made, was of the temperature of zero, or melting ice. The air, more or less charged with humidity, causes the weight of bodies to vary, the models which represent the weight of the *gramme*, have, therefore, been taken in a vacuum.

19. It has already been stated, that the divisions of these measures are all uniform, namely by tens, or decimal fractions, they may therefore be written as such. Instead of writing,

1 *mètre* and 1 tenth of a *mètre*, we may write, 1 m. 1.

2 *mètre* and 8 tenths,—2 m. 8.

10 *mètre* and 4 hundredths,—10 m. 04.

7 litres, 1 tenth, and 2 hundredths,—7 lit. 12, &c.

20. Names have been given to each of these divisions of the principal unit; but these names always indicate the value of the fraction, and the unit from which it is derived. To the name of the unit have been prefixed the particles *déci*, for tenth, *centi*, for hundredth, and *milli*, for thousandth. They are thus expressed, a *décimètre*, a *décilitre*, a *decigramme*, a *décistère*, a *déciare*, a *centimètre*, a *centilitre*, a *centigramme*, &c. The facility with which the divisions of the unit are reduced to the same expression, is very apparent; this cannot be done with any other kind of measures.

21. As it may sometimes be necessary to express great quantities of units, collections have been made of them in tens, hundreds, thousands, tens of thousands, &c., to which names, derived from the Greek, have been given; namely, *déca*, for tens; *hecto*, for hundreds; *kilo*, for thousands; and *myria*, for tens of thousands; they are thus expressed, a *décamètre*, a *décalitre*, &c.; a *hectomètre*, a *hectogramme*, &c.; a *kilomètre*, a *kilogramme*, &c.

22. The following table will facilitate the reduction of these weights and measures into our own.

The *Mètre*, is 3.28 feet, or 39.371 in.

Are, is 1076.441 square feet.

Litre, is 61.028 cubic inches.

Stère, is 35.317 cubic feet.

Gramme, is 15.4441 grains troy, or 5.6481 drams, averdupois.

MEASURE OF DAMAGES, *prac.* Those principles or rules of law which control a jury in adjusting or proportioning the damages, in certain cases. 1 Bouv. Inst. n. 636.

MEAN. This word is sometimes used for *mesne*. (q. v.)

MEASON-DUE. A corruption of *Maison de Dieu*. (q. v.)

MEDIATE POWERS. Those incident to primary powers, given by a principal to his agent. For example, the general authority given to collect, receive and pay debts due by or to the principal is a primary power. In order to accomplish this it is frequently required to settle accounts, adjust disputed claims, resist those which are unjust, and answer and defend suits; these subordinate powers are sometimes called mediate powers. Story, Ag. § 58. See *Primary powers*, and 1 Camp. R. 43, note; 4 Camp. R. 163; 6 S. & R. 149.

MEDIATION. The act of some mutual friend of two contending parties, who brings them to agree, compromise or settle their disputes. Vattel, Droit des Gens, liv. 2, ch. 18, § 328.

MEDIATOR. One who interposes between two contending parties, with their consent, for the purpose of assisting them in settling their differences. Sometimes this term is applied to an officer who is appointed by a sovereign nation to promote the settlement of disputes between two other nations. Vide *Minister*; *Mediator*.

MEDICAL JURISPRUDENCE. That science which applies the principles and practice of the different branches of medicine to the elucidation of doubtful questions in courts of justice. By some authors, it is used in a more extensive sense and also comprehends Medical Police, or those medical precepts which may prove useful to the legislature or the magistracy. Some authors, instead of using the phrase medical jurisprudence, employ, to convey the same idea, those of legal medicine, forensic medicine, or, as the Germans have it, state medicine.

2. The best American writers on this subject are Doctors T. R. Beck and J. B. Beck, *Elements of Medical Jurisprudence*; Doctor Thomas Cooper; Doctor James S. Stringham, who was the first individual to deliver a course of lectures on medical jurisprudence, in this country; Doctor Charles Caldwell. Among the British writers may be enumerated Doctor John Gordon Smith; Doctor Male; Doctor Paris and Mr. Fonblanque, who published a joint work; Mr. Chitty, and Dr. Ryan. The French writers are numerous; Briand, Biessy, Esquirol, Georget, Falret, Trebuchet, Marc, and others, have written treatises or published papers on this subject; the learned Foderé published a work entitled "*Les Lois éclairées par les sciences physiques ou Traité de Médecine Légale et d'hygiène publique*;" the "*Annale d'hygiène et de Médecine Légale*," is one of the most valued works on this subject. Among the Germans may be found Rose's *Manual on Medico Legal Dissection*; Metzger's *Principles of Legal Medicine*, and others. The reader is referred for a list of authors and their works on Medical Jurisprudence, to Dupin, *Profession d'Avocat*, tom. ii., p. 343, art. 1617 to 1636, *bis*. For a history of the rise and progress of Medical Jurisprudence, see Traill, *Med. Jur.* 13.

MEDICINE CHEST. A box containing an assortment of medicines.

2. The act of congress for the government and regulation of seamen in the merchant service, sect. 8, 1 Story's L. U. S. 106, directs that every ship or vessel, belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once, at least, in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at every port or place where the ship or vessel

may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

3. And by the act to amend the above mentioned act, approved March 2, 1805, 2 Story's Laws U. S. 971, it is provided that all the provisions, regulations, and penalties, which are contained in the eighth section of the act, entitled "An act for the government and regulation of seamen in the merchants' service," so far as relates to a chest of medicines to be provided for vessels of one hundred and fifty tons burthen and upwards, shall be extended to all merchant vessels of the burthen of seventy-five tons or upwards, navigated with six persons, or more, in the whole, and bound from the United States to any port or ports in the West Indies.

MEDIETAS LINGUÆ. Half tongue. This expression was used to signify that a jury for the trial of a foreigner or alien for a crime, was to be composed one half of natives and the other of foreigners. The jury *de medietate linguæ* is used in but a few if any of the United States. Dane's Ab. vol. 6, c. 182, a, 4, n. 1. Vide 2 Johns. R. 381; 1 Chit. Cr. Law, 525; Bac. Ab. Juries, E 8.

MELANCHOLIA, med. jur. A name given by the ancients to a species of partial intellectual mania, now more generally known by the name of *monomania*. (q. v.) It bore this name because it was supposed to be always attended by dejection of mind and gloomy ideas. Vide *Mania*.

MELIORATIONS, Scotch law. Improvements of an estate, other than mere repairs; betterments. (q. v.) 1 Bell's Com. 73.

MELIUS INQUIRENDUM VEL INQUIRENDUM. *English practice.* A writ which in certain cases issues after an imperfect inquisition returned on a *capias utlagatum* in outlawry. This *melius inquirendum* commands the sheriff to summon another inquest in order that the value, &c., of lands, &c., may be better or more correctly ascertained. Its use is rare.

MEMBER. This word has various significations: 1. The limits of the body useful in self-defence. *Membrum est pars corporis habens destinatum operationem in corpore.* Co. Litt. 126 a. See *Limbs*.

2.—2. An individual who belongs to a firm, partnership, company or corporation. Vide *Corporation; Partnership*.

3.—3. One who belongs to a legislative

body, or other branch of the government; as, a member of the house of representatives; a member of the court.

MEMBER OF CONGRESS. A member of the senate or house of representatives of the United States.

2. During the session of congress they are privileged from arrest, except for treason, felony, or breach of the peace; they receive a compensation of eight dollars per day while in session, besides mileage. (q. v.)

3. They are authorized to frank letters and receive them free of postage for sixty days before, during, and for sixty days after the session.

4. They are prohibited from entering into any contracts with the United States, directly or indirectly, in whole or in part for themselves and others, under the penalty of three thousand dollars. Act of April 21, 1808, 2 Story's L. U. S. 1091. Vide *Congress; Frank*.

MEMBERS, English law. Places were a custom-house has been kept of old time, with officers or deputies in attendance; and they are lawful places of exportation or importation. 1 Chit. Com. L. 726.

MEMORANDUM. Literally, to be remembered. It is an informal instrument recording some fact or agreement, so called from its beginning, when it was made in Latin. It is sometimes commenced with this word, though written in English; as "Memorandum, that it is agreed;" or it is headed with the words, "Be it remembered that," &c. The term memorandum is also applied to the clause of an instrument.

MEMORANDUM, insurance. A clause in a policy limiting the liability of the insurer. Its usual form is as follows, namely, "N. B. Corn, fish, salt, fruit, flour and seed, are warranted free from average, unless general, or the ship be stranded: sugar, tobacco, hemp, flax, hides and skins, are warranted free from average, under five per cent.; and all other goods, also the ship and freight, are warranted free from average, under three per cent. unless general, or the ship be stranded." Marsh. Ins. 223; 5 N. S. 293; Id. 540; 4 N. S. 640; 2 L. R. 433; Id. 435.

MEMORANDUM OR NOTE. These words are use in the 4th section of the statute 29 Charles II., c. 3, commonly called the statute of frauds and perjuries, which enacts that "no action shall be brought whereby to charge any person upon any agreement made upon consideration of mar-

riage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c.

2. Many cases have arisen out of the words of this part of the statute; the general rule seems to be that the contract must be stated with reasonable certainty in the memorandum or note so that it can be understood from the writing itself, without having recourse to parol proof. 3 John. R. 399; 2 Kent, Com. 402; Cruise, Dig. t. 32, c. 3, s. 18. See 1 N. R. 252; 3 Taunt. 169; 15 East, 103; 2 M. & R. 222; 8 M. & W. 834; 6 M. & W. 109.

MEMORANDUM CHECK. It is not unusual among merchants, when one makes a temporary loan from another, to give the lender a check on a bank, with the express or implied agreement that it shall be redeemed by the maker himself, and that it shall not be presented at the bank for payment. If passed to a third person, it will be valid in his hands, like any other check. 11 Paige, R. 612.

MEMORIAL. A petition or representation made by one or more individuals to a legislative or other body. When such instrument is addressed to a court, it is called a petition.

MEMORY. Understanding; a capacity to make contracts, a will, or to commit a crime, so far as intention is necessary.

2. Memory is sometimes employed to express the capacity of the understanding, and sometimes its power; when we speak of a retentive memory, we use it in the former sense; when of a ready memory, in the latter. Shelf. on Lun. Intr. 29, 30.

3. Memory, in another sense, is the reputation, good or bad, which a man leaves at his death. This memory, when good, is highly prized by the relations of the deceased, and it is therefore libelous to throw a shade over the memory of the dead, when the writing has a tendency to create a breach of the peace, by inciting the friends and relations of the deceased to avenge the insult offered to the family. 4 T. R. 126; 5 Co. R. 125; Hawk. b. 1, c. 73, s. 1.

MEMORY, TIME OF. According to the English common law, which has been altered by 2 & 3 Wm. IV., c. 71, the time of memory commenced from the reign of Richard the First, A. D. 1189. 2 Bl. Com. 31.

2. But proof of a regular usage for

twenty years, not explained or contradicted, is evidence, upon which many public and private rights are held, and sufficient for a jury in finding the existence of an immemorial custom or prescription. 2 Saund. 175, a, d; Peake's Ev. 336; 2 Price's R. 450; 4 Price's R. 198.

MENACE. A threat; a declaration of an intention to cause evil to happen to another.

2. When menaces to do an injury to another have been made, the party making them may, in general, be held to bail to keep the peace; and, when followed by any inconvenience or loss, the injured party has a civil action against the wrong doer. Com. Dig. Battery, D; Vin. Ab. h. t.; Bac. Ab. Assault; Co. Litt. 161 a, 162 b, 253 b; 2 Lutw. 1428. Vide *Threat*.

MENIAL. This term is applied to servants who live under their master's roof. Vide stat. 2 H. IV., c. 21.

MENSA. This comprehends all goods and necessities for livelihood. *Obsolete*.

MENSA ET THORO. The phrase *a mensa et thoro* is applied to a divorce which separates the husband and wife, but does not dissolve the marriage. Vide *Divorce*.

MERCHANDISE. By this term is understood all those things which merchants sell either wholesale or retail, as dry goods, hardware, groceries, drugs, &c. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used or which are used only by a slow consumption. Vide Pardess. n. 8; Dig. 13, 3, 1; Id. 19, 4, 1; Id. 50, 16, 66. 8 Pet. 277; 2 Story, R. 16, 53, 54; 6 Wend. 335.

MERCHANT. One whose business it is to buy and sell merchandise; this applies to all persons who habitually trade in merchandise. 1 Watts & S. 469; 2 Salk. 445.

2. In another sense, it signifies a person who owns ships, and trades, by means of them, with foreign nations, or with the different States of the United States; these are known by the name of shipping merchants. Com. Dig. Merchant, A; Dyer, R. 279 b; Bac. Ab. h. t.

3. According to an old authority, there are four species of merchants, namely, merchant adventurers, merchant dormant, merchant travellers, and merchant residents. 2 Brownl. 99. Vide, generally, 9 Salk. R. 445; Bac. Ab. h. t.; Com. Dig. h. t.; 1 Bl. Com. 75, 260; 1 Pard. Dr. Com. n. 78

MERCHANTMAN. A ship or vessel employed in a merchant's service. This term is used in opposition to a ship of war.

MERCHANTS' ACCOUNTS. In the statute of limitations, 21 Jac. I. c. 16, there is an exception which has been copied in the acts of the legislatures of a number of the States, that its provisions shall not apply to such accounts as concern trade and merchandise between merchant and merchant, their factors or servants.

2. This exception, it has been holden, applies to actions of assumpsit as well as to actions of account. 5 Cranch, 15. But to bring a case within the exception, there must be an account, and that account open and current, and it must concern trade. 12 Pet. 300. See 6 Pet. 151; 5 Mason, R. 505; Bac. Ab. Limitation of Actions, E 3; and article *Limitation*.

MERCY, practice. To be in mercy, signifies to be liable to punishment at the discretion of the judge.

MERCY, crim. law. The total or partial remission of a punishment to which a convict is subject. When the whole punishment is remitted, it is called a pardon; (q. v.) when only a part of the punishment is remitted, it is frequently a conditional pardon; or before sentence, it is called clemency or mercy. Vide *Rutherf. Inst.* 224; 1 Kent, Com. 265; 3 Story, Const. § 1488.

MERE. This is the French word for *mother*. It is frequently used, as, *in ventre sa mère*, which signifies a child unborn, or in the womb.

MERGER. Where a greater and lesser thing meet, and the latter loses its separate existence and sinks into the former. It is applied to estates, rights, crimes, and torts.

MERGER, estates. When a greater estate and less coincide and meet in one and the same person, without any intermediate estate, the less is immediately merged, that is, sunk or drowned in the latter; example, if there be a tenant for years, and the reversion in fee simple descends to, or is purchased by him, the term of years is merged in the inheritance, and no longer exists; but they must be to one and the same person, at one and the same time, in one and the same right. 2 Bl. Com. 177; 3 Mass. Rep. 172; Latch, 153; Poph. 166; 1 John. Ch. R. 417; 3 John. Ch. R. 53; 6 Madd. Ch. R. 119.

2. The estate in which the merger takes place, is not enlarged by the accession of

the preceding estate; and the greater, or only subsisting estate, continues, after the merger, precisely of the same quantity and extent of ownership, as it was before the accession of the estate which is merged, and the lesser estate is extinguished. *Prest. on Conv.* 7. As a general rule, equal estates will not drown in each other.

3. The merger is produced, either from the meeting of an estate of higher degree, with an estate of inferior degree; or from the meeting of the particular estate and the immediate reversion, in the same person. 4 Kent, Com. 98. Vide 3 *Prest. on Conv.* which is devoted to this subject. Vide, generally, Bac. Ab. Leases, &c. R; 15 Vin. Ab. 361; Dane's Ab. Index, h. t.; 10 Verm. R. 293; 8 Watts, R. 146; Co. Litt. 338 b, note 4; Hill. Ab. Index, h. t.; Bouv. Inst. Index, h. t.; and *Confusion; Consolidation; Unity of Possession*.

MERGER, crim. law. When a man commits a great crime which includes a lesser, the latter is merged in the former.

2. Murder, when committed by blows, necessarily includes an assault and battery; a battery, an assault; a burglary, when accompanied with a felonious taking of personal property, a larceny; in all these, and similar cases, the lesser crime is merged in the greater.

3. But when one offence is of the same character with the other, there is no merger; as in the case of a conspiracy to commit a misdemeanor, and the misdemeanor is afterwards committed in pursuance of the conspiracy. The two crimes being of equal degree, there can be no legal merger. 4 Wend. R. 265. Vide *Civil Remedy*.

MERGER, rights. Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment.

2. When there is a confusion of rights, and the debtor and creditor become the same person, there can be no right to put in execution; but there is an immediate merger. 2 Ves. jr. 264. Example, a man becomes indebted to a woman in a sum of money, and afterwards marries her, there is immediately a confusion of rights, and the debt is merged or extinguished.

MERGER, torts. Where a person in committing a felony also commits a tort, against a private person; in this case, the wrong is sunk in the felony, at least, until after the felon's conviction.

2. The old maxim that a trespass is merged in a felony, has sometimes been supposed to mean that there is no redress by civil action for an injury which amounts to a felony. But it is now established that the defendant is liable to the party injured either after his conviction; *Latch*, 144; *Noy*, 82; *W. Jones*, 147; *Sty.* 346; 1 *Mod.* 282; 1 *Hale*, P. C. 546; or acquittal. 12 *East*, R. 409; 1 *Tayl. R.* 58; 2 *Hayw.* 108. If the civil action be commenced before, the plaintiff will be nonsuited. *Yelv.* 90, a, n. See *Hamm. N. P.* 63; *Kely.* 48; *Cas. Tempt. Hardw.* 350; *Lofft.* 88; 2 *T. R.* 750; 3 *Greenl. R.* 458. *Butler, J.*, says, this doctrine is not extended beyond actions of trespass or tort. 4 *T. R.* 333. See also 1 *H. Bl.* 583, 588, 594; 15 *Mass. R.* 78; *Id.* 336. *Vide Civil Remedy; Injury.*

3. The Revised Statutes of New York, part 3, c. 4, t. 1, s. 2, direct that the right of action of any person injured by any felony, shall not, in any case, be merged in such felony, or be in any manner affected thereby. In *Kentucky*, *Pr. Dec.* 203, and *New Hampshire*, 6 *N. H. Rep.* 454, the owner of stolen goods, may immediately pursue his civil remedy. See, generally, *Minor*, 8; 1 *Stew. R.* 70; 15 *Mass.* 336; *Coxe*, 115; 4 *Ham.* 376; 4 *N. Hamp. Rep.* 239; 1 *Miles*, R. 312; 6 *Rand.* 223; 1 *Const. R.* 231; 2 *Root*, 90.

MERITS. This word is used principally in matters of defence.

2. A defence upon the merits, is one that rests upon the justice of the cause, and not upon technical grounds only; there is, therefore, a difference between a good defence, which may be technical or not, and a defence on the merits. 5 *B. & Ald.* 703; 1 *Ashm. R.* 4; 5 *John. R.* 536; *Id.* 360; 3 *John. R.* 245; *Id.* 449; 6 *John. R.* 131; 4 *John. R.* 486; 2 *Cowen, R.* 281; 7 *Cowen, R.* 514; 6 *Wend. R.* 511; 6 *Cowen, R.* 395.

MERTON, STATUTE OF. A statute so called, because the parliament or rather council, which enacted it, sat at Merton, in *Surrey*. It was made the 20 *Hen. III.* A. D. 1236. See *Barr. on the Stat.* 41.

MESCROYANT. Used in our ancient books. An unbeliever. *Vide Infidel.*

MESE. An ancient word used to signify house, probably from the French *maison*; it is said that by this word the buildings, curtilage, orchards and gardens will pass. *Co. Litt.* 56.

MESNE. The middle between two

extremes, that part between the commencement and the end, as it relates to time.

2. Hence the profits which a man receives between disseisin and recovery of lands are called *mesne profits*. (q. v.) Process which is issued in a suit between the original and final process, is called *mesne process*. (q. v.)

3. In *England*, the word *mesne* also applies to a dignity: those persons who hold lordships or manors of some superior who is called lord paramount, and grant the same to inferior persons, are called *mesne lords*.

MESNE PROCESS. Any process issued between original and final process; that is, between the original writ and the execution. See *Process, mesne*.

MESNE PROFITS, torts, remedies. The value of the premises, recovered in ejectment, during the time that the lessor of the plaintiff has been illegally kept out of the possession of his estate, by the defendant; such are properly recovered by an action of trespass, *quare clausum fregit*, after a recovery in ejectment. 11 *Serg. & Rawle*, 55; *Bac. Ab. Ejectment, H*; 3 *Bl. Com.* 205.

2. As a general rule, the plaintiff is entitled to recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years, for in that case, the defendant may plead the statute of limitations. 3 *Yeates' R.* 13; *B. N. P.* 88.

3. The value of improvements made by the defendant, may be set off against a claim for *mesne profits*, but profits before the demise laid, should be first deducted from the value of the improvements. 2 *W. C. C. R.* 165. *Vide, generally, Bac. Ab. Ejectment, H*; *Woodf. L. & T. ch.* 14, s. 3; 2 *Sell. Pr.* 140; *Fonbl. Eq. Index, h. t.*; *Com. L. & T. Index, h. t.*; 2 *Phil. Ev.* 208; *Adams on Ej. ch.* 13; *Dane's Ab. Index, h. t.*; *Pow. Mortg. Index, h. t.*; *Bouv. Inst. Index, h. t.*

MESNE, WRIT OF. The name of an ancient writ, which lies when the lord paramount distrains on the tenant paravail; the latter shall have a writ of *mesne* against the lord who is *mesne*. *F. N. B.* 316.

MESSENGER. A person appointed to perform certain duties, generally of a ministerial character.

2. In *England*, a messenger appointed under the bankrupt laws, is an officer who

is authorized to execute the lawful commands of commissioners of bankrupts.

MESSUAGE, property. This word is synonymous with dwelling-house; and a grant of a messuage with the appurtenances, will not only pass a house, but all the buildings attached or belonging to it, as also its curtilage, garden and orchard, together with the close on which the house is built. 1 Inst. 5, b.; 2 Saund. 400; Ham. N. P. 189; 4 Cruise, 321; 2 T. R. 502; 1 Tho. Co. Litt. 215, note 35; 4 Blackf. 331. But see the cases cited in 9 B. & Cress. 681; S. C. 17 Engl. Com. L. R. 472. This term, it is said, includes a church. 11 Co. 26; 2 Esp. N. P. 528; 1 Salk. 256; 8 B. & Cress. 25; S. C. 15 Engl. Com. L. Rep. 151. Et vide 3 Wils. 141; 2 Bl. Rep. 726; 4 M. & W. 567; 2 Bing. N. C. 617; 1 Saund. 6.

METHOD. The mode of operating or the means of attaining an object.

2. It has been questioned whether the method of making a thing can be patented. But it has been considered that a method or mode may be the subject of a patent, because, when the object of two patents or effects to be produced is essentially the same, they may both be valid, if the modes of attaining the desired effect are essentially different. Dav. Pat. Cas. 290; 2 B. & Ald. 350; 2 H. Bl. 492; 8 T. R. 106; 4 Burr. 2397; Gods. on Pat. 85; Perpigna, Manuel des Inventeurs, &c., c. 1, sect. 5, § 1, p. 22.

METRE or METER. This word is derived from the Greek, and signifies a measure.

2. This is the standard of French measure.

3. The fundamental base of the *mètre* is the quarter of the terrestrial meridian, or the distance from the pole to equator, which has been divided into ten millions of equal parts, one of which is of the length of the *mètre*. The *mètre* is equal to 3.28 feet, or 39.371 inches. Vide *Measure*.

MEUBLES MEUBLANS. A French term used in Louisiana, which signifies simply household furniture. 4 N. S. 664; 3 Harr. Cond. R. 431.

MICEL GEMOT, Eng. law. In Saxon times, the great council of the nation bore this name, sometimes also called the *witena gemot*, or assembly of wise men; in after-times, this assembly assumed the name of parliament. Vide 1 Bl. Comm. 147.

MICHAELMAS TERM, Eng. law. One of the four terms of the courts; it begins

on the 2d day of November, and ends on the 25th of November. It was formerly a movable term. St. 11 G. IV. and 1 W. IV. c. 70.

MICHIGAN. One of the new states of the United States of America. This state was admitted into the Union by the Act of Congress of January 26th, 1837, Sharsw. cont. of Story's L. U. S. 2531, which enacts "that the state of Michigan shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever."

2. The first constitution of this state was adopted by a convention of the people, begun and held at the capital in the city of Detroit, on Monday, the eleventh day of May, 1835. This was superseded by the present constitution, which was adopted 1850. It provides, article 3, § 1; The powers of the government shall be divided into three distinct departments; the legislative, the executive, and the judicial; and one department shall never exercise the powers of another, except in such cases as are expressly provided for in this constitution.

3.—1. Art. 4, relates to the *Legislative department*, and provides that

§ 1. The legislative power shall be vested in a senate and house of representatives.

4.—§ 6. No person holding any office under the United States [or this state] or any county office, except notaries public, officers of the militia and officers elected by townships, shall be eligible to or have a seat in either house of the legislature, and all votes given for any such person shall be void.

5.—§ 7. Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest, nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session. They shall not be questioned in any other place for any speech in either house.

6.—§ 8. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as each house may provide.

7.—§ 9. Each house shall choose its own officers, determine the rules of its proceeding,

and judge of the qualifications, elections, and return of its own members; and may, with the concurrence of two-thirds of all the members elected, expel a member; no member shall be expelled a second time for the same cause, nor for any cause known to his constituents antecedent to his election. The reason for such expulsion shall be entered upon the journal, with the names of the members voting on the question.

8.—§ 10. Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy; the yeas and nays of the members of either house, on any question, shall be entered on the journal at the request of one-fifth of the members present. Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public, and have the reason of his dissent entered on the journal.

9.—§ 11. In all elections by either house, or in joint convention, the votes shall be given *visa voce*. All votes on nominations to the senate shall be taken by yeas and nays, and published with the journal of its proceedings.

10.—§ 12. The doors of each house shall be open, unless the public welfare require secrecy; neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than where the legislature may then be in session.

11.—1st. In considering the *house of representatives*, it will be proper to take a view of the qualifications of members; the qualification of the electors; the number of members; the time for which they are elected.

12.—1. The representatives must be citizens of the United States, and qualified electors in the respective counties which they represent. Art. 4, s. 5. 2. In all elections, every white male citizen, every white male inhabitant residing in the state on the twenty-fourth day of June, one thousand eight hundred and thirty-five; every white male inhabitant residing in this state on the first day of January, one thousand eight hundred and fifty, who has declared his intention to become a citizen of the United States pursuant to the laws thereof six months preceding an election, or who has resided in this state two years and six months and declared his intention as aforesaid; and every civilized male inhabitant of Indian descent, a native of the United

States, and not a member of any tribe, shall be an elector and entitled to vote; but no citizen or inhabitant shall be an elector or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this state three months, and in the township or ward in which he offers to vote ten days next preceding such election. Art. 7, § 1. 3. The house of representatives shall consist of not less than sixty-five nor more than one hundred members. Art. 4, s. 3. 4. The election of representatives, pursuant to the provisions of this constitution, shall be held on the Tuesday succeeding the first Monday of November, in the year one thousand eight hundred and fifty-two, and on the Tuesday succeeding the first Monday of November of every second year thereafter. Art. 4, s. 34. Representatives shall be chosen for two years. Art. 4, s. 3.

13.—2d. The *senate* will be considered in the same order. 1. Senators must be citizens of the United States, and be qualified electors in the district which they represent. Art. 4, s. 5. 2. They are elected by the electors of representatives. Art. 7, s. 1. 3. The senate shall consist of thirty-two members. Art. 4, s. 2. 4. The senators shall be elected for two years, at the same time and in the same manner as the representatives are required to be chosen. Art. 4, section 2, § 4.

14.—2. The *executive* department is regulated by the fifth article of the constitution as follows, namely:

§ 1. The executive power is vested in a governor, who shall hold his office for two years; a lieutenant governor shall be chosen for the same term.

15.—§ 2. No person shall be eligible to the office of governor or lieutenant governor, who has not been five years a citizen of the United States, and a resident of this state two years next preceding the election; nor shall any person be eligible to either office who has not attained the age of thirty years.

16.—§ 3. The governor and lieutenant governor shall be elected at the times and places of choosing members of the legislature. The person having the highest number of votes for governor and lieutenant governor shall be elected; in case two or more persons have an equal and the highest number of votes for governor or lieutenant governor, the legislature shall by joint vote choose one of such persons.

17.—§ 4. The governor shall be com-

mander-in-chief of the military and naval forces, and may call out such forces to execute the laws, to suppress insurrections and to repel invasions.

18.—§ 5. He shall transact all necessary business with the officers of government; and may require information, in writing, from the officers of the executive department, upon any subject relating to the duties of their respective offices.

19.—§ 6. He shall take care that the laws be faithfully executed.

20.—§ 7. He may convene the legislature on extraordinary occasions.

21.—§ 8. He shall give to the legislature, and at the close of his official term to the next legislature, information by message of the condition of the state, and recommend such measures to them as he shall deem expedient.

22.—§ 9. He may convene the legislature at some other place, when the seat of government becomes dangerous from disease or a common enemy.

23.—§ 10. He shall issue writs of election to fill such vacancies as occur in the senate or house of representatives.

24.—§ 11. He may grant reprieves, commutations and pardons after convictions, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to regulations provided by law, relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall communicate to the legislature at each session information of each case of reprieve, commutation or pardon granted, and the reasons therefor.

25.—§ 12. In case of the impeachment of the governor, his removal from office, death, inability, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the disability ceases. When the governor shall be out of the state in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the state.

26.—§ 13. During a vacancy in the office of governor, if the lieutenant governor die,

resign, be impeached, displaced, be incapable of performing the duties of his office, or absent from the state, the president *pro tempore* of the senate shall act as governor until the vacancy be filled, or the disability cease.

27.—§ 14. The lieutenant governor shall, by virtue of his office, be president of the senate. In committee of the whole he may debate all questions; and when there is an equal division, he shall give the casting vote.

28.—§ 15. No member of congress, nor any person holding office under the United States, or this state, shall execute the office of governor.

29.—§ 16. No person elected governor or lieutenant governor shall be eligible to any office or appointment from the legislature, or either house thereof, during the time for which he was elected. All votes for either of them, for any such office, shall be void.

30.—§ 17. The lieutenant governor and president of the senate *pro tempore*, when performing the duties of governor, shall receive the same compensation as the governor.

31.—§ 18. All official acts of the governor, his approval of the laws excepted, shall be authenticated by the great seal of the state, which shall be kept by the secretary of state.

32.—§ 19. All commissions issued to persons holding office under the provisions of this constitution, shall be in the name and by the authority of the people of the state of Michigan, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

32.—§ 3. The *judicial* department is regulated by the sixth article as follows, namely:

33.—§ 1. The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.

34.—§ 2. For the term of six years, and thereafter, until the legislature otherwise provide, the judges of the several circuit courts shall be judges of the supreme court, four of whom shall constitute a quorum. A concurrence of three shall be necessary to a final decision. After six years the legislature may provide by law for the organization of a supreme court, with the

jurisdiction and powers prescribed in this constitution, to consist of one chief justice and three associate justices, to be chosen by the electors of the state. Such supreme court, when so organized, shall not be changed or discontinued by the legislature for eight years thereafter. The judges thereof shall be so classified that but one of them shall go out of office at the same time. Their term of office shall be eight years.

35.—§ 3. The supreme court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only.

36.—§ 4. Four terms of the supreme court shall be held annually, at such times and places as may be designated by law.

37.—§ 5. The supreme court shall, by general rules, establish, modify and amend the practice in such court and in the circuit courts, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.

38.—§ 6. The state shall be divided into eight judicial circuits; in each of which the electors thereof shall elect one circuit judge, who shall hold his office for the term of six years, and until his successor is elected and qualified.

39.—§ 7. The legislature may alter the limits of circuits, or increase the number of the same. No alteration or increase shall have the effect to remove a judge from office. In every additional circuit established the judge shall be elected by the electors of such circuit, and his term of office shall continue as provided in this constitution for judges of the circuit court.

40.—§ 8. The circuit courts shall have original jurisdiction in all matters civil and criminal, not excepted in this constitution, and not prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts

and tribunals within their respective jurisdictions.

41.—§ 9. Each of the judges of the circuit courts shall receive a salary payable quarterly. They shall be ineligible to any other than a judicial office during the term for which they are elected, and for one year thereafter. All votes for any person elected such judge for any office other than judicial, given either by the legislature or the people, shall be void.

42.—§ 10. The supreme court may appoint a reporter of its decisions. The decisions of the supreme court shall be in writing, and signed by the judges concurring therein. Any judge dissenting therefrom, shall give the reasons of such dissent in writing, under his signature. All such opinions shall be filed in the office of the clerk of the supreme court. The judges of the circuit court, within their respective jurisdictions, may fill vacancies in the office of county clerk and of prosecuting attorney; but no judge of the supreme court, or circuit court, shall exercise any other power of appointment to public office.

43.—§ 11. A circuit court shall be held at least twice in each year in every county organized for judicial purposes, and four times in each year in counties containing ten thousand inhabitants. Judges of the circuit court may hold courts for each other, and shall do so when required by law.

44.—§ 12. The clerk of each county organized for judicial purposes shall be the clerk of the circuit court of such county, and of the supreme court when held within the same.

45.—§ 13. In each of the counties organized for judicial purposes, there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years, and until his successor is elected and qualified. The jurisdiction, powers and duties of such court, shall be prescribed by law.

46.—§ 14. When a vacancy occurs in the office of judge of the supreme, circuit or probate court, it shall be filled by appointment of the governor, which shall continue until a successor is elected and qualified. When elected, such successor shall hold his office the residue of the unexpired term.

47.—§ 15. The supreme court, the circuit and probate courts of each county, shall be

courts of record, and shall each have a common seal.

48.—§ 16. The legislature may provide by law for the election of one or more persons in each organized county, who may be vested with judicial powers, not exceeding those of a judge of the circuit court at chambers.

49.—§ 17. There shall be not exceeding four justices of the peace in each organized township. They shall be elected by the electors of the townships, and shall hold their offices for four years, and until their successors are elected and qualified. At the first election in any township, they shall be classified as shall be prescribed by law. A justice elected to fill a vacancy shall hold his office for the residue of the unexpired term. The legislature may increase the number of justices in cities.

50.—§ 18. In civil cases justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars, and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law. They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by the legislature.

51.—§ 19. Judges of the supreme court, circuit judges, and justices of the peace, shall be conservators of the peace within their respective jurisdictions.

52.—§ 20. The first election of judges of the circuit courts shall be held on the first Monday in April, one thousand eight hundred and fifty-one, and every sixth year thereafter. Whenever an additional circuit is created, provision shall be made to hold the subsequent election of such additional judges at the regular elections herein provided.

53.—§ 21. The first election of judges of the probate courts shall be held on the Tuesday succeeding the first Monday of November, one thousand eight hundred and fifty-two, and every fourth year thereafter.

54.—§ 22. Whenever a judge shall remove beyond the limits of the jurisdiction for which he was elected, or a justice of the peace from the township in which he was elected, or by a change in the boundaries of such township shall be placed without the same, they shall be deemed to have vacated their respective offices.

55.—§ 23. The legislature may establish courts of conciliation, with such powers and duties as shall be prescribed by law.

56.—§ 24. Any suitor in any court of this state shall have the right to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice.

57.—§ 25. In all prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury shall have the right to determine the law and the fact.

58.—§ 26. The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizure. No warrant to search any place, or to seize any person or things, shall issue without describing them, nor without probable cause, supported by oath or affirmation.

59.—§ 27. The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties, in such manner as shall be prescribed by law.

60.—§ 28. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defence.

61.—§ 29. No person, after acquittal upon the merits, shall be tried for the same offence; all persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason, when the proof is evident or the presumption great.

62.—§ 30. Treason against the state shall consist only in levying war against, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act, or on confession in open court.

63.—§ 31. Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted, nor shall witnesses be unreasonably detained.

64.—§ 32. No person shall be compelled, in any criminal case, to be a witness against

himself; nor be deprived of life, liberty, or property, without due process of law.

65.—§ 33. No person shall be imprisoned for debt arising out of, or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers, or in any professional employment. No person shall be imprisoned for a militia fine in time of peace.

66.—§ 34. No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.

67.—§ 35. The style of all process shall be, "In the name of the people of the State of Michigan."

MIDDLEMAN, contracts. A person who is employed both by the seller and purchaser of goods, or by the purchaser alone, to receive them into his possession, for the purpose of doing something in or about them; as, if goods be delivered from a ship by the seller to a wharfinger, to be by him forwarded to the purchaser, who has been appointed by the latter to receive them; or if goods be sent to a packer, for and by orders of the vendee, the packer is to be considered as a middleman.

2. The goods in both these cases will be considered *in transitu*, provided the purchaser has not used the wharfinger's or the packer's warehouse as his own, and have an ulterior place of delivery in view. 3 B. & P. 127, 469; 4 Esp. R. 82; 2 B. & P. 457; 1 Campb. 282; 1 Atk. 245; 1 H. Bl. 364; 3 East, R. 93; Whit. on Trans. 195.

3. By middleman is also understood one who has been employed as an agent by a principal, and who has employed a sub-agent under him by authority of the principal, either express or implied. He is not in general liable for the wrongful acts of the sub-agent, the principal being alone responsible. 3 Campb. N. P. Cas. 4; 6 T. R. 411; 14 East, 605.

MIDWIFE, med. jur. A woman who practices midwifery; a woman who pursues the business of an *accoucheuse*.

2. A midwife is required to perform the business she undertakes with proper skill, and if she be guilty of any *mala praxis*, (q. v.) she is liable to an action or an indictment for the misdemeanor. Vide Vin. Ab. Physician; Com. Dig. Physician; 8 East, R. 343; 2 Wils. R. 359; 4 C. & P. 398; S. C. 19 E. C. L. R. 440; 4 C. & P.

407, n. a; 1 Chit. Pr. 43; 2 Russ. Cr. 288.

MILE, measure. A length of a thousand paces, or seventeen hundred and sixty yards, or five thousand two hundred and eighty feet. It contains eight furlongs, every furlong being forty poles, and each pole sixteen feet six inches. 2 Stark. R. 89.

MILEAGE. A compensation allowed by law to officers, for their trouble and expenses in travelling on public business.

2. The mileage allowed to members of congress, is eight dollars for every twenty miles of estimated distance, by the most usual roads, from his place of residence to the seat of congress, at the commencement and end of every session. Act of Jan. 22, 1818; 3 Story's Laws U. S. 1657.

3. In computing mileage the distance by the road usually travelled is that which must be allowed, whether in fact the officer travels a more or less distant way to suit his own convenience. 5 Shepl. R. 431.

MILITARY. That which belongs or relates to the army.

MILITIA. The military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection and repel invasion.

2. The Constitution of the United States provides on this subject as follows:

Art. 1, s. 8, 14. Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

3.—15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress.

4. Under these clauses of the constitution, the following points have been decided.

1. If congress had chosen, they might, by law, have considered a militia man, called into the service of the United States, as being, from the time of such call, constructively in that service, though not actually so, although he should not appear at the place of rendezvous. But they have not so considered him, in the acts of congress, till after his appearance at the place of rendezvous: previous to that, a fine was to be paid for the delinquency in not obeying the call, which fine was deemed an equiva-

lent for his services, and an atonement for his disobedience.

5.—2. The militia belong to the states respectively, and are subject, both in their civil and military capacities, to the jurisdiction and laws of the state, except so far as these laws are controlled by acts of congress, constitutionally made.

6.—3. It is presumable the framers of the constitution contemplated a full exercise of all the powers of organizing, arming, and disciplining the militia; nevertheless, if congress had declined to exercise them, it was competent to the state governments respectively to do it. But congress has executed these powers as fully as was thought right, and covered the whole ground of their legislation by different laws, notwithstanding important provisions may have been omitted, or those enacted might be beneficially altered or enlarged.

7.—4. After this, the states cannot enact or enforce laws on the same subject. For although their laws may not be directly repugnant to those of congress, yet congress, having exercised their will upon the subject, the states cannot legislate upon it. If the law of the latter be the same, it is inoperative: if they differ, they must, in the nature of things, oppose each other, so far as they differ.

8.—5. Thus if an act of congress imposes a fine, and a state law fine and imprisonment for the same offence, though the latter is not repugnant, inasmuch as it agrees with the act of the congress, so far as the latter goes, and add another punishment, yet the wills of the two legislating powers in relation to the subject are different, and cannot subsist harmoniously together.

9.—6. The same legislating power may impose cumulative punishments; but not different legislating powers.

10.—7. Therefore, where the state governments have, by the constitution, a concurrent power with the national government, the former cannot legislate on any subject on which congress has acted, although the two laws are not in terms contradictory and repugnant to each other.

11.—8. Where congress prescribed the punishment to be inflicted on a militia man, detached and called forth, but refusing to march, and also provided that courts martial for the trial of such delinquents, to be composed of militia officers only, should be held and conducted in the manner pointed out by the rules and articles of war, and a state had passed a law enacting the penalties on

such delinquents which the act of congress prescribed, and directing lists of the delinquents to be furnished to the comptroller of the United States and marshal, that further proceeding might take place according to the act of congress, and providing for their trial by state courts martial, such state courts martial have jurisdiction. Congress might have vested exclusive jurisdiction in courts martial to be held according to their laws, but not having done so expressly, their jurisdiction is not exclusive.

12.—9. Although congress have exercised the whole power of calling out the militia, yet they are not national militia, till employed in actual service; and they are not employed in actual service, till they arrive at the place of rendezvous. 5 Wheat. 1; Vide 1 Kent's Com. 262; 3 Story, Const. § 1194 to 1210.

13. The acts of the national legislature which regulate the militia are the following, namely: Act of May 8, 1792, 1 Story, L. U. S. 252; Act of February 28, 1795, 1 Story, L. U. S. 390; Act of March 2, 1803, 2 Story, L. U. S. 888; Act of April 10, 1806, 2 Story, L. U. S. 1005; Act of April 20, 1816, 3 Story, L. U. S. 1573; Act of May 12, 1820, 3 Story, L. U. S. 1786; Act of March 2, 1821, 3 Story, L. U. S. 1811.

MILL, *estates*. Mills are so very different and various, that it is not easy to give a definition of the term. They are used for the purpose of grinding and pulverising grain and other matters, to extract the juices of vegetables, to make various articles of manufacture. They take their names from the uses to which they are employed, hence we have paper-mills, fulling-mills, iron-mills, oil-mills, saw-mills, &c. In another respect their kinds are various; they are either fixed to the freehold or not. Those which are a part of the freehold, are either water-mills, wind-mills, steam-mills, &c.; those which are not so fixed, are hand-mills, and are merely personal property. Those which are fixed, and make a part of the freehold, are buildings with machinery calculated to obtain the object proposed in their erection.

2. It has been held that the grant of a mill, and its appurtenances, even without the land, carries the whole right of water enjoyed by the grantor, as necessary to its use, and as a necessary incident. Cro. Jac. 121. And a devise of a mill carries the land used with it, and the right to use the water. 1 Serg. & Rawle, 169; and see 5 Serg. & Rawle, 107; 2 Caine's Ca. 87; 10

Serg. & Rawle, 63; 1 Penna. R. 402; 3 N. H. Rep. 190; 6 Greenl. R. 436; Id. 154; 7 Mass. Rep. 6; 5 Shepl. 281.

3. A mill means not merely the building, in which the business is carried on, but includes the site, the dam, and other things annexed to the freehold, necessary for its beneficial enjoyment. 3 Mass. R. 280. See Vide 6 Greenl. R. 436.

4. Whether manufacturing machinery will pass under the grant of a mill must depend mainly on the circumstances of each case. 5 Eng. C. L. R. 168; S. C. 1 Brod. & Bing. 506. In England the law appears not to be settled. 1 Bell's Com. 754, note 4, 5th ed. In this note are given the opinions of Sir Samuel Romilly and Mr. Leech, on a question whether a mortgage of a piece of land on which a mill was erected, would operate as a mortgage of the machinery. Sir Samuel was clearly of opinion that such a mortgage would bind the machinery, and Mr. Leech was of a directly opposite opinion.

5. The American law on this subject, appears not to be entirely fixed. 1 Hill. Ab. 16; 1 Bailey's R. 540; 3 Kent, Com. 440; see Amos & Fer., on Firt. 188, et seq.; 1 Atk. 165; 1 Ves. 348; Sugd. Vend. 30; 6 John. 5; 10 Serg. & Rawle, 63; 2 Watts & Serg. 116; 6 Greenl. 157; 20 Wend. 636; 1 H. Bl. 259, note; 17 S. & R. 415; 10 Amer. Jur. 58; 1 Misso. R. 620; 3 Mason, 464; 2 Watts & S. 390. Vide 15 Vin. Ab. 398; Dane's Ab. Index, h. t.; 6 Cowen, 677.

MILL, money. An imaginary money, of which ten are equal to one cent, one hundred equal to a dime, and one thousand equal to a dollar. There is no coin of this denomination. Vide *Coin; Money*.

MILLED MONEY. This term means merely coined money, and it is not necessary that it should be marked or rolled on the edges. Running's case, Leach, 708.

MIL-REIS. The name of a coin. The mil-reis of Portugal is taken as money of account, at the custom-house, to be of the value of one hundred and twelve cents. Act of March 3, 1843.

2. The mil-reis of Azores, is deemed of the value of eighty-three and one-third cents. Act of March 3, 1843.

3. The mil-reis of Maderia is deemed of the value of one hundred cents. Id.

MIND AND MEMORY. It is usual in considering the state of a testator at the time of making his will, to ascertain whether he was of sound mind and memory; that is,

whether he had capacity to make a will. These words then import capacity, ability.

MINE. An excavation made for obtaining minerals from the bowels of the earth; and the minerals themselves are known by the name of mine.

2. Mines are therefore considered as open and not open. An open mine is one at which work has been done, and a part of the materials taken out. When land is let on which there is an open mine, the tenant may, unless restricted by his lease, work the mine; 1 Cru. Dig. 132; 5 Co. R. 12; 1 Chit. Pr. 184, 5; and he may open new pits or shafts for working the old vein, for otherwise the working of the same mine might be impracticable. 2 P. Wms. 388; 3 Tho. Co. Litt. 237; 10 Pick. R. 460. A mine not opened, cannot be opened by a tenant for years unless authorized, nor even by a tenant for life, without being guilty of waste. 5 Co. 12.

3. Unless expressly excepted, mines would be included in the conveyance of land, without being expressly named, and so *vice versa*, by a grant of a mine, the land itself, the surface above the mine, if livery be made, will pass. Co. Litt. 6; 1 Tho. Co. Litt. 218; Shep. To. 26. Vide, generally, 15 Vin. Ab. 401; 2 Supp. to Ves. jr. 257, and the cases there cited, and 448; Com. Dig. Grant, G 7; Id. Waifs, H 1; Crabb, R. P. §§ 98-101; 10 East, 273; 1 M. & S. 84; 2 B. & A. 554; 4 Watts, 223-246.

4. In New York the following provisions have been made in relation to the mines in that state, by the revised statutes, part 1, chapter 9, title 11. It is enacted as follows, by

§ 1. The following mines are, and shall be, the property of this state, in its right of sovereignty. 1. All mines of gold and silver discovered, or hereafter to be discovered, within this state. 2. All mines of other metals discovered, or hereafter to be discovered, upon any lands owned by persons not being citizens of any of the United States. 3. All mines of other metals discovered, or hereafter to be discovered, upon lands owned by a citizen of any of the United States, the ore of which, upon an average, shall contain less than two equal third parts in value, of copper, tin, iron or lead, or any of those metals.

5.—§ 2. All mines, and all minerals and fossils discovered, or hereafter to be discovered, upon any lands belonging to the people of this state, are, and shall be the

property of the people, subject to the provisions hereinafter made to encourage the discovery thereof.

6.—§ 3. All mines of whatever description, other than mines of gold and silver, discovered or hereafter to be discovered, upon any lands owned by a citizen of the United States, the ore of which, upon an average, shall contain two equal third parts or more, in value, of copper, tin, iron and lead, or any of those metals, shall belong to the owner of such land.

7.—§ 4. Every person who shall make a discovery of any mine of gold or silver, within this state, and the executors, administrators or assigns of such person, shall be exempted from paying to the people of this state, any part of the ore, profit or produce of such mine, for the term of twenty-one years, to be computed from the time of giving notice of such discovery, in the manner hereinafter directed.

8.—§ 5. No person discovering a mine of gold or silver within this state, shall work the same, until he give notice thereof, by information in writing, to the secretary of this state, describing particularly therein the nature and situation of the mine. Such notice shall be registered in a book, to be kept by the secretary for that purpose.

9.—§ 6. After the expiration of the term above specified, the discoverer of the mine, or his representatives, shall be preferred in any contract for the working of such mine, made with the legislature or under its authority.

10.—§ 7. Nothing in this title contained shall affect any grants heretofore made by the legislature, to persons having discovered mines; nor be construed to give to any person a right to enter on, or to break up the lands of any other person, or of the people of this state, or to work any mines in such lands, unless the consent, in writing, of the owner thereof, or of the commissioners of the land office, when the lands belong to the people of this state, shall be previously obtained.

MINISTER, government. An officer who is placed near the sovereign, and is invested with the administration of some one of the principal branches of the government.

2. Ministers are responsible to the king or other supreme magistrate who has appointed them. 4 Conn. 134.

MINISTER, international law. This is the general name given to public functionaries who represent their country abroad,

such as *ambassadors*, (q. v.) *envoys*, (q. v.) and *residents*. (q. v.) A custom of recent origin has introduced a new kind of ministers, without any particular determination of character; these are simply called *ministers*, to indicate that they are invested with the general character of a sovereign's mandatories, without any particular assignment of rank or character.

2. The minister represents his government in a vague and indeterminate manner, which cannot be equal to the first degree; and he possesses all the rights essential to a public minister.

3. There are also *ministers plenipotentiary*, who, as they possess full powers, are of much greater distinction than simple ministers. These also, are without any particular attribution of rank and character, but by custom are now placed immediately below the ambassador, or on a level with the envoy extraordinary. Vattel, liv. 4, c. 6, § 74; 1 Kent, Com. 38; Merl. Répert. h. t. sect. 1, n. 4.

4. Formerly no distinction was made in the different classes of public ministers, but the modern usage of Europe introduced some distinctions in this respect, which, on account of a want of precision, became the source of controversy. To obviate these, the congress of Vienna, and that of Aix la Chapelle, put an end to these disputes by classing ministers as follows: 1. Ambassadors, and papal legates or nuncios. 2. Envoys, ministers, or others accredited to sovereigns, (auprès des souverains). 3. Ministers resident, accredited to sovereigns. 4. Chargés d'Affaires, accredited to the minister of foreign affairs. Réces du Congrès de Vienne, du 19 Mars, 1815; Protocoll du Congrès d'Aix la Chapelle, du 21 Novembre, 1818; Wheat. Intern. Law, pt. 3, c. 1, § 6.

5. The act of May 1, 1810, 2 Story's L. U. S. 1171, fixes a compensation for public ministers, as follows:—

§ 1. *Be it enacted, &c.* That the president of the United States shall not allow to any minister plenipotentiary a greater sum than at the rate of nine thousand dollars per annum, as a compensation for all his personal services and expenses; nor to any chargé des affaires, a greater sum than at the rate of four thousand five hundred dollars per annum, as a compensation for all his personal services and expenses; nor to the secretary of any legation or embassy to any foreign country, or secretary of any

minister plenipotentiary, a greater sum than at the rate of two thousand dollars per annum, as a compensation for all his personal services and expenses; nor to any consul who shall be appointed to reside at Algiers, a greater sum than at the rate of four thousand dollars per annum, as a compensation for all his personal services and expenses; nor to any other consul who shall be appointed to reside at any other of the states on the coast of Barbary, a greater sum than at the rate of two thousand dollars per annum, as a compensation for all his personal services and expenses; nor shall there be appointed more than one consul for any one of the said states: Provided, it shall be lawful for the president of the United States to allow to a minister plenipotentiary, or chargé des affaires, on going from the United States to any foreign country, an outfit, which shall in no case exceed one year's full salary of such minister or chargé des affaires; but no consul shall be allowed an outfit in any case whatever, any usage or custom to the contrary notwithstanding.

6.—§ 2. That to entitle any chargé des affaires, or secretary of any legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to the compensation hereinbefore provided, they shall, respectively, be appointed by the president of the United States, by and with the advice and consent of the senate; but in the recess of the senate, the president is hereby authorized to make such appointments, which shall be submitted to the senate at the next session thereafter, for their advice and consent; and no compensation shall be allowed to any chargé des affaires, or any of the secretaries hereinbefore described, who shall not be appointed as aforesaid: Provided, That nothing herein contained shall be construed to authorize any appointment of a secretary to a chargé des affaires, or to any consul residing on the Barbary coast, or to sanction any claim against the United States for expense incident to the same, any usage or custom to the contrary notwithstanding.

7. The Act of August 6, 1842, sect. 9, directs, that the president of the United States shall not allow to any minister resident a greater sum than at the rate of six thousand dollars per annum, as a compensation for all his personal services and expenses: Provided, that it shall be lawful for the president to allow to such minister

resident, on going from the United States to any foreign country, an outfit, which shall in no case exceed one year's full salary of such minister resident.

MINISTER, eccles. law. One ordained by some church to preach the gospel.

2. Ministers are authorized in the United States, generally, to marry, and are liable to fines and penalties for marrying minors contrary to the local regulations. As to the right of ministers or parsons, see Am. Jur. No. 30, p. 268; Anth. Shep. Touch. 564; 2 Mass. R. 500; 10 Mass. R. 97; 14 Mass. R. 333; 3 Fairf. R. 487.

MINISTER, mediator. An officer appointed by the government of one nation, with the consent of two other nations, who have a matter in dispute, with a view by his interference and good office to have such matter settled.

MINISTERIAL. That which is done under the authority of a superior; opposed to judicial; as, the sheriff is a ministerial officer bound to obey the judicial commands of the court.

2. When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular way; but when he acts in a judicial capacity, he can only be required to proceed; the manner of doing so is left entirely to his judgment. See 2 Fairf. 377; Bac. Ab. Justices of the Peace, E; 1 Conn. 295; 3 Conn. 107; 9 Conn. 275; 12 Conn. 464; also *Judicial; Mandamus; Sheriff*.

MINISTERIAL TRUSTS. These, which are also called instrumental trusts, demand no further exercise of reason or understanding, than every intelligent agent must necessarily employ; as to convey an estate. They are a species of special trusts, distinguished from discretionary trusts, which necessarily require much exercise of the understanding. 2 Bouv. Inst. n. 1896.

MINOR, persons. One under the age of twenty-one years, while in a state of infancy; one who has not attained the age of a major.

2. The terms *major* and *minor* are more particularly used in the civil law. The common law terms are adult and infant. See *Infant*.

MINORITY. The state or condition of a minor; infancy. In another sense, it signifies the lesser number of votes of a deliberative assembly; opposed to majority. (q. v.)

MINT. The place designated by law,

where money is coined by authority of the government of the United States.

2. The mint was established by the Act of April 2, 1792, 1 Story's L. U. S. 227, and located at Philadelphia, where, by virtue of sundry acts of congress, it still remains. Act of April 24, 1800, 1 Story, 770; Act of March 3, 1801, 1 Story, 816; Act of May 19, 1828, 4 Sharsw. cont. of Story's L. U. S. 2120.

3. Below will be found a reference to the acts of congress now in force in relation to the mint.

Act of January 18, 1837, 4 Sharsw. cont. of Story, L. U. S. 2120; Act of May 19, 1828, 4 Id. 2120; Act of May 3, 1835; Act of February 13, 1837; Act of March 3, 1849; Act of March 3, 1851, s. 11.

Vide Coin; Foreign Coin; Money.

MINUTE, measures. In divisions of the circle or angular measures, a minute is equal to sixty seconds, or one sixtieth part of a degree.

2. In the computation of time, a minute is equal to sixty seconds, or the sixtieth part of an hour. *Vide Measure.*

MINUTE, practice. A memorandum of what takes place in court; made by authority of the court. From these minutes the record is afterwards made up.

2. Toullier says, they are so called because the writing in which they were originally, was small, that the word is derived from the Latin *minuta*, (*scriptura*) in opposition to copies which were delivered to the parties, and which were always written in a larger hand. 8 Toull. n. 413.

3. Minutes are not considered as any part of the record. 1 Ohio R. 268. See 23 Pick. R. 184.

MINUTE BOOK. A book kept by the clerk or prothonotary of a court, in which minutes of its proceedings are entered. It has been decided that minutes are no part of the record. 1 Ohio R. 268.

MIRROR DES JUSTICES. The Mirror of Justices, a treatise written during the reign of Edward II. Andrew Horne is its reputed author. It was first published in 1642, and in 1768 it was translated into English by William Hughes. Some diversity of opinion seems to exist as to its merits. Pref. to 9 & 10 Co. Rep. As to the history of this celebrated book, see St. Armand's Hist. Essays on the Legislative power of England, 58, 59.

MIS. A syllable which prefixed to some word signifies some fault or defect; as,

misadventure, misprision, mistrial, and the like.

MISADVENTURE, crim. law, torts. An accident by which an injury occurs to another.

2. When applied to homicide, misadventure is the act of a man who, in the performance of a lawful act, without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues, must be neither *malum in se*, nor *malum prohibitum*. The usual examples under this head, are, 1. When the death ensues from innocent recreations. 2. From moderate and lawful correction (*q. v.*) in *foro domestico*. 3. From acts lawful and indifferent in themselves, done with proper and ordinary caution. 4 Bl. Com. 182; 1 East, P. C. 221.

MISBEHAVIOUR. Improper or unlawful conduct. See 2 Mart. N. S. 688.

2. A party guilty of misbehaviour; as, for example, to threaten to do injury to another, may be bound to his good behaviour, and thus restrained. See *Good Behaviour*.

3. Verdicts are not unfrequently set aside on the ground of misbehaviour of jurors; as, when the jury take out with them papers which were not given in evidence, to the prejudice of one of the parties. *Ld. Raym.* 148. When they separate before they have agreed upon their verdict. 3 Day, 237, 310. When they cast lots for a verdict; 2 Lev. 205; or give their verdict, because they have agreed to give it for the amount ascertained, by each juror putting down a sum, adding the whole together, and then dividing by twelve, the number of jurors, and giving their verdict for the quotient. 15 John. 87. See *Bac. Ab. Verdict, H.*

4. A verdict will be set aside if the successful party has been guilty of any misbehaviour towards the jury; as, if he say to a juror, "I hope you will find a verdict for me," or "the matter is clearly of my side." 1 Vent. 125; 2 Roll. Ab. 716, pl. 17. See *Code*, 166, 401; *Bac. Ab. Verdict, I.*

MISCARRIAGE, med. juris. By this word is technically understood the expulsion of the ovum or embryo from the uterus within the first six weeks after conception; between that time and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the fœtus

at any time before birth, is termed in law, procuring miscarriage. Chit. Med. Jur. 410; 2 Dunglison's Human Physiology, 364. Vide *Abortion; Fetus*.

MISCARRIAGE, contracts, torts. By the English statute of frauds, 29 O. II. c. 3, s. 4, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement," &c. "shall be in writing," &c. The word miscarriage, in this statute comprehends that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave or license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and, therefore, falls within the meaning of the word miscarriage. 2 Barn. & Ald. 516; Burge on Sur. 21.

MISCASTING. By this term is not understood any pretended miscasting or misvaluing, but simply an error in auditing and numbering. 4 Bouv. Inst. n. 4128.

MISCOGNISANT. This word, which is but little used, signifies ignorant, or not knowing. Stat. 32 H. VIII. c. 9.

MISCONDUCT. Unlawful behaviour by a person entrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.

2. A verdict will be set aside when any of the jury have been guilty of such misconduct, and a court will set aside an award, if it have been obtained by the misconduct of an arbitrator. 2 Atk. 501, 504; 2 Chit. R. 44; 1 Salk. 71; 3 P. Wms. 362; 1 Dick. 66.

MISCONTINUANCE, practice. By this term is understood a continuance of a suit by undue process. Its effect is the same as a discontinuance. (q. v.) 2 Hawk. 299; Kitch. 231; Jenk. Cent. 57.

MISDEMEANOR, crim. law. This term is used to express every offence inferior to felony, punishable by indictment, or by particular prescribed proceedings; in its usual acceptation, it is applied to all those crimes and offences for which the law has not provided a particular name; this word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences, which do not amount to felony, as perjury, battery, libels, conspiracies and public nuisances.

2. Misdemeanors have sometimes been called misprisions. (q. v.) Burn's Just. tit. Misdemeanor; 4 Bl. Com. 5, n. 2; 2 Bar. & Adolph. 75; 1 Russell, 43; 1 Chitty, Pr. 14; 3 Verm. 347; 2 Hill, S. C. 674; Addis. 21; 3 Pick. 26; 1 Greenl. 226; 2 P. A. Browne, 249; 9 Pick. 1; 1 S. & R. 342; 6 Call, 245; 4 Wend. 229; 2 Stew. & Port. 379. And see 4 Wend. 229, 265; 12 Pick. 496; 3 Mass. 254; 5 Mass. 106. See *Offence*.

MISDIRECTION, practice. An error made by a judge in charging the jury in a special case.

2. Such misdirection is either in relation to matters of law or matters of fact.

3.—1. When the judge at the trial misdirects the jury, on matters of law, material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted; 6 Mod. 242; 2 Salk. 649; 2 Wils. 269; or if such misdirection appear in the bill of exceptions or otherwise upon the record, a judgment founded on a verdict thus obtained, will be reversed. When the issue consists of a mixed question of law and fact, and there is a conceded state of facts, the rest is a question for the court; 2 Wend. R. 596; and a misdirection in this respect will avoid the verdict.

4.—2. Misdirection as to matter of fact will in some cases be sufficient to vitiate the proceedings. If, for example, the judge should undertake to dictate to the jury. When the judge delivers his opinion to the jury on a matter of fact, it should be delivered as *mere opinion*, and not as direction. 12 John. R. 513. But the judge is in general allowed a very liberal discretion in charging a jury on matters of fact. 1 McCl. & Y. 286.

5. As to its effects, misdirection must be calculated to do injustice; for if justice has been done, and a new trial would produce the same result, a new trial will not be granted on that account. 2 Salk. 644, 646; 2 T. R. 4; 1 B. & P. 338; 5 Mass. R. 1; 7 Greenl. R. 442; 2 Pick. R. 310; 4 Day's R. 42; 5 Day's R. 329; 3 John. R. 528; 2 Penna. R. 325.

MISE, English law. In a writ of right which is intended to be tried by the grand assize, the general issue is called the mise. Lawes, Civ. Pl. 111; 7 Cowen, 51. This word also signifies expenses, and it is so commonly used in the entries of judgments in personal actions; as when the plaintiff

recovers, the judgment is *quod recuperet damna sua* for such value, and *pro misis et castigiis* for costs and charges for so much, &c.

MISERABLE DEPOSITUM, *civ. law.* The name of an involuntary deposit, made under pressing necessity; as, for instance, shipwreck, fire, or other inevitable calamity. Poth. Procéd. Civ. 5ème part., ch. 1, § 1; Louis. Code, 2935.

MISERICORDIA, *mercy.* An arbitrary or discretionary amercement.

2. To be in mercy, is to be liable to such punishment as the judge may in his discretion inflict. According to Spelman, misericordia is so called, because the party is in mercy, and to distinguish this fine from redemptions, or heavy fines. Spelm. Gl. ad voc.; see Co. Litt. 126 b, and Madox's Excheq. c. 14. See *Judgment of Misericordia*.

MISFEASANCE, *torts, contracts.* The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury. It differs from malfeasance, (q. v.) or nonfeasance, (q. v.) Vide, generally, 2 Vin. Ab. 35; 2 Kent, Com. 443; Doct. Pl. 62; Story, Bail. § 9.

2. It seems to be settled that there is a distinction between misfeasance and nonfeasance in the case of mandates. In cases of nonfeasance, the mandatary is not generally liable, because his undertaking being gratuitous, there is no consideration to support it; but in cases of misfeasance, the common law gives a remedy for the injury done, and to the extent of that injury. 5 T. R. 143; 4 John. Rep. 84; Story, Bailment, § 165; 2 Ld. Raym. 909, 919, 920; 2 Johns. Cas. 92; Doct. & Stu. 210; 1 Esp. R. 74; 1 Russ. Cr. 140; Bouv. Inst. Index h. t.

MISJOINDER, *pleading.* Misjoinder of causes of action, or counts, consists in joining, in different counts in one declaration, several demands, which the law does not permit to be joined, to enforce several distinct, substantive rights of recovery; as, where a declaration joins a count in trespass with another in case, for distinct wrongs; or a count in tort, with another in contract. Gould. on Pl. c. 4, § 98; Archb. Civ. Pl. 61, 78, 176; Serg. and Rawle, 358; Dane's Ab. Index, h. t.

2. Misjoinder of parties, consists in joining as plaintiffs or defendants, persons who have not a joint interest. When the

misjoinder relates to the plaintiffs, the defendants may, at common law, plead the matter in abatement, whether the action be real; 12 H. IV., 15; personal; Johns. Ch. R. 350, 438; 12 John. R. 1; 2 Mass. R. 293; or mixed; or it will be good cause of nonsuit at the trial. 3 Bos. & Pull. 235. Where the objection appears upon the face of the declaration, the defendant may demur generally; 2 Saund. 115; or move in arrest of judgment; or bring a writ of error.

3. When in actions *ex contractu* against several, there is a misjoinder of the defendants, as if there be *too many* persons made defendants, and the objection appears on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and, if the objection do not appear on the pleadings, the plaintiff may be nonsuited upon the trial, if he fail in proving a joint contract. 5 Johns. R. 280; 2 Johns. R. 213; 11 Johns. R. 101; 5 Mass. R. 270.

4. In actions *ex delicto*, the misjoinder cannot in general be objected to, because in actions for torts, one defendant may be found guilty and the others acquitted. Archb. Civ. Pl. 79. As to the cases in which a misjoinder may be aided by a *nolle prosequi*, see 2 Archb. Pr. 218-220.

MISNOMER. The act of using a wrong name.

2. Misnomers may be considered with regard to contracts, to devises and bequests, and to suits or actions.

3.—1. In general, when the party can be ascertained, a mistake in the name will not avoid the contract. 11 Co. 20, 21; Lord Raym. 304; Hob. 125. *Nihil facit error nominis, cum de corpori constat*, is the rule of the civil law.

4.—2. Misnomers of legatees will not in general avoid the legacy, when the person intended can be ascertained from the context. Example: Thomas Stockdale bequeathed "to his nephew Thomas Stockdale, second son of his brother John Stockdale," 1000*l.* John had no son named Thomas, his second son was named William, and he claimed the legacy. It was determined in his favor, because the mistake of the name was obviated by the correct description given of the person, namely, the second son of John Stockdale. 19 Ves. 381; S. C. Coop. 229; and see Ambl. 175; 3 Leon. 18; Co. Litt. 3 a; Finch's R. 403; Domat l. 4, t. 2, s. 1, n. 22; 1 Rep. Leg. 131.

5.—3. Misnomers in suits or actions, when the mistake is in the name of one of the parties, must be pleaded in abatement; 1 Chit. Pl. 440; 1 Mass. 76; 5 Mass. 97; 15 Mass. 469; 16 Mass. 146; 10 S. & R. 257; 4 Cowen, R. 148; Coxe, 138; 6 Munf. 219; 2 Wash. C. C. R. 200; 2 Penna. R. 984; 5 Halst. R. 295; 1 Pen. R. 75, 137; 6 Munf. 580; 3 Caines, 170; 1 Tayl. R. 148; 8 Yerg. 101; Harp. R. 49; for the misnomer of one of the parties sued is not material on the general issue, when the identity is proved. 16 East, R. 110.

6. The names of third persons must be correctly laid, for the error will not be helped by pleading the general issue; but, if a sufficient description be given, it has been held, in a civil case, that the misnomer was immaterial. Example: in an action for medicines alleged to have been furnished to defendant's wife, Mary, and his wife was named Elizabeth, the misnomer was held to be immaterial, the word wife being the material word. 2 Marsh. R. 159. In indictments, the names of third persons must be correctly given. Rosc. Cr. Ev. R. 78. Vide, generally, 18 E. C. L. R. 149; 10 East, R. 83, n; Bac. Ab. h. t.; Dane's Ab. h. t.; 1 Vin. Ab. 7; 15 Vin. Ab. 466; 2 Phil. Ev. 2, note b; Bac. Ab. Abatement, D; Archb. Civ. Pl. 305; 1 Metc. & Perk. Dig. Abatement, V; and this Dictionary, *Abatement*; *Contracts*; *Parties to Contracts*; *Parties to Actions*.

MISPLEADING. Pleading incorrectly, or omitting anything in pleading which is essential to the support or defence of an action, is so called.

2. Pleading not guilty to an action of debt, is an example of the first; and when the plaintiff sets out a title not simply in a defective manner, but sets out a defective title, is an example of the second. See 3 Salk. 365.

MISPRISION, crim. law. 1. In its larger sense, this word is used to signify every considerable misdemeanor, which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatever. 2. In its narrower sense it is the concealment of a crime.

2. *Misprision of treason*, is the concealment of treason, by being merely passive; Act of Congress of April 30, 1790, 1 Story's L. U. S. 83; 1 East, P. C. 139; for if any assistance be given to the traitor, it makes

the party a principal, as there is no accessories in treason.

3. *Misprision of felony*, is the like concealment of felony, without giving any degree of maintenance to the felon; Act of Congress of April 30, 1790; s. 6, 1 Story's L. U. S. 84; for if any aid be given him, the party becomes an accessory after the fact.

4. It is the duty of every good citizen, knowing of a treason or felony having been committed, to inform a magistrate. Silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprision. 1 Russ. on Cr. 43; Hawk. P. C. c. 59, s. 6; Id. Book 1, c. 5, s. 1; 4 Bl. Com. 119.

5. Misprisions which are merely positive, are denominated contempts or high misdemeanors; as, for example, dissuading a witness from giving evidence. 4 Bl. Com. 126.

MISREADING, contracts. When a deed is read falsely to an illiterate or blind man, who is a party to it, such false reading amounts to a fraud, because the contract never had the assent of both parties. 5 Co. 19; 6 East, R. 309; Dane's Ab. c. 86, a, 3, § 7; 2 John. R. 404; 12 John. R. 469; 3 Cowen, R. 537.

MISRECITAL, contracts, pleading. The incorrect recital of a matter of fact, either in an agreement or a plea; under the latter term is here understood the declaration and all the subsequent pleadings. Vide *Recital*, and the cases there cited; and Bac. Ab. Pleas, &c. B. 5, n. 3.

MISREPRESENTATION, contracts. The statement made by a party to a contract, that a thing relating to it is in fact in a particular way, when he knows it is not so.

2. The misrepresentation must be both false and fraudulent, in order to make the party making it, responsible to the other for damages. 3 Conn. R. 413; 10 Mass. R. 197; 1 Rep. Const. Court, 328, 475, Yelv. 21 a, note 1; Peake's Cas. 115; 3 Campb. 154; Marsh. Ins. B. 1, c. 10, s. 1. And see *Representation*. It is not every misrepresentation which will make a party liable; when a mere misstatement of a fact has been erroneously made, without fraud, in a casual, improvident communication, respecting a matter which the person to whom the communication was made, and who had an interest in it, should not have taken upon trust, but was bound to inquire him-

self, and had the means of ascertaining the truth, there would be no responsibility; 5 Maule & Selw. 380; 1 Chit. Pr. 836; 1 Sim. R. 13, 63; and when the informant was under no legal pledge or obligation as to the precise accuracy and correctness of his statement, the other party can maintain no action for the consequences of that statement, upon which it was his indiscretion to place reliance. 12 East, 688; see, also, 2 Cox, R. 134; 13 Ves. 133; 3 Bos. & Pull. 370; 2 East, 103; 3 T. R. 56, 61; 3 Bulstr. 93; 6 Ves. 183; 3 Ves. & Bea. 110; 4 Dall. R. 250. *Vide Concealment; Representation; Suggestio falsi; Suppressio veri.*

MISSING SHIP, mar. law. When a ship or other vessel has been at sea for a much longer time than she ought to have been, she is presumed to have perished there with all on board, and such a vessel is called a missing ship.

2. There is no precise time fixed as to when the presumption is to arise, and this must depend upon the circumstances of each case. 2 Str. R. 1199; Park. Ins. 63; Marsh. Ins. 488; 2 Johns. R. 150; 1 Caines' R. 525; Holt's N. P. Rep. 242.

MISSISSIPPI. The name of one of the new states of the United States of America. This state was admitted into the Union, by a resolution of congress, passed the 10th day of December, 1817; 3 Story's L. U. S. 1716; by which it is "Resolved, that the state of Mississippi, shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever."

2. The constitution of this state was adopted at the town of Washington, the 15th day of August, 1817. It was revised by a convention, and adopted on the 26th day of October, 1832, when it went into operation.

3. By the second article of the constitution, a provision is made for the distribution of powers as follows, namely:

§ 1. The powers of the government of the state of Mississippi, shall be divided into three distinct departments, and each of them confided to a separate body of magistracy; to wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

4.—2. No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging

to either of the others, except in the instances hereinafter expressly directed or permitted.

5.—1st. The legislative power of this state is vested in two distinct branches: the one styled "the senate," the other, "the house of representatives;" and both together, "the legislature of the state of Mississippi."

6. The following regulations, contained in the third article of the constitution, apply to both branches of the legislature.

7.—§ 16. Each house may determine the rules of its own proceedings, punish members for disorderly behaviour, and, with the consent of two-thirds, expel a member, but not a second time for the same cause; and shall have all other powers necessary for a branch of the legislature of a free and independent state.

8.—§ 17. Each house shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either house, on any question, shall, at the desire of any three members present, be entered on the journal.

9.—§ 18. When vacancies happen in either house, the governor, or the person exercising the powers of the governor, shall issue writs of election to fill such vacancies.

10.—§ 19. Senators and representatives shall, in all cases, except of treason, felony, or breach of the peace, be privileged from arrest during the session of the legislature, and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the legislature is convened.

11.—§ 20. Each house may punish by imprisonment, during the session, any person, not a member, for disrespectful or disorderly behaviour in its presence, or for obstructing any of its proceedings: Provided, such imprisonment shall not, at any one time, exceed forty-eight hours.

12.—§ 21. The doors of each house shall be open, except on such occasions of great emergency, as, in the opinion of the house, may require secrecy.

13.—§ 22. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

14.—§ 23. Bills may originate in either house, and be amended, altered or rejected by the other, but no bill shall have the force of a law, until on three several days,

it be read in each house, and free discussion be allowed thereon, unless four-fifths of the house in which the bill shall be pending, may deem it expedient to dispense with this rule; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.

15.—§ 24. All bills for raising revenue shall originate in the house of representatives, but the senate may amend or reject them as other bills.

16.—§ 25. Each member of the legislature shall receive from the public treasury a compensation for his services, which may be increased or diminished by law, but no increase of compensation shall take effect during the session at which such increase shall have been made.

17.—§ 26. No senator or representative shall, during the term for which he shall have been elected, nor for one year thereafter, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased, during such term, except such offices as may be filled by elections by the people; and no member of either house of the legislature shall, after the commencement of the first session of the legislature after his election and during the remainder of the term for which he is elected, be eligible to any office or place, the appointment to which may be made in whole or in part by either branch of the legislature.

18.—§ 27. No judge of any court of law or equity, secretary of state, attorney general, clerk of any court of record, sheriff or collector, or any person holding a lucrative office under the United States or this state, shall be eligible to the legislature: Provided, That offices in the militia, to which there is attached no annual salary, and the office of justice of the peace, shall not be deemed lucrative.

19.—§ 28. No person who hath heretofore been, or hereafter may be, a collector or holder of public moneys, shall have a seat in either house of the legislature, until such person shall have accounted for, and paid into the treasury, all sums for which he may be accountable.

20.—§ 29. The first election for senators and representatives shall be general throughout the state, and shall be held on the first Monday and day following in November, 1833; and thereafter, there shall be biennial elections for senators to fill the

places of those whose term of service may have expired.

21.—§ 30. The first and all future sessions of the legislature shall be held in the town of Jackson, in the county of Hinds, until the year 1850. During the first session thereafter, the legislature shall have power to designate by law the permanent seat of government: Provided, however, That unless such designation be then made by law, the seat of government shall continue permanently at the town of Jackson. The first session shall commence on the third Monday in November, in the year 1833. And in every two years thereafter, at such time as may be prescribed by law.

22.—1. *The senate.* Under this head will be considered the qualification of senators; their number; by whom they are elected; the time for which they are elected. 1. No person shall be a senator unless he be a citizen of the United States, and shall have been an inhabitant of this state for four years next preceding his election, and the last year thereof a resident of the district for which he shall be chosen, and have attained the age of thirty years. Art. 3, s. 14. 2. The number of senators shall never be less than one-fourth, nor more than one-third, of the whole number of representatives. Art. 3, s. 10. 3. The qualifications of electors is as follows: every free white male person of the age of twenty-one years or upwards, who shall be a citizen of the United States, and shall have resided in this state one year next preceding an election, and the last four months within the county, city, or town in which he offers to vote, shall be deemed a qualified elector. Art. 3, s. 1. 4. The senators shall be chosen for four years, and on their being convened in consequence of the first election, they shall be divided by lot from their respective districts into two classes, as nearly equal as can be. And the seats of the senators of the first class shall be vacated at the expiration of the second year.

23.—2. *The house of representatives,* will be considered in the same order that has been observed in relation to the senate. 1. No person shall be a representative unless he be a citizen of the United States, and shall have been an inhabitant of this state two years next preceding his election, and the last year thereof a resident of the county, city or town for which he shall be chosen; and shall have attained the age of twenty-one years. Art. 3, s. 7. 2. The

number of representatives shall not be less than thirty-six, nor more than one hundred. Art. 3, s. 9. 3. They are elected by the same electors who elect senators. Art. 3, s. 1. 4. The representatives are chosen every two years on the first Monday and day following in November. They serve two years from the day of the commencement of the general election and no longer. Art. 3, s. 5, and 6.

24.—§ 2d. *The judicial power.* By the fourth article of the constitution, the judicial power is distributed as follows, namely:

§ 1. The judicial power of this state shall be vested in one high court of errors and appeals, and such other courts of law and equity as are hereafter provided for in this constitution.

25.—§ 2. The high court of errors and appeals shall consist of three judges, any two of whom shall form a quorum. The legislature shall divide the state into three districts, and the qualified electors of each district shall elect one of said judges for the term of six years.

26.—§ 3. The office of one of said judges shall be vacated in two years, and of one in four years, and of one in six years, so that at the expiration of every two years, one of said judges shall be elected as aforesaid.

27.—§ 4. The high court of errors and appeals shall have no jurisdiction, but such as properly belongs to a court of errors and appeals.

28.—§ 5. All vacancies that may occur in said court, from death, resignation or removal, shall be filled by election as aforesaid. Provided, however, that if the unexpired term do not exceed one year, the vacancy shall be filled by executive appointment.

29.—§ 6. No person shall be eligible to the office of judge of the high court of errors and appeals, who shall not have attained, at the time of his election, the age of thirty years.

30.—§ 7. The high court of errors and appeals shall be held twice in each year, at such place as the legislature shall direct, until the year eighteen hundred and thirty-six, and afterwards at the seat of government of the state.

31.—§ 8. The secretary of state, on receiving all the official returns of the first election, shall proceed, forthwith, in the presence and with the assistance of two justices of the peace, to determine by lot

among the three candidates having the highest number of votes, which of said judges elect shall serve for the term of two years, which shall serve for the term of four years, and which shall serve for the term of six years, and having so determined the same, it shall be the duty of the governor to issue commissions accordingly.

32.—§ 9. No judge shall sit on the trial of any cause when the parties or either of them shall be connected with him by affinity or consanguinity, or when he may be interested in the same, except by consent of the judge and of the parties; and whenever a quorum of said court are situated as aforesaid, the governor of the state shall in such case specially commission two or more men of law knowledge for the determination thereof.

33.—§ 10. The judges of said court shall receive for their services a compensation to be fixed by law, which shall not be diminished during their continuance in office.

34.—§ 11. The judges of the circuit court shall be elected by the qualified electors of each judicial district, and hold their offices for the term of four years, and reside in their respective districts.

35.—§ 12. No person shall be eligible to the office of judge of the circuit court, who shall not, at the time of his election, have attained the age of twenty-six years.

36.—§ 13. The state shall be divided into convenient districts, and each district shall contain not less than three nor more than twelve counties.

37.—§ 14. The circuit court shall have original jurisdiction in all matters, civil and criminal, within this state; but in civil cases only when the principal of the sum in controversy exceeds fifty dollars.

38.—§ 15. A circuit court shall be held in each county of this state, at least twice in each year; and the judges of said courts shall interchange circuits with each other, in such manner as may be prescribed by law, and shall receive for their services a compensation to be fixed by law, which shall not be diminished during their continuance in office.

39.—§ 16. A separate superior court of chancery shall be established, with full jurisdiction in all matters of equity; Provided, however, the legislature may give to the circuit courts of each county equity jurisdiction in all cases where the value of the thing, or amount in controversy, does not exceed five hundred dollars; also, in

all cases of divorce, and for the foreclosure of mortgages. The chancellor shall be elected by the qualified electors of the whole state, for the term of six years, and shall be at least thirty years old at the time of his election.

40.—§ 17. The style of all process, shall be "The state of Mississippi," and all prosecutions shall be carried on in the name and by the authority of "The state of Mississippi," and shall conclude "against the peace and dignity of the same."

41.—§ 18. A court of probates shall be established in each county of this state, with jurisdiction in all matters testamentary and of administration in orphans' business and the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis*; the judge of said court shall be elected by the qualified electors of the respective counties, for the term of two years.

42.—§ 19. The clerk of the high court of errors and appeals shall be appointed by said court, for the term of four years, and the clerks of the circuit, probate, and other inferior courts, shall be elected by the qualified electors of the respective counties, and shall hold their offices for the term of two years.

43.—§ 20. The qualified electors of each county shall elect five persons for the term of two years, who shall constitute a board of police for each county, a majority of whom may transact business; which body shall have full jurisdiction over roads, highways, ferries, and bridges, and all other matters of county police, and shall order all county elections to fill vacancies that may occur in the offices of their respective counties: the clerk of the court of probate shall be the clerk of the board of county police.

44.—§ 21. No person shall be eligible as a member of said board, who shall not have resided one year in the county: but this qualification shall not extend to such new counties as may hereafter be established until one year after their organization; and all vacancies that may occur in said board shall be supplied by election as aforesaid to fill the unexpired term.

45.—§ 22. The judges of all the courts of the state, and also the members of the board of county police, shall in virtue of their offices be conservators of the peace, and shall be by law vested with ample powers in this respect.

46.—§ 23. A competent number of justices of the peace and constables shall be chosen in each county by the qualified electors thereof, by districts, who shall hold their offices for the term of two years. The jurisdiction of justices of the peace shall be limited to causes in which the principal of the amount in controversy shall not exceed fifty dollars. In all causes tried by a justice of the peace, the right of appeal shall be secured under such rules and regulations as shall be prescribed by law.

47.—§ 24. The legislature may from time to time establish such other inferior courts as may be deemed necessary, and abolish the same whenever they shall deem it expedient.

48.—§ 25. There shall be an attorney general elected by the qualified electors of the state; and a competent number of district attorneys shall be elected by qualified voters of their respective districts, whose compensation and term of service shall be prescribed by law.

49.—§ 26. The legislature shall provide by law for determining contested elections of judges of the high court of errors and appeals, of the circuit and probate courts, and other officers.

50.—§ 27. The judges of the several courts of this state, for wilful neglect of duty or other reasonable cause, shall be removed by the governor on the address of two-thirds of both houses of the legislature; the address to be by joint vote of both houses. The cause or causes for which such removal shall be required, shall be stated at length in such address, and on the journals of each house. The judge so intended to be removed, shall be notified and admitted to a hearing in his own defence before any vote for such address shall pass; the vote on such address shall be taken by yeas and nays, and entered on the journals of each house.

51.—§ 28. Judges of probate, clerks, sheriffs, and other county officers, for wilful neglect of duty, or misdemeanor in office, shall be liable to presentment or indictment by a grand jury, and trial by a petit jury, and upon conviction shall be removed from office.

52.—3d. The chief executive power of this state shall be vested in a governor. It will be proper to consider his qualifications; by whom he is elected; the time for which he is elected; his rights, duties, and powers; and how vacancies are supplied

when the office of governor becomes vacant.

53.—1. The governor shall be at least thirty years of age, shall have been a citizen of the United States for twenty years, shall have resided in this state at least five years next preceding the day of his election, and shall not be capable of holding the office more than four in any term of six years. Art. 5, s. 3.

54.—2. The governor shall be elected by the qualified electors of the state. Art. 5, s. 2.

55.—3. He shall hold his office for two years from the time of his installation. Art. 5, s. 1.

56.—4. He shall, at stated times, receive for his services a compensation which shall not be increased or diminished during the term for which he shall be elected. Art. 5, s. 4.

57.—5. He shall be commander-in-chief of the army and navy in this state, and of the militia, except when they shall be called into the service of the United States. Art. 5, s. 5.

58.—6. He may require information in writing, from the officers in the executive department, on any subject relating to the duties of their respective offices. Art. 5, s. 6.

59.—7. He may, in cases of emergency, convene the legislature at the seat of government, or at a different place, if that shall have become, since their last adjournment, dangerous from an enemy or from disease; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the day of the next stated meeting of the legislature. Art. 5, s. 7. *

60.—8. He shall from time to time give to the legislature information of the state of the government, and recommend to their consideration such measures as he may deem necessary and expedient. Art. 5, s. 8.

61.—9. He shall take care that the laws be faithfully executed. Art. 5, s. 9.

62.—10. In all criminal and penal cases, except in those of treason and impeachment, he shall have power to grant reprieves and pardons, and remit fines; and in cases of forfeiture to stay the collection until the end of the next session of the legislature, and to remit forfeitures by and with the advice and consent of the senate. In cases

of treason he shall have power to grant reprieves by and with the advice and consent of the senate, but may respite the sentence until the end of the next session of the legislature. Art. 5, s. 10.

63.—11. All commissions shall be in the name and by the authority of the state of Mississippi; be sealed with the great seal, and signed by the governor, and be attested by the secretary of state. The governor is also invested with the veto power. Art. 5, s. 15 and 16.

64. Whenever the office of governor shall become vacant by death, resignation, removal from office, or otherwise, the president of the senate shall exercise the office of governor until another governor shall be duly qualified; and in case of the death resignation, removal from office, or other disqualifications of the president of the senate so exercising the office of governor, the speaker of the house of representatives shall exercise the office, until a president of the senate shall have been chosen; and when the office of governor, president of the senate, and speaker of the house shall become vacant, in the recess of the senate, the person acting as secretary of state for the time being, shall by proclamation convene the senate, that a president may be chosen to exercise the office of governor. Art. 5, s. 17.

MISSOURI. The name of one of the new states of the United States of America. This state was admitted into the Union by a resolution of congress, approved March 2, 1821, 3 Story's L. U. S. 1823, by which it is resolved, that Missouri shall be admitted into this Union on an equal footing with the original states, in all respects whatever. To this resolution there is a condition, which having been fulfilled, it is now useless here to repeat.

2. The convention which formed the constitution of this state assembled at St. Louis, on Monday the 12th of June, 1820, and continued by adjournment, till the 19th day of July, 1820, when the constitution was adopted, establishing "an independent republic by the name of the 'state of Missouri.'"

3. The powers of the government are divided into three distinct departments, each of which is confided to a separate magistracy. Art. 2.

4.—1st. The legislative power is vested in a general assembly, which consists of a senate and house of representatives. 1. The

senate is to consist of not less than fourteen nor more than thirty-three members. The senators are chosen by the electors for the term of four years; one-half of the senators are chosen every second year. 2. The *house of representatives* is never to consist of more than one hundred members. The members are chosen by the qualified electors every second year.

5.—2d. The *executive* power is vested in a governor and lieutenant-governor. 1. The supreme executive power is vested in a chief magistrate, styled "*the governor of the state of Missouri*." Art. 4, s. 1. He is elected by the people, and holds his office for four years, and until a successor be duly appointed and qualified. Art. 4, s. 3. He is invested with the veto power. Art. 4, s. 10. The *lieutenant-governor* is elected at the same time, in the same manner, for the same term, and is required to possess the same qualifications as the governor. Art. 4, s. 14. He is by virtue of his office president of the senate, and when the office of governor becomes vacant by death, resignation, absence from the state, removal from office, refusal to qualify, or otherwise, the lieutenant-governor possesses all the powers and discharges all the duties of governor until such vacancy be filled, or the governor, so absent or impeached, shall return or be acquitted. And in such case there shall be a new election after three months' previous notice.

6.—3d. The *judicial* powers are vested by the 5th article of the constitution as follows:

§ 1. The judicial powers, as to matters of law and equity, shall be vested in a "supreme court," in a "chancellor," in "circuit courts," and in such inferior tribunals as the general assembly may, from time to time, ordain and establish.

7.—2. The supreme court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be coëxtensive with the state, under the restrictions and limitations in this constitution provided.

8.—3. The supreme court shall have a general superintending control over all inferior courts of law. It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original remedial writs; and to hear and determine the same.

9.—4. The supreme court shall consist of three judges, any two of whom shall be

a quorum, and the said judges shall be conservators of the peace throughout the state.

10.—5. The state shall be divided into convenient districts, not to exceed four; in each of which the supreme court shall hold two sessions annually, at such place as the general assembly shall appoint; and when sitting in either district, it shall exercise jurisdiction over causes originating in that district only: provided, however, that the general assembly may, at any time hereafter, direct by law, that the said court shall be held at one place only.

11.—6. The circuit court shall have jurisdiction over all criminal cases which shall not be otherwise provided for by law; and exclusive original jurisdiction in all civil cases which shall not be cognizable before justices of the peace, until otherwise directed by the general assembly. It shall hold its terms in such place in each county as may be by law directed.

12.—7. The state shall be divided into convenient circuits, for each of which a judge shall be appointed, who, after his appointment, shall reside, and be a conservator of the peace, within the circuit for which he shall be appointed.

13.—8. The circuit courts shall exercise a superintending control over all such inferior tribunals as the general assembly may establish; and over justices of the peace in each county in their respective circuits.

14.—9. The jurisdiction of the court of chancery shall be coëxtensive with the state, and the times and places of holding its sessions shall be regulated in the same manner as those of the supreme court.

15.—10. The court of chancery shall have original and appellate jurisdiction in all matters of equity, and a general control over executors, administrators, guardians, and minors, subject to appeal, in all cases, to the supreme court, under such limitations as the general assembly may by law provide.

16.—11. Until the general assembly shall deem it expedient to establish inferior courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the court of chancery, in such manner, and under such restrictions, as shall be prescribed by law.

17.—12. Inferior tribunals shall be established in each county, for the transaction of all county business; for appointing guardians; for granting letters testamentary, and of administration; and for settling the

accounts of executors, administrators, and guardians.

18.—13. The governor shall nominate, and, by and with the advice and consent of the sonate, appoint the judges of the supreme court, the judges of the circuit courts, and the chancellor, each of whom shall hold his office during good behaviour, and shall receive for his services a compensation, which shall not be diminished during his continuance in office, and which shall not be less than two thousand dollars annually.

19.—14. No person shall be appointed a judge in the supreme court, nor of a circuit court, nor chancellor, before he shall have attained to the age of thirty years; nor shall any person continue to exercise the duties of any of said offices after he shall have attained to the age of sixty-five years.

20.—15. The courts respectively shall appoint their clerks, who shall hold their offices during good behaviour. For any misdemeanor in office, they shall be liable to be tried and removed by the supreme court, in such manner as the general assembly shall by law provide.

21.—16. Any judge of the supreme court, or of the circuit court, or the chancellor, may be removed from office on the address of two-thirds of each house of the general assembly to the governor for that purpose; but each house shall state on its respective journal the cause for which it shall wish the removal of such judge or chancellor, and give him notice thereof; and he shall have the right to be heard in his defence in such manner as the general assembly shall by law direct; but no judge nor chancellor shall be removed in this manner for any cause for which he might have been impeached.

22.—17. In each county there shall be appointed as many justices of the peace as the public good may be thought to require. Their powers and duties, and their duration in office, shall be regulated by law.

23.—18. An attorney general shall be appointed by the governor, by and with the advice and consent of the senate. He shall remain in office four years, and shall perform such duties as shall be required of him by law.

24.—19. All writs and process shall run, and all prosecutions shall be conducted in the name of the "state of Missouri;" all writs shall be tested by the clerk of the court from which they shall be issued, and all indictments shall conclude,

"against the peace and dignity of the state."

MISTAKE, contracts. An error committed in relation to some matter of fact affecting the rights of one of the parties to a contract.

2. Mistakes in making a contract are distinguished ordinarily into, first, mistakes as to the motive; secondly, mistakes as to the person, with whom the contract is made; thirdly, as to the subject matter of the contract; and, lastly, mistakes of fact and of law. See Story, Eq. Jur. §110; Bouv. Inst. Index, h. t.; *Ignorance; Motive*.

3. In general, courts of equity will correct and rectify all mistakes in deeds and contracts founded on good consideration. 1 Ves. 317; 2 Atk. 203; Mitf. Pl. 116; 4 Vin. Ab. 277; 13 Vin. Ab. 41; 18 E. Com. Law Reps. 14; 8 Com. Digest, 75; Madd. Ch. Prac. Index, h. t.; 1 Story on Eq. ch. 5, p. 121; Jeremy's Eq. Jurisd. B. 3, part 2, p. 358. See article *Surprise*.

4. As to mistakes in the names of legatees, see 1 Rop. Leg. 131; Domat, l. 4, t. 2, s. 1, n. 22. As to mistakes made in practice, and as to the propriety or impropriety of taking advantage of them, see Chitt. Pr. Index, h. t. As to mistakes of law in relation to contracts, see 23 Am. Jur. 146 to 166.

MISTRIAL. An erroneous trial on account of some defect in the persons trying, as if the jury come from the wrong county; or because there was no issue formed, as if no plea be entered; or some other defect of jurisdiction. 3 Cro. 284; Hob. 5; 2 M. & S. 270.

MISUSE OF PROPERTY. The unlawful use of property.

2. The misuse of personal property delivered lawfully to the defendant, is a conversion which will enable the owner immediately to maintain trover. 6 Shepl. 382; 8 Leigh, 565; 3 Bouv. Inst. n. 3525.

MISUSER. An unlawful use of a right.

2. In cases of public officers and corporations, a misuser is sufficient to cause the right to be forfeited. 2 Bl. Com. 153; 5 Pick. R. 163.

MITIGATION. To make less rigorous or penal.

2. Crimes are frequently committed under circumstances which are not justifiable nor excusable, yet they show that the offender has been greatly tempted; as, for example, when a starving man steals bread

to satisfy his hunger, this circumstance is taken into consideration in mitigation of his sentence.

3. In actions for damages, or for torts, matters are frequently proved in mitigation of damages. In an action for criminal conversation with the plaintiff's wife, for example, evidence may be given of the wife's general bad character for want of chastity; or of particular acts of adultery committed by her, before she became acquainted with the defendant; 12 Mod. R. 232; Bull. N. P. 27, 296; Selw. N. P. 25; 1 Johns. Cas. 16; or that the plaintiff has carried on a criminal conversation with other women; Bull. N. P. 27; or that the plaintiff's wife has made the first advances to the defendant. 2 Esp. N. P. C. 562; Selw. N. P. 25. See 3 Am. Jur. 287, 313; Bouv. Inst. Index, h. t.

4. In actions for libel, although the defendant cannot under the general issue prove the crime, which is imputed to the plaintiff, yet he is in many cases allowed to give evidence of the plaintiff's general character in mitigation of damages. 2 Campb. R. 251; 1 M. & S. 284.

MITIOR SENSUS, *construction*. The more lenient sense. It was formerly held in actions for libel and slander, that when two or more constructions could be put upon the words, one of which would not be actionable, the words were to be so construed, for *verba accipienda sunt in mitiore sensu*. 4 Co. 13, 20. It is now, however, well established, that they are not to be taken in the more lenient or more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. 2 Campb. 403; 2 T. R. 206.

MITTER, *law-French*. To put, to send, or to pass; as *mitter l'estate*, to pass the estate; *mitter le droit*, to pass a right. 2 Bl. Com. 324; Bac. Ab. Release, C; Co. Lit. 193, 273, b. *Mitter a large*, to put or set at large. Law French Dict. h. t.

MITTIMUS, *English practice*. A writ enclosing a record sent to be tried in a county palatine; it derives its name from the Latin word *mittimus*, "we send." It is the jury process of these counties, and commands the proper officer of the county palatine to command the sheriff to summon the jury for the trial of the cause, and to return the record, &c. 1 M. R. 278; 2 M. R. 88.

MITTIMUS, *crim. law, practice*. A precept in writing, under the hand and seal of

a justice of the peace, or other competent officer, directed to the gaoler or keeper of a prison, commanding him to receive and safely keep, a person charged with an offence therein named, until he shall be delivered by due course of law. Co. Litt. 590.

MIXED. To join; to mingle. A compound made of several simples is said to be something mixed.

MIXED ACTIONS, *practice*. An action partaking of a real and personal action, by which real property is demanded, and damages for a wrong sustained: an ejectment is of this nature. 4 Bouv. Inst. n. 3650.

MIXED OR COMPOUND LARCENY, *crim. law*. A larceny which has all the properties of simple larceny, and is accompanied with one or both the aggravations of violence to the person or taking from the house.

MIXED GOVERNMENT. A government composed of some of the powers of a monarchical, aristocratical, and democratical government. See *Government*.

MIXED PROPERTY. That kind of property which is not altogether real nor personal, but a compound of both. Heir-looms, tomb-stones, monuments in a church, and title deeds to an estate, are of this nature. 1 Ch. Pr. 95; 2 Bl. Com. 428; 3 Barn. & Adolph. 174; 4 Bingh. R. 106; S. C. 13 Engl. Com. Law Rep. 362.

MIXT CONTRACT, *civil law*. One in which one of the parties confers a benefit on the other, and requires of the latter something of less value than what he has given; as a legacy charged with something of less value than the legacy itself. Poth. Oblig. n. 12. See *Contract*.

MIXTION. The putting of different goods or chattels together in such a manner that they can no longer be separated; as putting the wines of two different persons into the same barrel, the grain of several persons into the same bag, and the like.

2. The intermixture may be occasioned by the wilful act of the party, or owner of one of the articles; by the wilful act of a stranger; by the negligence of the owner or a stranger; or by accident. See, as to the rights of the parties under each of these circumstances, the article *Confusion of goods*. Vide Aso & Man. Inst. B. 2, t. 2, c. 8.

MOBBING AND RIOTING, *Scotch law*. The general term mobbing and rioting includes all those convocations of the

lieges for violent and unlawful purposes, which are attended with injury to the persons or property of the lieges, or terror and alarm to the neighborhood in which it takes place. The two phrases are usually placed together, but, nevertheless, they have distinct meanings, and are sometimes used separately in legal language; the word mobbing being peculiarly applicable to the unlawful assemblage and violence of a number of persons, and that of rioting to the outrageous behaviour of a single individual. Alison, *Prin. C. Law of Scotl.* c. 23, p. 509.

MODEL. A machine made on a small scale to show the manner in which it is to be worked or employed.

2. The Act of Congress of July 4, 1836, section 6, requires an inventor who is desirous to take out a patent for his invention, to furnish a model of his invention, in all cases which admit of representation by model, of a convenient size to exhibit advantageously its several parts.

MODERATE CASTIGAVIT, pleading. The name of a plea in trespass by which the defendant justifies an assault and battery, because he *moderately corrected* the plaintiff, whom he had a right to correct. 2 *Ohit.* Pl. 576; 2 *Bos. & Pull.* 224. *Vide Correction*, and 15 *Mass. R.* 347, 2 *Phil. Ev.* 147; *Bac. Ab. Assault, &c. C.*

2. This plea ought to disclose, in general terms, the cause which rendered the correction expedient. 3 *Salk.* 47.

Moderator. A person appointed to preside at a popular meeting; sometimes he is called a chairman.

MODIFICATION. A change; as the modification of a contract. This may take place at the time of making the contract by a condition, which shall have that effect; for example, if I sell you one thousand bushels of corn, upon condition that my crop shall produce that much, and it produces only eight hundred bushels, the contract is modified, it is for eight hundred bushels, and no more.

2. It may be modified by the consent of both parties, after it has been made. See 1 *Bouv. Inst. n.* 733.

MODO ET FORMA, pleading. In manner and form. These words are used in tendering an issue in a civil case.

2. Their legal effect is to put in issue all material circumstances and no other, they may therefore be always used with safety.

3. These words are sometimes of the substance of the issue, and sometimes merely words of form. When they are of the substance of the issue, they put in issue the circumstances alleged as concomitants of the principal matter denied by the pleader, such as time, place, manner, &c. When not of the substance of the issue, they do not put in issue such circumstances. *Bac. Ab. Pleas, G 1*; *Lawes' Pl.* 120; *Hardr.* 39. To determine when they are of the substance of the issue and when not so, the established criterion is, that when the circumstances of manner, time, place, &c. alleged in connexion with the principal fact traversed, are originally and in themselves material, and therefore necessary to be proved as stated, the words *modo et forma*, are of the substance of the issue, and do, consequently, put those concomitants in issue; but that when such concomitants or circumstances are not in themselves material, and therefore not necessary to be proved as stated, the words *modo et forma*, are not of the substance of the issue, and consequently do not put them in issue. *Lawes on Pl.* 120; and see *Gould, Pl. c. 6, § 22*; *Steph. Pl.* 213; *Dane's Ab. Index, h. t.*; *Kitch.* 232. See *Bac. Ab. Verdict, P*; *Vin. Ab. Modo et Forma*.

MODUS, civil law. Manner; means; way.

Modus, eccl. law. Where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, as a pecuniary compensation, or the performance of labor, or when any means are adopted by which the general law of tithing is altered, and a new method of taking them is introduced, it is called a *modus decimandi*, or special manner of taking tithes. 2 *Bl. Com.* 29.

MOHATRA, French law. The name of a fraudulent contract, made to cover a usurious loan of money.

2. It takes place when an individual buys merchandise from another on a credit at a high price, to sell it immediately to the first seller, or to a third person, who acts as his agent, at a much less price for cash. 16 *Toull. n.* 44; 1 *Bouv. Inst. n.* 1118.

MOIETY. The half of anything; as, if a testator bequeath one moiety of his estate to A, and the other to B, each shall take an equal part. Joint tenants are said to hold by moieties. *Lit.* 125; 3 *M. G. & S.* 274, 283

MOLESTATION, Scotch law. The

name of an action competent to the proprietor of a landed estate, against those who disturb his possession. It is chiefly used in questions of commonry, or of controverted marches. Ersk. Prin. B. 4, t. 1, n. 48.

MOLITER MANUS IMPOSUIT, *pleading*. In an action of trespass to the person, the defendant frequently justifies by pleading that he used no more force than was necessary to remove the plaintiff who was unlawfully in the house of the defendant, and for this purpose he *gently* laid his hands upon him, *molitur manus imposuit*.

2. This plea may be used whenever the defendant laid hold of the plaintiff to prevent his committing a breach of the peace.

3. When supported by evidence, it is a complete defence. Ham. N. P. 149; 2 Chit. Pl. 574, 576; 12 Vin. Ab. 182; Bac. Abr. Assault and Battery, C 8.

MOLITURA. Toll paid for grinding at a mill; culture. Not used.

MONARCHY, government. That form of government in which the sovereign power is entrusted to the hands of a single magistrate. Toull. tit. pré. n. 30. The country governed by a monarch is also called a *monarchy*.

MONEY. Gold, silver, and some other less precious metals, in the progress of civilization and commerce, have become the common standards of value; in order to avoid the delay and inconvenience of regulating their weight and quality whenever passed, the governments of the civilized world have caused them to be manufactured in certain portions, and marked with a stamp which attests their value; this is called money. 1 Inst. 207; 1 Hale's Hist. 188; 1 Pardess. n. 132; Dom. Lois civ. liv. pré. t. 3, s. 2, n. 6.

2. For many purposes, bank notes; (q. v.) 1 Y. & J. 380; 3 Mass. 405; 14 Mass. 122; 2 N. H. Rep. 333; 17 Mass. 560; 7 Cowen, 662; 4 Pick. 74; Brayt. 24; a check; 4 Bing. 179; S. C. 13 E. C. L. R. 295; and negotiable notes; 3 Mass. 405; will be so considered. To support a count for money had and received, the receipt by the defendant of bank notes, promissory notes; 3 Mass. 405; 3 Shepl. 285; 9 Pick. 93; 7 John. 132; credit in account, in the books of a third person; 3 Campb. 199; or any chattel, is sufficient; 4 Pick. 71; 17 Mass. 560; and will be treated as money. See 7 Wend. 311; 8 Wend. 641; 7 S. & R. 246; 8 T. R. 687; 3 B. & P. 559; 1 Y. & J. 380.

3. The constitution of the United States has vested in congress the power "to coin money, and regulate the value thereof." Art. 1, s. 8.

4. By virtue of this constitutional authority, the following provisions have been enacted by congress.

1. Act of April 2, 1792, 1 Story's L. U. S. 229.

§ 9. That there shall be from time to time, struck and coined at the said mint, coins of gold, silver, and copper, of the following denominations, values, and descriptions, viz: Eagles; each to be of the value of ten dollars, or units, and to contain two hundred and forty-seven grains and four-eighths of a grain of pure, or two hundred and seventy grains of standard, gold. Half eagles; each to be of the value of five dollars, and to contain one hundred and twenty-three grains and six-eighths of a pure, or one hundred and thirty-five grains of standard, gold. Quarter eagles; each to be of the value of two dollars and a half dollar, and to contain sixty-one grains and seven-eighths of a grain of pure, or sixty-seven grains and four-eighths of a grain of standard, gold. Dollars, or units; each to be of the value of a Spanish milled dollar, as the same is now current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard, silver. Half dollars; each to be of half the value of the dollar or unit, and to contain one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver. Quarter dollars; each to be of one-fourth the value of the dollar, or unit, and to contain ninety-two grains and thirteen-sixteenth parts of a grain of pure, or one hundred and four grains of standard, silver. Dimes; each to be of the value of one-tenth of a dollar, or unit, and to contain thirty-seven grains and two-sixteenth parts of a grain of pure, or forty-one grains and three-fifth parts of a grain of standard, silver. Half dimes; each to be of the value of one-twentieth of a dollar, and to contain eighteen grains and nine-sixteenth parts of a grain of pure, or twenty grains and four-fifth parts of a grain of standard, silver. Cents; each to be of the value of the one-hundredth part of a dollar, and to contain eleven pennyweights of copper. Half cents; each to be of the value of half a cent, and to contain five pennyweights and a half a pennyweight of copper.

5.—§ 10. That upon the said coins, respectively, there shall be the following devices and legends, namely: Upon one side of each of the said coins there shall be an impression emblematic of liberty, with an inscription of the word liberty, and the year of the coinage; and, upon the reverse of each of the gold and silver coins, there shall be the figure or representation of an eagle, with this inscription, "United States of America." and, upon the reverse of each of the copper coins, there shall be an inscription which shall express the denomination of the piece, namely, cent or half cent, as the case may require.

6.—§ 11. That the proportional value of gold to silver, in all coins which shall, by law, be current as money within the United States, shall be as fifteen to one, according to quantity in weight, of pure gold or pure silver; that is to say, every fifteen pounds weight of pure silver shall be of equal value, in all payments, with one pound weight of pure gold; and so in proportion, as to any greater or less quantities of the respective metals.

7.—§ 12. That the standard for all gold coins of the United States, shall be eleven parts fine to one part alloy: and accordingly, that eleven parts in twelve, of the entire weight of each of the said coins, shall consist of pure gold, and the remaining one-twelfth part of alloy; and the said alloy shall be composed of silver and copper in such proportions, not exceeding one-half silver, as shall be found convenient; to be regulated by the director of the mint for the time being, with the approbation of the president of the United States, until further provision shall be made by law. And to the end that the necessary information may be had in order to the making of such further provision, it shall be the duty of the director of the mint, at the expiration of a year after commencing the operations of the said mint, to report to congress the practice thereof during the said year, touching the composition of the alloy of the said gold coins, the reasons for such practice, and the experiments and observations which shall have been made concerning the effects of different proportions of silver and copper in the said alloy.

8.—§ 13. That the standard for all silver coins of the United States, shall be one thousand four hundred and eighty-five parts fine to one hundred and seventy-nine parts alloy; and, accordingly, that one thousand

four hundred and eighty-five parts in one thousand six hundred and sixty-four parts, of the entire weight of each of the said coins, shall consist of pure silver, and the remaining one hundred and seventy-nine parts of alloy; which alloy shall be wholly of copper.

9.—2. Act of June 28, 1834, 4 Sharsw. cont. of Story's Laws U. S. 2376.

§ 1. That the gold coins of the United States shall contain the following quantities of metal, that is to say: each eagle shall contain two hundred and thirty-two grains of pure gold, and two hundred and fifty-eight grains of standard gold; each half-eagle, one hundred and sixteen grains of pure gold, and one hundred and twenty-nine grains of standard gold; each quarter eagle shall contain fifty-eight grains of pure gold, and sixty-four and a half grains of standard gold; every such eagle shall be of the value of ten dollars; every such half eagle shall be of the value of five dollars; and every such quarter eagle shall be of the value of two dollars and fifty cents; and the said gold coins shall be receivable in all payments, when of full weight, according to their respective values; and when of less than full weight, at less values, proportioned to their respective actual weights.

10.—§ 2. That all standard gold or silver deposited for coinage after the thirty-first of July next, shall be paid for in coin under the direction of the secretary of the treasury, within five days from the making of such deposit, deducting from the amount of said deposit of gold and silver, one-half of one per centum: Provided, That no deduction shall be made unless said advance be required by such depositor within forty days.

11.—§ 3. That all gold coins of the United States, minted anterior to the thirty-first day of July next, shall be receivable in all payments at the rate of ninety-four and eight-tenths of a cent per pennyweight.

12.—3. Act of January 18, 1837, 4 Sharsw. cont. of Story's Laws U. S. 2524.

§ 9. That of the silver coins, the dollar shall be of the weight of four hundred and twelve and one-half grains; the half dollar of the weight of two hundred and six and one-fourth grains; the quarter dollar of the weight of one hundred and three and one-eighth grains; the dime, or tenth part of a dollar, of the weight of forty-one and a quarter grains; and the half dime, or

twentieth part of a dollar, of the weight of twenty grains, and five-eighths of a grain. And that dollars, half dollars, and quarter dollars, dimes and half dimes, shall be legal tenders of payment, according to their nominal value, for any sums whatever.

13.—§ 10. That of the gold coins, the weight of the eagle shall be two hundred and fifty-eight grains; that of the half eagle, one hundred and twenty-nine grains; and that of the quarter eagle, sixty-four and one-half grains. And that for all sums whatever, the eagle shall be a legal tender of payment for ten dollars; the half eagle for five dollars; and the quarter eagle for two and a half dollars.

14.—§ 11. That the silver coins heretofore issued at the mint of the United States, and the gold coins issued since the thirty-first day of July, one thousand eight hundred and thirty-four, shall continue to be legal tenders of payment for their nominal values, on the same terms as if they were of the coinage provided for by this act.

15.—§ 12. That of the copper coins, the weight of the cent shall be one hundred and sixty-eight grains, and the weight of the half cent eighty-four grains. And the cent shall be considered of the value of one hundredth part of a dollar, and the half cent of the value of one two-hundredth part of a dollar.

16.—§ 13. That upon the coins struck at the mint, there shall be the following devices and legends; upon one side of each of said coins, there shall be an impression emblematic of liberty, with an inscription of the word LIBERTY, and the year of the coinage; and upon the reverse of each of the gold and silver coins, there shall be the figure or representation of an eagle, with the inscription United States of America, and a designation of the value of the coin; but on the reverse of the dime and half dime, cent and half cent, the figure of the eagle shall be omitted.

17.—§ 38. That all acts or parts of acts heretofore passed, relating to the mint and coins of the United States, which are inconsistent with the provisions of this act, be, and the same are hereby repealed.

18.—4. Act of March 3, 1825, 3 Story's L. U. S. 2005.

§ 20. That, if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting

any coin, in the resemblance or similitude of the gold or silver coin, which has been, or hereafter may be, coined at the mint of the United States; or in the resemblance or similitude of any foreign gold or silver coin which by law now is, or hereafter may be made current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish, or sell, as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic, or corporate, or any other person or persons, whatsoever; every person, so offending, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

19.—§ 21. That, if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any coin, in the resemblance or similitude of any copper coin, which has been, or hereafter may be, coined at the mint of the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish, or sell as true, any such false, forged, or counterfeited coin, with intent to defraud any body politic, or corporate, or any other person or persons whatsoever; every person so offending, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding three years. See generally, 1 J. J. Marsh. 202; 1 Bibb, 330; 2 Wash. 282; 3 Call, 557; 5 S. & R. 48; 1 Dall. 124; 2 Dana, 298; 3 Conn. 534; 4 Harr. & McHen. 199.

20.—5. Act of March 3, 1849, Minot's Statutes at Large of U. S. 397.

21.—§ 1. That there shall be, from time to time, struck and coined at the mint of the United States, and the branches thereof, conformably in all respects to law, (except that on the reverse of the gold dollar the figure of the eagle shall be omitted,) and conformably in all respects

to the standard for gold coins now established by law, coins of gold of the following denominations and values, viz.: double eagles, each to be of the value of twenty dollars, or units, and gold dollars, each to be of the value of one dollar, or unit.

22.—§ 2. That, for all sums whatever, the double eagle shall be a legal tender for twenty dollars, and the gold dollar shall be a legal tender for one dollar.

23.—§ 3. That all laws now in force in relation to the coins of the United States, and the striking and coining the same, shall, so far as applicable, have full force and effect in relation to the coins herein authorized, whether the said laws are penal or otherwise; and whether they are for preventing counterfeiting or debasement, for protecting the currency, for regulating and guarding the process of striking and coining, and the preparations therefor, or for the security of the coin, or for any other purpose.

24.—§ 4. That, in adjusting the weights of gold coins henceforward, the following deviations from the standard weight shall not be exceeded in any of the single pieces; namely, in the double eagle, the eagle, and the half eagle, one half of a grain, and in the quarter eagle, and gold dollar, one quarter of a grain; and that, in weighing a large number of pieces together, when delivered from the chief coiner to the treasurer, and from the treasurer to the depositors, the deviation from the standard weight shall not exceed three pennyweights in one thousand double eagles; two pennyweights in one thousand eagles; one and one half pennyweights in one thousand half eagles; one pennyweight in one thousand quarter eagles; and one half of a pennyweight in one thousand gold dollars.

25.—6. Act of March 3, 1851. *Minot's Statutes at Large*, U. S. 591.

26.—§ 11. That from and after the passage of this act, it shall be lawful to coin at the mint of the United States and its branches, a piece of the denomination and legal value of three cents, or three hundredths of a dollar, to be composed of three-fourths silver and one-fourth copper, and to weigh twelve grains and three-eighths of a grain; that the said coin shall bear such devices as shall be conspicuously different from those of the other silver coins, and of the gold dollar, but having the inscription United States of America, and its denomination and date; and that it shall be a legal tender in payment of debts

for all sums of thirty cents and under. And that no ingots shall be used for the coinage of the three cent pieces herein authorized, of which the quality differs more than five thousandths from the legal standard; and that in adjusting the weight of the said coin, the following deviations from the standard weight shall not be exceeded, namely, one half of a grain in the single piece, and one pennyweight in a thousand pieces.

MONEY BILLS, legislation. Bills or projects of laws providing for raising revenue, and for making grants or appropriations of the public treasure.

2. The first clause of the seventh section of the constitution of the United States declares, "all bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills." *Vide Story on the Const.* § 871 to 877.

3. What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter of some discussion. *Tucker's Black. App.* 261 and note; *Story*, § 877. In practice, the power has been confined to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. *Story, Ibid.*; 2 *Elliot's Debates*, 283, 284.

MONEY COUNTS, pleadings. The *common counts* in an action of assumpsit are so called, because they are founded on express or implied promises to pay money in consideration of a precedent debt; they are of four descriptions: 1. The *indebitatus assumpsit*. (q. v.) 2. The *quantum meruit*. (q. v.) 3. The *quantum valebant*. (q. v.) and, 4. The account stated. (q. v.)

2. Although the plaintiff cannot resort to an implied promise when there is a general contract, yet he may, in many cases, recover on the common counts, notwithstanding there was a special agreement, provided it has been executed. 1 *Camp.* 471; 12 *East*, 1; 7 *Cranch*, Rep. 299; 10 *Mass. Rep.* 287; 7 *Johns. Rep.* 132; 10 *John. Rep.* 136; 5 *Mass. Rep.* 391. It is therefore advisable to insert the money counts in an action of assumpsit, when suing on a special contract. 1 *Chit. Pl.* 333, 4.

MONEY HAD AND RECEIVED. An action of assumpsit will lie to recover money to which the plaintiff is entitled, and which in justice and equity, when no rule of policy or strict law prevents it, the defendant

ought to refund to the plaintiff, and which he cannot with a good conscience retain, on a count for money had and received. 6 S. & R. 369; 10 S. & R. 219; 1 Dall. 148; 2 Dall. 154; 3 J. J. Marsh. 175; 1 Harr. 447; 1 Harr. & Gill. 258; 7 Mass. 288; 6 Wend. 290; 13 Wend. 488; Addis. on Contr. 230.

2. When the money has been received by the defendant in consequence of some tortious act to the plaintiff's property, as when he cut down the plaintiff's timber and sold it, the plaintiff may waive the tort and sue in assumpsit for money had and received. 1 Dall. 122; 1 Blackf. 181; 5 Pick. 285; 1 J. J. Marsh. 543; 4 Pick. 452; 12 Pick. 120; 4 Binn. 374; 8 Watts, 277; 4 Call, 451.

3. In general the action for money had and received lies only where money has been received by the defendant. 14 S. & R. 179; 1 Pick. 204; 7 S. & R. 246; 1 J. J. Marsh. 544; 3 J. J. Marsh. 6; 7 J. J. Marsh. 100; 3 Bibb, 378; 11 John. 464. But bank notes or any other property received as money, will be considered for this purpose as money. 17 Mass. 560; 3 Mass. 405; 14 Mass. 122; Brayt. 24; 7 Cowen, 622; 4 Pick. 74. See 9 S. & R. 11.

4. No privity of contract between the parties is required in order to support this action, except that which results from the fact of one man's having the money of another, which he cannot conscientiously retain. 17 Mass. 563, 579. See 2 Dall. 54; Mart. & Yerg. 221; 5 Conn. 71.

MONEY LENT. In actions of assumpsit a count is frequently introduced in the declaration charging that the defendant promised to pay the plaintiff for money lent. To recover, the plaintiff must prove that the defendant received his money, but it is not indispensable that it should be originally lent. If, for example, money has been advanced upon a special contract, which has been abandoned and rescinded, and which cannot be enforced, the law raises an implied promise from the person who holds the money, to pay it back as money lent. 5 M. & P. 26; 7 Bing. 266; 9 M. & W. 729; 3 M. & W. 484. See 1 Chip. 214; 3 J. J. Marsh. 37.

MONEY PAID. When one advances money for the benefit of another with his consent, or at his express request, although he be not benefited by the transaction, the creditor may recover the money in an action

of assumpsit declaring for money paid for the defendant. 5 S. & R. 9. But one cannot by a voluntary payment of another's debt make himself creditor of that other. 1 Const. R. 472; 1 Gill. & John. 497; 5 Cowen, 603; 10 John. 361; 14 John. 87; 2 Root, 84; 2 Stew. 500; 4 N. H. Rep. 188; 3 John. 434; 8 John. 436; 1 South. 150.

2. Assumpsit for money paid will not lie where property, not money, has been paid or received. 7 S. & R. 246; 3 Bibb, 378; 14 S. & R. 179; 10 S. & R. 75; 7 J. J. Marsh. 18. But see 7 Cowen, 662.

8. But where money has been paid to the defendant either for a just, legal or equitable claim, although it could not have been enforced at law, it cannot be recovered as money paid. See *Money had and received*.

4. The form of declaring is for "money paid by the plaintiff for the use of the defendant and at his request." 1 M. & W. 511.

MONITION, practice. In those courts which use the civil law process, (as the court of admiralty, whose proceedings are, under the provisions of the acts of congress, to be according to the course of the civil law,) it is a process in the nature of a summons; it is either, general, special, or mixed.

2.—1. The *general monition* is a citation or summons to all persons interested, or, as is commonly said, to the whole world, to appear and show cause why the libel filed in the case should not be sustained, and the prayer of relief granted. This is adopted in prize cases, admiralty suits for forfeitures, and other suits *in rem*, when no particular individuals are summoned to answer. In such cases the taking possession of the property libeled, and this general citation or nomination, served according to law, are considered constructive notice to the world of the pendency of the suit; and the judgment rendered thereupon is conclusive upon the title of the property which may be affected. In form, the monition is a warrant of the court, in an admiralty cause, directed to the marshal or his deputy, commanding him in the name of the president of the United States, to give public notice, by advertisements in such newspapers as the court may select, and by notifications to be posted in public places, that a libel has been filed in a certain admiralty cause pending, and of the time and place ap-

pointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The monition is served in the manner directed in the warrant.

3.—2. A *special monition* is a similar warrant, directed to the marshal or his deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. It is served by delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but the service should be personal if possible. *Clerke's Prax.* tit. 21; *Dunlap's Adm. Pr.* 135.

4.—3. A *mixed monition* is one which contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warrant. This is served by newspaper advertisements, by notifications posted in public places, and by delivery of a copy attested by the officer to each person specially named, or by leaving it at his usual place of residence. See *Dunlap's Adm. Pr. Index*, h. t.; *Bett's Adm. Pr. Index*, h. t.

MONITORY LETTER, *eccl. law.* The process of an official, a bishop, or other prelate having jurisdiction, issued to compel, by ecclesiastical censures, those who know of a crime or other matter which requires to be explained, to come and reveal it. *Merl. Répert.* h. t.

MONOCRACY. A government by one person only.

MONOCRAT. A monarch who governs alone; an absolute governor.

MONOGAMY. A marriage contracted between one man and one woman, in exclusion of all the rest of mankind; it is used in opposition to bigamy and polygamy. (q. v.) *Wolff, Dr. de la Nat.* § 857. The state of having only one husband or one wife at one time.

MONOGRAM. A character or cipher composed of one or more letters interwoven, being an abbreviation of a name.

2. A signature made by a monogram would perhaps be binding, provided it could be proved to have been made and intended as a signature. 1 *Denio, R.* 471. And there seems to be no reason why such a signature should not be as binding as one which is altogether illegible. See *Initial; Mark; Signature*.

MONOMANIA. *med. jur.* Insanity only upon a particular subject, and with a single delusion of the mind.

2. The most simple form of this disorder is that in which the patient has imbibed some single notion, contrary to common sense and to his own experience, and which seems, and no doubt really is, dependent on errors of sensation. It is supposed the mind in other respects retains its intellectual powers. In order to avoid any civil act done, or criminal responsibility incurred, it must manifestly appear that the act in question was the effect of monomania. *Cyclop. Pract. Medicine*, title Soundness and Unsoundness of Mind; *Dr. Ray on Insanity*, § 203; 13 *Ves.* 89; 3 *Bro. C. C.* 444; 1 *Addams' R.* 283; *Hagg. R.* 18; 2 *Addams' R.* 102; 2 *Addams' R.* 79, 94, 209; 5 *Car. & P.* 168; *Dr. Burrows on Insanity*, 484, 485. *Vide Delusion; Mania*; and *Trebuchet, Jur. de la Méd.* 55 to 58.

MONOPOLY, commercial law. This word has various significations. 1. It is the abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public.

2.—2. All combinations among merchants to raise the price of merchandise to the injury of the public, is also said to be a monopoly.

3.—3. A monopoly is also an institution or allowance by a grant from the sovereign power of a state, by commission, letters-patent, or otherwise, to any person, or corporation, by which the exclusive right of buying, selling, making, working, or using anything, is given. *Bac. Abr.* h. t.; 3 *Inst.* 181.

4. The constitutions of Maryland, North Carolina, and Tennessee, declare that "monopolies are contrary to the genius of a free government, and ought not to be allowed."—*Vide art. Copyright; Patent*.

MONSTER, physiology, persons. An animal which has a conformation contrary to the order of nature. *Dunglison's Human Physiol.* vol. 2, p. 422.

2. A monster, although born of a woman in lawful wedlock, cannot inherit. Those who have however the essential parts of the human form, and have merely some defect of conformation, are capable of inheriting, if otherwise qualified. 2 *Bl. Com.* 246; 1 *Beck's Med. Jurisp.* 366; *Co. Litt.* 7, 8;

Dig. lib. 1, t. 5, l. 14; 1 Swift's Syst. 331; Fred. Code, Pt. 1, b. 1, t. 4, s. 4.

3. No living human birth, however much it may differ from human shape, can be lawfully destroyed. Traill. Med. Jur. 47; see Briand, Méd. Lég. 1ere part. c. 6, art. 2, § 3; 1 Foderé, Méd. Lég. § 402-405.

MONSTRANS DE DROIT. Literally showing of right, in the English law, is a process by which a subject claims from the crown a restitution of a right. Bac. Ab. Prerogative, E; 3 Bl. 256; 1 And. 181; 5 Leigh's R. 512.

MONSTRANS DE FAIT. Literally, showing of a deed; a profert. Bac. Ab. Pleas, &c. I 12, n. 1.

MONSTRAVERUNT, WRIT OF, Eng. law. A writ which lies for the tenants of ancient demesne who hold by free charter, and not for those tenants who hold by copy of court roll, or by the rod, according to the custom of the manor. F. N. B. 81.

MONTES PIETATIS, or *Monts de Piété*. The name of institutions established by public authority for lending money upon pledge of goods. In these establishments a fund is provided, with suitable warehouses, and all necessary accommodations. Directors manage these concerns. When the money for which the goods pledged is not returned in proper time, the goods are sold to reimburse the institutions.

2. These establishments are found principally on the continent of Europe. With us private persons, called pawnbrokers, perform this office, sometimes with doubtful fidelity. See Bell's Com. B. 5, c. 2, s. 2.

MONTH. A space of time variously computed, as it is applied to astronomical, civil or solar, or lunar months.

2. The astronomical month contains one-twelfth part of the time employed by the sun in going through the zodiac. In law, when a month simply is mentioned, it is never understood to mean an astronomical month.

3. The civil or solar month is that which agrees with the Gregorian calendar, and these months are known by the names of January, February, March, &c. They are composed of unequal portions of time. There are seven of thirty one days each, four of thirty, and one which is sometimes composed of twenty-eight days, and in leap years, of twenty-nine.

4. The lunar month is composed of twenty-eight days only. When a law is

passed or contract made, and the month is expressly stated to be solar or civil, which is expressed by the term calendar month, or when it is expressed to be a lunar month, no difficulty can arise; but when time is given for the performance of an act, and the word month simply is used, so that the intention of the parties cannot be ascertained; then the question arises, how shall the month be computed? By the law of England a month means ordinarily, in common contracts, as, in leases, a lunar month; a contract, therefore, made for a lease of land for twelve months, would mean a lease for forty-eight weeks only. 2 Bl. Com. 141; 6 Co. R. 62; 6 T. R. 224. A distinction has been made between "twelve months," and "a twelve-month;" the latter has been held to mean a year. 6 Co. R. 61.

5. Among the Greeks and Romans the months were lunar, and probably the mode of computation adopted in the English law has been adopted from the codes of these countries. Clef des Lois Rom. mot Mois.

6. But in mercantile contracts, a month simply signifies a calendar month; a promissory note to pay money in twelve months, would therefore mean a promise to pay in one year, or twelve calendar months. Chit. on Bills, 406; 1 John. Cas. 99; 3 B. & B. 187; 1 M. & S. 111; Story on Bills, § 143; Story, P. N. § 213; Bayl. on Bills, c. 7; 4 Kent, Comm. Sect. 56; 2 Mass. 170; 4 Mass. 460; 6 Watts. & Serg. 179.

7. In general, when a statute speaks of a month, without adding "calendar," or other words showing a clear intention, it shall be intended a lunar month. Com. Dig. Ann. B; 4 Wend. 512; 15 John. R. 358. See 2 Cowen, R. 518; Id. 605. In all legal proceedings, as in commitments, pleadings, &c. a month means four weeks. 3 Burr. R. 1455; 1 Bl. Rep. 450; Dougl. R. 446, 463.

8. In Pennsylvania and Massachusetts, and perhaps some other states, 1 Hill. Ab. 118, n., a month mentioned generally in a statute, has been construed to mean a calendar month. 2 Dall. R. 302; 4 Dall. Rep. 143; 4 Mass. R. 461; 4 Bibb. R. 105. In England, in the ecclesiastical law, months are computed by the calendar. 3 Burr. R. 1455; 1 M. & S. 111.

9. In New York, it is enacted that whenever the term "month," or "months," is or shall be used in any statute, act, deed, verbal or written contract, or any public or

private instrument whatever, it shall be construed to mean a calendar, and not a lunar month; unless otherwise expressed. Rev. Stat. part 1, c. 19, tit. 1, § 4. Vide, generally, 2 Sim. & Stu. 476; 2 A. K. Marsh. Rep. 245; 3 John. Ch. Rep. 74; 2 Campb. 294; 1 Esp. R. 146; 6 T. R. 224; 1 M. & S. 111; 3 East, R. 407; 4 Moore, 465; 1 Bl. Rep. 150; 1 Bing. 307; S. C. 8 Eng. C. L. R. 328; 1 M. & S. 111; 1 Str. 652; 6 M. & S. 227; 3 Brod. & B. 187; S. C. 7 Eng. C. L. R. 404.

MONUMENT. A thing intended to transmit to posterity the memory of some one; it is used, also, to signify a tomb where a dead body has been deposited. In this sense it differs from a cenotaph, which is an empty tomb. Dig. 11, 7, 2, 6; Id. 11, 7, 2, 42.

MONUMENTS. Permanent landmarks established for the purpose of ascertaining boundaries.

2. Monuments may be either natural or artificial objects, as rivers, known streams, springs, or marked trees. 7 Wheat. R. 10; 6 Wheat. R. 582; 9 Cranch, 178; 6 Pet. 498; Pet. C. C. R. 64; 3 Ham. 284; 5 Ham. 534; 5 N. H. Rep. 524; 3 Dev. 75. Even posts set up at the corners, 5 Ham. 534, and a clearing, 7 Cowen, 723, are considered as monuments. Sed vide 3 Dev. 75.

3. When monuments are established, they must govern, although neither courses, nor distances, nor computed contents correspond. 5 Cowen, 346; 1 Cowen, 605; 6 Cowen, 706; 7 Cowen, 723; 6 Mass. 131; 2 Mass. 380; 3 Pick. 401; 5 Pick. 135; 3 Gill & John. 142; 5 Har. & John. 163, 255; 2 Id. 260; Wright, 176; 5 Ham. 534; 1 H. & McH. 355; 2 H. & McH. 416; Cooke, 146; 1 Call, 429; 3 Call, 239; 3 Fairf. 325; 4 H. & M. 125; 1 Hayw. 22; 5 J. J. Marsh. 578; 3 Hawks, 91; 3 Murph. 88; 4 Monr. 32; 5 Monr. 175; 2 Overt. 200; 2 Bibb, 493; S. C. 6 Wheat. 582; 4 W. C. C. Rep. 15. Vide *Boundary*.

MOORING, mar. law. The act of arriving of a ship or vessel at a particular port, and there being anchored or otherwise fastened to the shore.

2. Policies of insurance frequently contain a provision that the ship is insured from one place to another, "and till there moored twenty-four hours in good safety." As to what shall be a sufficient mooring, see 1 Marsh. Ins. 262; Park. on Ins. 35; 2 Str. 1251; 3. T. R. 362.

MOOT, English law. A term used in the inns of court, signifying the exercise of arguing imaginary cases, which young barristers and students used to perform at certain times, the better to be enabled by this practice to defend their clients' cases. A *moot question* is one which has not been decided.

MORÂ, IN, civil law. This term, in *morâ*, is used to denote that a party to a contract, who is obliged to do anything, has neglected to perform it, and is in default. Story on Bailm. § 123, 259; Jones on Bailm. 70; Poth. Prêt à Usage, c. 2, § 2, art. 2, n. 60; Encyclopédie, mot Demeuro; Broderode, mot Morâ.

MORA, estates. A moor, barren or unprofitable ground; marsh; a heath. 1 Inst. 5; Fleta, lib. 2, c. 71.

MORAL EVIDENCE. That evidence which is not obtained either from intuition or demonstration. It consists of those convictions of the mind, which are produced by the use of the senses, the testimony of men, and analogy or induction. It is used in contradistinction to *mathematical evidence*. (q. v.) 3 Bouv. Inst. n. 3050.

MORAL INSANITY, med. jur. A term used by medical men, which has not yet acquired much reputation in the courts. Moral insanity is said to consist in a morbid perversion of the moral feelings, affections, inclinations, temper, habits, and moral dispositions, without any notable lesion of the intellect, or knowing and reasoning faculties, and particularly without any maniacal hallucination. Prichard, art. Insanity, in Cyclopædia of Practical Medicine.

2. It is contended that some human beings exist, who, in consequence of a deficiency in the moral organs, are as blind to the dictates of justice, as others are deaf to melody. Combe, Moral Philosophy, Lect. 12.

3. In some, this species of malady is said to display itself in an irresistible propensity to commit murder; in others, to commit theft, or arson. Though most persons afflicted with this malady commit such crimes, there are others whose disease is manifest in nothing but irascibility. Annals D'Hygiène, tom. i. p. 284. Many are subjected to melancholy and dejection, without any delusion or illusion. This, perhaps, without full consideration, has been judicially declared to be a "groundless theory." The courts, and law writers, have not given it their full assent. 1 Chit.

Med. Jur. 352; 1 Beck, Med. Jur. 553; Ray, Med. Jur. Prel. Views, § 23, p. 49.

MORAL OBLIGATION. A duty which one owes, and which he ought to perform, but which he is not legally bound to fulfil.

2. These obligations are of two kinds: 1st. Those founded on a natural right; as, the obligation to be charitable, which can never be enforced by law. 2d. Those which are supported by a good or valuable antecedent consideration; as, where a man owes a debt barred by the act of limitations, this cannot be recovered by law, though it subsists in morality and conscience; but if the debtor promise to pay it, the moral obligation is a sufficient consideration for the promise, and the creditor may maintain an action of assumpsit, to recover the money. 1 Bouv. Inst. n. 623.

MORATUR IN LEGE. He demurs in law. He rests on the pleadings of the case, and abides the judgment of the court.

MORGANTIC MARRIAGE. During the middle ages, there was an intermediate estate between matrimony and concubinage, known by this name. It is defined to be a lawful and inseparable conjunction of a single man, of noble and illustrious birth, with a single woman of an inferior or plebeian station, upon this condition, that neither the wife nor children should partake of the title, arms, or dignity of the husband, nor succeed to his inheritance, but should have a certain allowance assigned to them by the morgantic contract. The marriage ceremony was regularly performed; the union was for life and indissoluble; and the children were considered legitimate, though they could not inherit. Fred. Code, book 2, art. 3; Poth. Du Marriage, 1, c. 2, s. 2; Shelf. M. & D. 10; Pruss. Code, art. 835.

MORT D'ANCESTOR. An ancient and now almost obsolete remedy in the English law. An assize of *mort d'ancestor* was a writ which was sued out where, after the decease of a man's ancestor, a stranger abated, and entered into the estate. 1 Co. Litt. 159. The remedy in such case is now to bring ejectment.

MORTGAGE, contracts, conveyancing. Mortgages are of several kinds: as they concern the kind of property mortgaged, they are mortgages of lands, tenements, and hereditaments, or of goods and chattels; as they affect the title of the thing mortgaged, they are legal and equitable.

2. In equity all kinds of property, real or personal, which are capable of an abso-

lute sale, may be the subject of a mortgage; rights in remainder and reversion, franchises, and choses in action, may, therefore, be mortgaged. But a mere possibility or expectancy, as that of an heir, cannot. 2 Story, Eq. Jur. § 1021; 4 Kent, Com. 144; 1 Powell, Mortg. 17, 23; 3 Meri. 667.

3. A legal mortgage of lands may be described to be a conveyance of lands, by a debtor to his creditor, as a pledge and security for the repayment of a sum of money borrowed, or performance of a covenant; 1 Watts, R. 140; with a proviso, that such conveyance shall be void on payment of the money and interest on a certain day, or the performance of such covenant by the time appointed, by which the conveyance of the land becomes absolute at law, yet the mortgagor has an equity of redemption, that is, a right in equity on the performance of the agreement within a reasonable time, to call for a re-conveyance of the land. Cruise, Dig. t. 15, c. 1, s. 11; 1 Pow. on Mortg. 4 a, n.; 2 Chip. 100; 1 Pet. R. 386; 2 Mason, 581; 18 Wend. 485; 5 Verm. 532; 1 Yeates, 579; 2 Pick. 211.

4. It is an universal rule in equity that once a mortgage, always a mortgage; 2 Cowen, R. 324; 1 Yeates, R. 584; every attempt, therefore, to defeat the equity of redemption, must fail. See *Equity of Redemption*.

5. As to the *form*, such a mortgage must be in writing, when it is intended to convey the legal title. 1 Penna. R. 240. It is either in one single deed which contains the whole contract—and which is the usual form—or it is two separate instruments, the one containing an absolute conveyance, and the other a defeasance. 2 Johns. Ch. Rep. 189; 15 Johns. R. 555; 2 Greenl. R. 152; 12 Mass. 456; 7 Pick. 157; 3 Wend. 208; Addis. 357; 6 Watts, 405; 3 Watts, 188; 3 Fairf. 346; 7 Wend. 248. But it may be observed in general, that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it appears to have been the intention of the parties that such conveyance should be a mortgage only, or pass an estate redeemable, a court of equity will always so construe it. Vern. 183, 268, 394; Prec. Ch. 95; 1 Wash. R. 126; 2 Mass. R. 493. 4 John. R. 186; 2 Cain. Er. 124.

6. As the money borrowed on mortgage is seldom paid on the day appointed, mortgages have now become entirely subject to the court of chancery, where it is an established rule that the mortgagee holds the estate merely as a pledge or security for the repayment of his money; therefore a mortgage is considered in equity as personal estate.

7. The mortgagor is held to be the real owner of the land, the debt being considered the principal, and the land the accessory; whenever the debt is discharged, the interest of the mortgagee in the lands determines of course, and he is looked on in equity as a trustee for the mortgagor.

8. An equitable mortgage of lands is one where the mortgagor does not convey regularly the land, but does some act by which he manifests his determination to bind the same for the security of a debt he owes. An agreement in writing to transfer an estate as a security for the repayment of a sum of money borrowed, or even a deposit of title deeds, and a verbal agreement, will have the same effect of creating an equitable mortgage. 1 Rawle, Rep. 328; 5 Wheat. R. 284; 1 Cox's Rep. 211. But in Pennsylvania there is no such a thing as an equitable mortgage. 3 P. S. R. 233. Such an agreement will be carried into execution in equity against the mortgagor, or any one claiming under him with notice, either actual or constructive, of such deposit having been made. 1 Bro. C. C. 269; 2 Dick. 759; 2 Anstr. 427; 2 East, R. 486; 9 Ves. jr. 115; 11 Ves. jr. 398, 403; 12 Ves. jr. 6, 192; 1 John. Cas. 116; 2 John. Ch. R. 608; 2 Story, Eq. Jur. § 1020. Miller, Eq. Mortg. *passim*.

9. A mortgage of goods is distinguishable from a mere pawn. 5 Verm. 582; 9 Wend. 80; 8 John. 96. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law, though equity will interfere to compel a redemption. But in a pledge, a special property only passes to the pledgee, the general property remaining in the pledger. There have been some cases of mortgages of chattels, which have been held valid without any actual possession in the mortgagee; but they stand upon very peculiar grounds and may be deemed exceptions to the general rule. 2 Pick. R. 607; 5 Pick. R. 59; 5 Johns. R. 261; Sed vide 12

Mass. R. 300; 4 Mass. R. 352; 6 Mass. R. 422; 15 Mass. R. 477; 5 S. & R. 275; 12 Wend. 277; 15 Wend. 212, 244; 1 Penn. 57. Vide, generally, Powell on Mortgages; Cruise, Dig. tit. 15; Viner, Ab. h. t.; Bac. Ab. h. t.; Com. Dig. h. t.; American Digests, generally, h. t.; New York Rev. Stat. p. 2, c. 8; 9 Wend. 80; 9 Greenl. 79; 12 Wend. 61; 2 Wend. 296; 3 Cowen, 166; 9 Wend. 345; 12 Wend. 297; 5 Greenl. 96; 14 Pick. 497; 3 Wend. 348; 2 Hall, 63; 2 Leigh, 401, 15 Wend. 244; Bouv. Inst. Index, h. t.

10. It is proper to observe that a conditional sale with the right to repurchase very nearly resembles a mortgage; but they are distinguishable. It is said that if the debt remains, the transaction is a mortgage, but if the debt is extinguished by mutual agreement, or the money advanced is not loaned, but the grantor has a right to refund it in a given time, and have a reconveyance, this is a conditional sale. 2 Edw. R. 138; 2 Call, R. 354; 5 Gill & John. 82; 2 Yerg. R. 6; 6 Yerg. R. 96; 2 Sumner, R. 487; 1 Paige, R. 56; 2 Ball & Beat. 274. In cases of doubt, however, courts of equity will always lean in favor of a mortgage. 7 Cranch, R. 237; 2 Desaus. 564.

11. According to the laws of Louisiana a mortgage is a right granted to the creditor over the property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment. Civ. Code of Lo. art. 3245.

12. Mortgage is conventional, legal or judicial. 1st. The conventional mortgage is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession. Civ. Code, art. 3257.

13.—2d. Legal mortgage is that which is created by operation of law: this is also called tacit mortgage, because it is established by the law, without the aid of any agreement. Art. 3279. A few examples will show the nature of this mortgage. Minors, persons interdicted, and absentees, have a legal mortgage on the property of their tutors and curators, as a security for their administration; and the latter have a mortgage on the property of the former for advances which they have made. The property of persons who, without being law-

fully appointed curators or tutors of minors, &c., interfere with their property, is bound by a legal mortgage from the day on which the first act of interference was done.

14.—3d. The judicial mortgage is that resulting from judgments, whether these be rendered on contested cases or by default, whether they be final or provisional, in favor of the person obtaining them. Art. 3289.

15. Mortgage, with respect to the manner in which it binds the property, is divided into general mortgage, or special mortgage. General mortgage is that which binds all the property, present or future, of the debtor. Special mortgage is that which binds only certain specified property. Art. 3255.

16. The following objects are alone susceptible of mortgage: 1. Immovables, subject to alienation, and their accessories considered likewise as immovable. 2. The usufruct of the same description of property with its accessories during the time of its duration. 3. Slaves. 4. Ships and other vessels. Art. 3256.

MORTGAGEE, estates, contracts. He to whom a mortgage is made.

2. He is entitled to the payment of the money secured to him by the mortgage; he has the legal estate in the land mortgaged, and may recover it in ejectment; on the other hand he cannot commit waste; 4 Watts, R. 460; he cannot make leases to the injury of the mortgagor; and he must account for the profits he receives out of the thing mortgaged when in possession. Cruise, Dig. tit. 15, c. 2.

MORTGAGOR, estates, contracts. He who makes a mortgage.

2. He has rights, and is liable to certain duties as such. 1. He is quasi tenant at will; he is entitled to an equity of redemption after forfeiture. 2. He cannot commit waste, nor make a lease injurious to the mortgagee. As between the mortgagor and third persons, the mortgagor is owner of the land. Dougl. 632; 4 M'Cord, R. 340; 3 Fairf. R. 243; but see 3 Pick. R. 204; 1 N. H. Rep. 171; 2 N. H. Rep. 16; 10 Conn. R. 243; 1 Vern. 3; 2 Vern. 621; 1 Atk. 605. He can, however, do nothing which will defeat the rights of the mortgagee, as, to make a lease to bind him. Dougl. 21. Vide *Mortgagee*; 2 Jack. & Walk. 194.

MORTIFICATION, Scotch law. This term is nearly synonymous with mortmain.

MORTMAIN. An unlawful alienation

of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. These purchases having been chiefly made by religious houses, in consequence of which lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations. 2 Bl. Com. 268; Co. Litt. 2 b; Ersk. Inst. B. 2, t. 4, s. 10; Barr. on the Stat. 27, 97.

2. Mortmain is also employed to designate all prohibitory laws, which limit, restrain, or annul gifts, grants, or devises of lands and other corporeal hereditaments to charitable uses. 2 Story, Eq. Jur. § 1137, note 1. See Shelf. on Mortm. 2, 3.

MORTUARIES, Eng. law. These are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister, in many parishes, on the death of the parishioner. 2 Bl. Com. 425.

MORTUUM VADIUM. A mortgage; a dead pledge.

MORTUUS EST. A return made by the sheriff, when the defendant is dead, as an excuse for not executing the writ. 4 Watts, 270, 276.

MOTHER, domestic relations. A woman who has borne a child.

2. It is generally the duty of a mother to support her child, when she is left a widow, until he becomes of age, or is able to maintain himself; 8 Watts, R. 366; and even after he becomes of age, if he be chargeable to the public, she may, perhaps, in all the states, be compelled, when she has sufficient means, to support him. But when the child has property sufficient for his support, she is not, even during his minority, obliged to maintain him. 1 Bro. C. C. 387; 2 Mass. R. 415; 4 Mass. R. 97.

3. When the father dies without leaving a testamentary guardian, at common law, the mother is entitled to be the guardian of the person and estate of the infant, until he arrives at fourteen years, when he is able to choose a guardian. Litt. sect. 123; 3 Co. 38; Co. Litt. 84 b; 2 Atk. 14; Com Dig. B, D, E; 7 Ves. 348. See 10 Mass. 135, 140; 15 Mass. 272; 4 Binn. 487; 4 Stew. & Port. 123; 2 Mass. 415; Harper, R. 9; 1 Root, R. 487.

4. In Pennsylvania, the orphans' court will, in such case, appoint a guardian until the infant shall attain his fourteenth year. During the joint lives of the parents, (q. v.) the father (q. v.) is alone responsible for the support of the children; and has the only

control over them, except when in special cases the mother is allowed to have possession of them. 1 P. A. Browne's Rep. 143; 5 Binn. R. 520; 2 Serg. & Rawle, 174. Vide 4 Binn. R. 492, 494.

5. The mother of a bastard child, as natural guardian, has a right to the custody and control of such child, and is bound to maintain it. 2 Mass. 109; 12 Mass. 387, 433; 2 John. 375; 15 John. 208; 6 S. & R. 255; 1 Ashmead, 55.

MOTHER-IN-LAW. In Latin *socrus*. The mother of one's wife, or of one's husband.

MOTION, practice. An application to a court by one of the parties in a cause, or his counsel, in order to obtain some rule or order of court, which he thinks becomes necessary in the progress of the cause, or to get relieved in a summary manner, from some matter which would work injustice.

2. When the motion is made on some matter of fact, it must be supported by an affidavit that such facts are true; and for this purpose, the party's affidavit will be received, though it cannot be read on the hearing. 1 Binn. R. 145; S. P. 2 Yeates' R. 546. Vide 3 Bl. Com. 304; 2 Sell. Pr. 356; 15 Vin. Ab. 495; Grah. Pr. 542; Smith's Ch. Pr. Index, h. t.

MOTIVE. The inducement, cause or reason why a thing is done.

2. When there is such a mistake in the motive, that had the truth been known, the contract would not have been made, it is generally void. For example, if a man should, after the death of Titius, of which he was ignorant, insure his life, the error of the motive would avoid the contract. Toull. Dr. Civ. Fr. liv. 3, c. 2, art. 1. Or, if Titius should sell to Livius his horse, which both parties supposed to be living at some distance from the place where the contract was made, when, in fact, the horse was then dead, the contract would be void. Poth. Vente, n. 4; 2 Kent, Com. 367. When the contract is entered into under circumstances of clear mistake or surprise, it will not be enforced. See the following authorities on this subject. 1 Russ. & M. 527; 1 Ves. jr. 221; 4 Price, 135; 1 Ves. jr. 210; Atkinson on Tith. 144. Vide *Cause; Consideration*.

3. The motive of prosecutions is frequently an object of inquiry, particularly when the prosecutor is a witness, and in his case, as that of any other witness, when the motion is ascertained to be bad, as a desire

of revenge for a real or supposed injury, the credibility of the witness will be much weakened, though this will not alone render him incompetent. See *Evidence; Witness*.

MOURNING. This word has several significations. 1. It is the apparel worn at funerals, and for a time afterwards, in order to manifest grief for the death of some one, and to honor his memory. 2. The expenses paid for such apparel.

2. It has been held, in England, that a demand for mourning furnished to the widow and family of the testator, is not a funeral expense. 2 Carr. & P. 207. Vide 14 Ves. 346; 1 Ves. & Bea. 364. See 2 Bell's Comm. 156.

MOVABLES, estates. Such subjects of property as attend a man's person wherever he goes, in contradistinction to things immovable. (q. v.)

2. Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. Movable are further distinguished into such as are in possession, or which are in the power of the owner, as, a horse in actual use, a piece of furniture in a man's own house; or such as are in the possession of another, and can only be recovered by action, which are therefore said to be in action, as a debt. Vide art. *Personal Property*, and Fonbl. Eq. Index, h. t.; Pow. Mortg. Index, h. t.; 2 Bl. Comm. 384; Civ. Code of Lo. art. 464 to 472; 1 Bouv. Inst. n. 462.

MULATTO. A person born of one white and one black parent. 7 Mass. R. 88; 2 Bailey, 558.

MULCT, punishment. A fine imposed on the conviction of an offence.

MULCT, commerce. An imposition laid on ships or goods by a company of trade, for the maintenance of consuls and the like. Obsolete.

MULIER. A woman, a wife; sometimes it is used to designate a marriageable virgin, and in other cases the word *mulier* is employed in opposition to *virgo*. Poth. Pand. tom. 22, h. t. In its most proper signification, it means a wife.

2. A son or a daughter, born of a lawful wife, is called *filius mulieratus* or *filia mulierata*, a son *mulier*, or a daughter *mulier*. The term is used always in contradistinction to a bastard; mulier being always legitimate. Co. Litt. 243.

3. When a man has a bastard son, and afterwards marries the mother, and has by her another son, the latter is called the *mulier puisné*. 2 Bl. Com. 248.

MULTIFARIOUSNESS, equity pleading. By multifariousness in a bill, is understood the improperly joining in one bill distinct matters, and thereby confounding them; as, for example, the uniting in one bill, several matters, perfectly distinct and unconnected, against one defendant; or the demand of several matters of distinct natures, against several defendants in the same bill. Coop. Eq. Pl. 182; Mitf. by Jeremy, 181; 2 Mason's R. 201; 18 Ves. 80; Hardr. R. 337; 4 Cowen's R. 682; 4 Bouv. Inst. n. 4165.

2. In order to prevent confusion in its pleadings and decrees, a court of equity will anxiously discountenance this multifariousness. The following case will illustrate this doctrine; suppose an estate should be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances, and therefore there should be a distinct bill upon each contract; on the other hand, the vendor in the like case, would not be allowed to file one bill for a specific performance against all the purchasers of the estate, for the same reason. Coop. Eq. Pl. 182; 2 Dick. Rep. 677; 1 Madd. Rep. 88; Story's Eq. Pl. § 271 to 286. It is extremely difficult to say what constitutes multifariousness as an abstract proposition. Story, Eq. Pl. § 530, 539; 4 Blackf. 249; 2 How. S. C. Rep. 619, 642; 4 Bouv. Inst. n. 4243.

MULTITUDE. The meaning of this word is not very certain. By some it is said that to make a multitude there must be ten persons at least, while others contend that the law has not fixed any number. Co. Litt. 257.

MULTURE, Scotch law. The quantity of grain or meal payable to the proprietor of the mill, or to the multurer, his tacksmen, for manufacturing the corns. Ersk. Prin. Laws of Scotl. B. 2 t. 9, n. 19.

MUNERA. The name given to grants made in the early feudal ages, which were mere tenancies at will, or during the pleasure of the grantor. Dalr. Feud. 198, 199; Wright on Ten. 19.

MUNICIPAL. Strictly, this word applies only to what belongs to a city. Among
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the Romans, cities were called *municipia*; these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called *municipal magistrates*. With us this word has a more extensive meaning; for example, we call *municipal law*, not the law of a city only, but the law of the state. 1 Bl. Com. Municipal is used in contradistinction to international; thus we say an offence against the law of nations is an international offence, but one committed against a particular state or separate community, is a municipal offence.

MUNICIPALITY. The body of officers, taken collectively, belonging to a city, who are appointed to manage its affairs and defend its interests.

MUNIMENTS. The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which he is enabled to defend the title of his estate. Termes de la Ley, h. t.; 3 Inst. 170.

MURAGE. A toll formerly levied in England for repairing or building public walls.

MURAL MONUMENTS. Monuments made in walls.

2. Owing to the difficulty or impossibility of removing them, secondary evidence may be given of inscriptions on walls, fixed tables, gravestones, and the like. 2 Stark. Rep. 274.

MURDER, crim. law. This, one of the most important crimes that can be committed against individuals, has been variously defined. Hawkins defines it to be the wilful killing of any subject whatever, with malice aforethought, whether the person slain shall be an Englishman or a foreigner. B. 1, c. 13, s. 3. Russell says, murder is the killing of any person under the king's peace, with malice prepense or aforethought, either express or implied by law. 1 Rus. Cr. 421. And Sir Edward Coke, 3 Inst. 47, defines or rather describes this offence to be, "when a person of sound mind and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought either express or implied."

2. This definition, which has been adopted by Blackstone, 4 Com. 195; Chitty, 2 Cr. Law, 724; and others, has been severely and perhaps justly criticised. What, it has been asked, are *sound memory and*

understanding? What has soundness of memory to do with the act; be it ever so imperfect,—how does it affect the guilt? If discretion is necessary, can the crime ever be committed, for, is it not the highest indiscretion in a man to take the life of another, and thereby expose his own? If the person killed be an idiot or a new born infant, is he a reasonable creature? Who is in the king's peace? What is malice aforethought? Can there be any malice afterthought? Livingst. Syst. of Pen. Law, 186.

3. According to Coke's definition there must be, 1st. Sound mind and memory in the agent. By this is understood there must be a *will*, (q. v.) and legal *discretion*. (q. v.) 2. An actual killing, but it is not necessary that it should be caused by direct violence; it is sufficient if the acts done apparently endanger life, and eventually prove fatal. Hawk. b. 1, c. 31, s. 4; 1 Hale, P. C. 431; 1 Ashm. R. 289; 9 Car. & Payne, 356; S. C. 38 E. C. L. R. 152; 2 Palm. 545. 3. The party killed must have been a reasonable being, alive and in the king's peace. To constitute a birth, so as to make the killing of a child murder, the whole body must be detached from that of the mother; but if it has come wholly forth, but is still connected by the umbilical chord, such killing will be murder. 2 Bouv. Inst. n. 1722, note. Fœticide (q. v.) would not be such a killing; he must have been *in rerum naturâ*. 4. Malice, either express or implied. It is this circumstance which distinguishes murder from every description of homicide. Vide art. *Malice*.

4. In some of the states, by legislative enactments, murder has been divided into degrees. In Pennsylvania, the act of April 22, 1794, 8 Smith's Laws, 186, makes "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find the person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed by exami-

nation of witnesses, to determine the degree of the crime, and give sentence accordingly." Many decisions have been made under this act to which the reader is referred: see Whart. Dig. Criminal Law, h. t.

5. The legislature of Tennessee has adopted the same distinction, in the very words of the act of Pennsylvania, just cited. Act of 1829, 1 Tenn. Laws, Dig. 244. Vide 3 Yerg. R. 283; 5 Yerg. R. 340.

6. Virginia has adopted the same distinction. 6 Rand. R. 721.

Vide, generally, Bac. Ab. h. t.; 15 Vin. Ab. 500; Com. Dig. Justices, M 1, 2; Dane's Ab. Index, h. t.; Hawk. Index, h. t.; 1 Russ. Cr. b. 3, c. 1; Rosc. Cr. Ev. h. t.; Hale, P. C. Index, h. t.; 4 Bl. Com. 195; 2 Swift's Syst. Index, h. t.; 2 Swift's Dig. Index, h. t.; American Digests, h. t.; Wheel-er's C. C. Index, h. t.; Stark. Ev. Index, h. t.; Chit. Cr. Law, Index, h. t.; New York Rev. Stat. part 4, c. 1, t. 1 and 2.

MURDER, pleadings. In an indictment for murder, it must be charged that the prisoner "did kill and murder" the deceased, and unless the word murder be introduced into the charge, the indictment will be taken to charge manslaughter only. Foster, 424; Yelv. 205; 1 Chit. Cr. Law, *243, and the authorities and cases there cited.

MURDRUM, old Engl. law. During the times of the Danes, and afterwards till the reign of Edward III., murdrum was the killing of a man in a secret manner, and in that it differed from simple homicide.

2. When a man was thus killed, and he was unknown, by the laws of Canute he was presumed to be a Dane, and the vill was compelled to pay forty marks for his death. After the conquest, a similar law was made in favor of Frenchmen, which was abolished by 3 Edw. III.

3. By murdrum was also understood the fine formerly imposed in England upon a person who had committed homicide *per infortunium* or *se defendendo*. Prin. Pen. Law, 219, note r.

MUSICAL COMPOSITION. The act of congress of February 3, 1831, authorizes the granting of a copyright for a musical composition. A question was formerly agitated whether a composition published on a single sheet of paper, was to be considered a book, and it was decided in the affirmative. 2 Campb. 28, n.; 11 East, 244. See *Copyright*.

TO MUSTER, *mar. law.* By this term is understood to collect together and exhibit soldiers and their arms; it also signifies to employ recruits and put their names down in a book to enrol them.

MUSTER-ROLL, *maritime law.* A written document containing the names, ages, quality, place of residence, and, above all, place of birth, of every person of the ship's company. It is of great use in ascertaining the ship's neutrality. Marsh. Ins. B. 1, c. 9, s. 6, p. 407; Jacobs. Sea Laws, 161; 2 Wash. C. C. R. 201.

MUSTIRO. This name is given to the issue of an Indian and a negro. Dudl. S. Car. R. 174.

MUTATION, *French law.* This term is synonymous with change, and is particularly applied to designate the change which takes place in the property of a thing in its transmission from one person to another; permutation therefore happens when the owner of the thing sells, exchanges or gives it. It is nearly synonymous with transfer. (q. v.) Merl. Répert. h. t.

MUTATION OF LIBEL, *practice.* An amendment allowed to a libel, by which there is an alteration of the substance of the libel, as by propounding a new cause of action, or asking one thing instead of another. Dunl. Adm. Pr. 213; Law's Eccl. Law, 165-167; 1 Paine's R. 435; 1 Gall. R. 123; 1 Wheat. R. 261.

MUTATIS MUTANDIS. The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered, when necessary, as to names, offices, and the like.

MUTE, *persons.* One who is dumb. Vide *Deaf and Dumb*.

MUTE, STANDING MUTE, *practice, crim. law.* When a prisoner upon his arraignment totally refuses to answer, insists upon mere frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to stand mute.

2. In the case of the United States v. Hare, et al., Circuit Court, Maryland Dist. May sess. 1818, the prisoner standing mute was considered as if he had pleaded not guilty.

3. The act of congress of March 3, 1825, 3 Story's L. U. S. 2002, has since provided as follows; § 14, That if any person, upon his or her arraignment upon any indictment before any court of the United States for any offence, *not capital*, shall

stand mute, or will not answer or plead to such indictment, the court shall, notwithstanding, proceed to the trial of the person, so standing mute, or refusing to answer or plead, as if he or she had pleaded not guilty; and upon a verdict being returned by the jury, may proceed to render judgment accordingly. A similar provision is to be found in the laws of Pennsylvania.

4. The barbarous punishment of *peine forte et dure* which till lately disgraced the criminal code of England, was never known in the United States. Vide *Dumb*; 15 Vin. Ab. 527.

5. When a prisoner stands mute, the laws of England arrive at the forced conclusion that he is guilty, and punish him accordingly. 1 Chit. Cr. Law, 428.

6. By the old French law, when a person accused was mute, or stood mute, it was the duty of the judge to appoint him a curator, whose duty it was to defend him, in the best manner he could; and for this purpose, he was allowed to communicate with him privately. Poth. Procéd. Crim. s. 4, art. 2, § 1.

MUTILATION, *crim. law.* The depriving a man of the use of any of those limbs, which may be useful to him in fight, the loss of which amounts to *mayhem*. 1 Bl. Com. 130.

MUTINY, *crimes.* The unlawful resistance of a superior officer, or the raising of commotions and disturbances on board of a ship against the authority of its commander, or in the army in opposition to the authority of the officers; a sedition; (q. v.) a revolt. (q. v.)

2. By the act for establishing rules and articles for the government of the armies of the United States, it is enacted as follows: Article 7. Any officer or soldier, who shall begin, excite, or cause, or join in, any mutiny or sedition in any troop or company in the service of the United States, or in any party, post, detachment or guard, shall suffer death, or such other punishment as by a court martial shall be inflicted. Article 8. Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or coming to the knowledge of any intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by the sentence of a court martial, with death, or otherwise, according to the nature of his offence.

3. And by the act for the better government of the navy of the United States, it is enacted as follows: Article 13. If any person in the navy shall make or attempt to make any mutinous assembly, he shall, on conviction thereof by a court martial, suffer death; and if any person as aforesaid, shall utter any seditious or mutinous words, or shall conceal or connive at any mutinous or seditious practices, or shall treat with contempt his superior, being in the execution of his office, or being witness to any mutiny or sedition, shall not do his utmost to suppress it, he shall be punished at the discretion of a court martial. Vide 2 Stra. R. 1264.

MUTUAL. Reciprocal.

2. In contracts there must always be a consideration in order to make them valid. This is sometimes mutual, as when one man promises to pay a sum of money to another in consideration that he shall deliver him a horse, and the latter promises to deliver him the horse in consideration of being paid the price agreed upon. When a man and a woman promise to marry each other, the promise is mutual. It is one of the qualities of an award, that it be mutual; but this doctrine is not as strict now as formerly. 3 Rand. 94; see 3 Caines, 254; 4 Day, 422; 1 Dall. 364, 365; 6 Greenl. 247; 8 Greenl. 315; 6 Pick. 148.

8. To entitle a contracting party to a specific performance of an agreement, it must be mutual, for otherwise it will not be compelled. 1 Sch. & Lef. 18; Bunb. 111; Newl. Contr. 152. See Rosc. Civ. Ev. 261.

4. A distinction has been made between mutual debts and mutual credits. The former term is more limited in its signification than the latter. In bankrupt cases, where a person was indebted to the bankrupt in a sum payable at a future day, and the bankrupt owed him a smaller sum which was then due; this, though in strict-

ness, not a mutual debt, was holden to be a mutual credit. 1 Atk. 228, 230; 7 T. R. 378; Burge on Sur. 455, 457.

MUTUARY, *contracts*. A person who borrows personal chattels to be consumed by him, and returned to the lender in kind; the person who receives the benefit arising from the contract of mutuum. Story, Bailm. § 47.

MUTUUM, or loan for consumption, *contracts*. A loan of personal chattels to be consumed by the borrower, and to be returned to the lender in kind and quantity; as a loan of corn, wine, or money, which are to be used or consumed, and are to be replaced by other corn, wine, or money. Story on Bailm. § 228; Louis. Code, tit. 12, c. 2; Ayliffe's Pand. 481; Poth. Pand. tom. 22, h. t.; Dane's Ab. Index, h. t.; 1 Bouv. Inst. 1080.

2. It is of the essence of this contract, 1st. That there be either a certain sum of money, or a certain quantity of other things, which is to be consumed by use, which is to be the subject-matter of the contract, and which is loaned to be consumed. 2d. That the thing be delivered to the borrower. 3d. That the property in the thing be transferred to him. 4th. That he obligates himself to return as much. 5th. That the parties agree on all these points. Poth. Prêt. de Consomption, n. 1; 1 Bouv. Inst. n. 1091-6.

MYSTERY or MISTERY. This word is said to be derived from the French *mes-tier* now written *métier*, a trade. In law it signifies a trade, art, or occupation. 2 Inst. 668.

2. Masters frequently bind themselves in the indentures with their apprentices to teach them their art, trade, and *mystery*. Vide 2 Hawk. c. 23, s. 11.

MYSTIC. In a secret manner; concealed; as mystic testament, for a secret testament. Vide 2 Bouv. Inst. n. 8138; *Testament Mystic*.

N.

NAIL. A measure of length, equal to two inches and a quarter. Vide *Measure*.

NAKED. This word is used in a metaphorical sense to denote that a thing is not complete, and for want of some quality it is either without power, or it possesses a limited power. A naked contract, is one made without consideration, and, for that reason, it is void; a naked authority, is one given without any right in the agent, and wholly for the benefit of the principal. 2 Bouv. Inst. n. 1302. See *Nudum Pactum*.

NAME. One or more words used to distinguish a particular individual, as Socrates, Benjamin Franklin.

2. The Greeks, as is well known, bore only one name, and it was one of the especial rights of a father to choose the names for his children and to alter them if he pleased. It was customary to give to the eldest son the name of the grandfather on his father's side. The day on which children received their names was the tenth after their birth. The tenth day, called *δεκάτη*, was a festive day, and friends and relatives were invited to take part in a sacrifice and a repast. If in a court of justice proofs could be adduced that a father had held the *δεκάτη*, it was sufficient evidence that he had recognized the child as his own. Smith's Dict. of Greek and Rom. Antiq. h. v.

3. Among the Romans, the division into *racas*, and the subdivision of *racas* into *families*, caused a great multiplicity of names. They had first the *pronomen*, which was proper to the person; then the *nomen*, belonging to his race; a surname or *cognomen*, designating the family; and sometimes an *agnomen*, which indicated the branch of that family in which the author has become distinguished. Thus, for example, Publius Cornelius Scipio Africanus; Publius is the *pronomen*; Cornelius, the *nomen*, designating the name of the race Cornelia; Scipio, the *cognomen*, or surname of the family; and Africanus, the *agnomen*, which indicated his exploits.

4. Names are divided into Christian names, as, Benjamin, and surnames, as, Franklin.

5. No man can have more than one Christian name; 1 Ld. Raym. 562; Bac. Ab. Misnomer, A; though two or more names usually kept separate, as John and Peter, may undoubtedly be compounded, so as to form, in contemplation of law, but one. 5 T. R. 195. A letter put between the Christian and surname, as an abbreviation of a part of the Christian name, as, John B. Peterson, is no part of either. 4 Watts' R. 329; 5 John. R. 84; 14 Pet. R. 322; 8 Pet. R. 7; 2 Cowen. 463; Co. Litt. 3 a; 1 Ld. Raym. 562; Vin. Ab. Misnomer, C 6, pl. 5 and 6; Com. Dig. Indictment, G 1, note u; Willes, R. 654; Bac. Abr. Misnomer and Addition; 3 Chit. Pr. 164 to 173; 1 Young, R. 602. But see 7 Watts & Serg. 406.

5. In general a corporation must contract and sue and be sued by its corporate name; 8 John. R. 295; 14 John. R. 288; 19 John. R. 300; 4 Rand. R. 359; yet a slight alteration in stating the name is unimportant, if there be no possibility of mistaking the identity of the corporation suing. 12 L. R. 444.

6. It sometimes happens that two different sets of partners carry on business in the same social name, and that one of the partners is a member of both firms. When there is a confusion in this respect, the partners of *one firm* may, in some cases, be made responsible *for the debts of another*. Baker v. Charlton, Peake's N. P. Cas. 80; 3 Mart. N. S. 39; 7 East. 210; 2 Bouv. Inst. n. 1477.

7. It is said that in devises if the name be mistaken, if it appear the testator meant a particular corporation, the devise will be good; a devise to "the inhabitants of the *south parish*," may be enjoyed by the inhabitants of the *first parish*. 3 Pick. R. 232; 6 S. & R. 11; see also Hob. 33; 6 Co. 65; 2 Cowen, R. 778.

8. As to names which have the same sound, see Bac. Ab. Misnomer, A; 7 Serg. & Rawle, 479; Hammond's Analysis of Pleading, 89; 10 East. R. 83; and article *Idem Sonans*.

9. As to the effect of using those which have the same derivation, see 2 Roll. Ab.

135; 1 W. C. C. R. 285; 1 Chit. Cr. Law, 108. For the effect of changing one's name, see 1 Rep. Leg. 102; 3 M. & S. 453; Com. Dig. G 1, note x.

10. As to the omission or mistake of the name of a legatee, see 1 Rep. Leg. 132, 147; 1 Supp. to Ves. Jr. 81, 82; 6 Ves. 42; 1 P. Wms. 425; Jacob's R. 464. As to the effect of mistakes in the names of persons in pleading, see Steph. Pl. 319. Vide, generally, 13 Vin. Ab. 13; 15 Vin. Ab. 595; Dane's Ab. Index, h. t.; Roper on Leg. Index, h. t.; 8 Com. Dig. 814; 3 Mis. R. 144; 4 McCord, 487; 5 Halst. 230; 3 Mis. R. 227; 1 Pick. 388; Merl. Rép. mot Nom; and article *Misnomer*.

11. When a person uses a name in making a contract under seal, he will not be permitted to say that it is not his name; as, if he sign and seal a bond "A and B," (being his own and his partner's name), and he had no authority from his partner to make such a deed, he cannot deny that his name is A & B. 1 Raym. 2; 1 Salk. 214. And if a man describes himself in the body of a deed by the name of James and signs it John, he cannot, on being sued by the latter name, plead that his name is James. 3 Taunt. 505; Cro. Eliz. 897, n. a. Vide 3 P. & D. 271; 11 Ad. & L. 594.

NAMES OF SHIPS. The act of congress of December 31, 1792, concerning the registering and recording of ships or vessels, provides,

§ 3. That every ship or vessel, hereafter to be registered, (except as is hereinafter provided,) shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registry, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband, or acting and managing owner of such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. And if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in manner aforesaid, the owner or owners shall forfeit fifty dollars; one half to the person giving the information thereof, the other half to the use of the United States. 1 Story's L. U. S. 269.

2. And by the act of February 18, 1793, it is directed,

§ 11. That every licensed ship or vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner as is provided for registered ships or vessels; and if any licensed ship or vessel be found without such painting, the owner or owners thereof shall pay twenty dollars. 1 Story's L. U. S. 290.

3. By a resolution of congress, approved, March 3, 1819, it is resolved, that all the ships of the navy of the United States, now building, or hereafter to be built, shall be named by the secretary of the navy, under the direction of the president of the United States, according to the following rule, to wit: Those of the first class, shall be called after the states of this Union; those of the second class, after the rivers; and those of the third class, after the principal cities and towns; taking care that no two vessels in the navy shall bear the same name. 3 Story's L. U. S. 1757.

4. When a ship is pledged, as in the contract of bottomry, it is indispensable that its *name* should be properly stated; when it is merely the place in which the pledge is to be found, as in *respondentia*, it should also be stated, but a mistake in this case would not be fatal. 2 Bouv. Inst. n. 1255.

NAMIUM. An old word which signifies the taking or distraining another person's movable goods; 2 Inst. 140; 3 Bl. Com. 149; a distress. Dalt. Feud. Pr. 113.

NARR, pleading. An abbreviation of the word *narratio*; a declaration in the cause.

NARRATOR. A pleader who draws *narrs*; *serviens narrator*, a serjeant at law. Fleta, l. 2, c. 37. Obsolete.

NARROW SEAS, English law. Those seas which adjoin the coast of England. Bac. Ab. Prerogative, B 3.

NATALE. The state or condition of a man acquired by birth.

NATIONAL or PUBLIC DOMAIN. All the property which belongs to the state is comprehended under the name of national or public domain.

2. Care must be taken not to confound the public or national domain, with the national finances, or the public revenue, as taxes, imposts, contributions, duties, and the like, which are not considered as property, and are essentially attached to the sovereignty. Vide *Domain*; *Eminent Domain*.

NATIONALITY. The state of a person in relation to the nation in which he was born.

2. A man retains his nationality of origin during his minority, but, as in the case of his domicile of origin, he may change his nationality upon attaining full age; he cannot, however, renounce his allegiance without permission of the government. See *Citizen; Domicil; Expatriation; Naturalization*; Fœlix, Du Dr. Intern. privé, n. 26; 8 Cranch, 263; 8 Cranch, 253; Chit. Law of Nat. 31 2 Gall. 485; 1 Gall. 545.

NATIONS. Nations or states are independent bodies politic; societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

2. But every combination of men who govern themselves, independently of all others, will not be considered a nation; a body of pirates, for example, who govern themselves, are not a nation. To constitute a nation another ingredient is required. The body thus formed must respect other nations in general, and each of their members in particular. Such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and will peculiar to herself, and is susceptible of obligations and rights. Vattel, Prelim. § 1, 2; 5 Pet. S. C. R. 52.

3. It belongs to the government to declare whether they will consider a colony which has thrown off the yoke of the mother country as an independent state; and until the government have decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged. 1 Johns. Ch. R. 543; 13 John. 141, 561; see 5 Pet. S. C. R. 1; 1 Kent, Com 21; and *Body Politic; State*.

NATIVES. All persons born within the jurisdiction of the United States, are considered as natives.

2. Natives will be classed into those born before the declaration of our independence, and those born since.

3.—1. All persons, without regard to the place of their birth, who were born before the declaration of independence, who were in the country at the time it was made, and who yielded a deliberate assent to it, either express or implied, as by remaining in the country, are considered as natives. Those persons who were born within the colonies, and before the declaration of inde-

pendence, removed into another part of the British dominions, and did not return prior to the peace, would not probably be considered natives, but aliens.

4.—2. Persons born within the United States, since the Revolution, may be classed into those who are citizens, and those who are not.

5.—1st. Natives who are citizens are the children of citizens, and of aliens who at the time of their birth were residing within the United States.

6. The act to establish a uniform rule of naturalization, approved April 14, 1802, § 4, provides that the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States. But, the right of citizenship shall not descend to persons whose fathers have never resided in the United States.

7.—2d. Natives who are not citizens are, first, the children of ambassadors, or other foreign ministers, who, although born here, are subjects or citizens of the government of their respective fathers. Secondly, Indians, in general, are not citizens. Thirdly, negroes, or descendants of the African race, in general, have no power to vote, and are not eligible to office.

8. Native male citizens, who have not lost their political rights, after attaining the age required by law, may vote for all kinds of officers, and be elected to any office for which they are legally qualified.

9. The constitution of the United States declares that no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president or vice-president of the United States. Vide, generally, 2 Cranch, 280; 4 Cranch, 209; 1 Dal. 53; 20 John. 218; 2 Mass. 236, 244, note; 2 Pick. 394, n.; 2 Kent, 35.

NATURAL AFFECTION. The affection which a husband, a father, a brother, or other near relative, naturally feels towards those who are so nearly allied to him, sometimes supplies the place of a valuable consideration in contracts; and natural affection is a good consideration in a deed. For example, if a father should covenant without any other consideration to stand seised to the use of his child, the naming him to be of kin implies the consideration of natural affection, whereupon such use

will arise. Carth. 138; Dane's Ab. Index, h. t.

NATURAL CHILDREN. In the phraseology of the English or American law, natural children are children born out of wedlock, or bastards, and are distinguished from legitimate children; but in the language of the civil law, natural are distinguished from adoptive children, that is, they are the children of the parents spoken of, by natural procreation. See Inst. lib. 3, tit. 1, § 2.

2. In Louisiana, illegitimate children who have been acknowledged by their father, are called natural children; and those whose fathers are unknown are contradistinguished by the appellation of bastards. Civ. Code of Lo. art. 220. The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, whenever it shall not have been made in the registering of the birth or baptism of such child. Id. art. 221. Such acknowledgment shall not be made in favor of the children produced by an incestuous or adulterous connexion. Id. art. 222.

3. Fathers and mothers owe alimony to their natural children, when they are in need. Id. art. 256, 913. In some cases natural children are entitled to the legal succession of their natural fathers or mothers. Id. art. 911 to 927.

4. Natural children owe alimony to their father or mother, if they are in need, and if they themselves have the means of providing it. Id. art. 256.

5. The father is of right the tutor of his natural children acknowledged by him; the mother is of right the tutrix of her natural child not acknowledged by the father. The natural child, acknowledged by both, has for tutor, first the father; in default of him, the mother. Id. art. 274. See 1 Bouv. Inst. n. 319, et seq.

NATURAL EQUITY. That which is founded in natural justice, in honesty and right, and which arises *ex aquo et bono*. It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range, that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility

of enforcing them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness. 4 Bouv. Inst. n. 3720.

NATURAL OBLIGATION, civil law. One which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice. Poth. n. 173, and n. 191. See *Obligation*.

NATURAL PRESUMPTIONS, evidence. Presumptions of fact; those which depend upon their own form and efficacy in generating belief or conviction in the mind, as derived from those connexions which are pointed out by experience; they are independent of any artificial connexions, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society. These presumptions fall within the exclusive province of the jury, who are to pass upon the facts. 3 Bouv. Inst. n. 3064; Greenleaf on Ev. § 44.

NATURAL DAY. That space of time included between the rising and the setting of the sun. See *Day*.

NATURAL FOOL. An idiot; one born without the reasoning powers, or a capacity to acquire them.

NATURAL FRUITS. The natural production of trees, bushes, and other plants, for the use of men and animals, and for the reproduction of such trees, bushes or plants.

2. This expression is used in contradistinction to artificial or figurative fruits; for example, apples, peaches and pears are natural fruits; interest is the fruit of money, and this is artificial.

NATURALIZATION. The act by which an alien is made a citizen of the United States of America.

2. The Constitution of the United States, art. 1, s. 8, vests in congress the power "to establish an uniform rule of naturalization." In pursuance of this authority congress have passed several laws on this subject, which, as they are of general interest, are here transcribed as far as they are in force.

3.—1. An act to establish an uniform rule of naturalization, and to repeal the acts

heretofore passed on that subject. Approved April 14, 1802. 7 Hill, 137.

§ 1. *Be it enacted, &c.* That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise: First, That he shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court, of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least before his admission, that it was, bona fide, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whatever, and particularly, by name, the prince, potentate, state or sovereignty, whereof such alien may, at the time, be a citizen or subject. Secondly, That he shall, at the time of his application to be admitted, declare, on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court. Thirdly, That the court admitting such alien shall be satisfied that he has resided within the United States five years, at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that, during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same:

4. Provided, That the oath of the applicant shall, in no case, be allowed to prove his residence. Fourthly, That in case the alien, applying to be admitted to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application shall be made, which renunciation shall be recorded in the said court:

5. Provided, That no alien, who shall

be a native citizen, denizen, or subject, of any country, state, or sovereign, with whom the United States shall be at war, at the time of his application, shall be then admitted to be a citizen of the United States:

6. Provided, also, That any alien who was residing within the limits, and under the jurisdiction, of the United States, before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen, on due proof made to some one of the courts aforesaid, that he has resided two years, at least, within and under the jurisdiction of the United States, and one year, at least, immediately preceding his application within the state or territory where such court is at the time held; and on his declaring on oath, or affirmation, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject; and, moreover, on its appearing to the satisfaction of the court, that, during the said term of two years, he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien, applying for admission to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his moreover making in the court an express renunciation of his title or order of nobility, before he shall be entitled to such admission: all of which proceedings, required in this proviso to be performed in the court, shall be recorded by the clerk thereof:

7. And provided, also, That any alien who was residing within the limits, and under the jurisdiction, of the United States, at any time between the said twenty-ninth day of January, one thousand seven hundred and ninety-five, and the eighteenth day of June, one thousand seven hundred and ninety-eight, may, within two years after the passing of this act, be admitted to become a citizen, without a compliance with the first condition above specified.

8.—§ 3. And whereas, doubts have arisen whether certain courts of record, in some of the states, are included within the

description of district or circuit courts: *Be it further enacted*, That every court of record, in any individual state, having common law jurisdiction, and a seal, and clerk or prothonotary, shall be considered as a district court within the meaning of this act; and every alien, who may have been naturalized in any such court, shall enjoy, from and after the passing of the act, the same rights and privileges, as if he had been naturalized in a district or circuit court of the United States.

9.—§ 4. That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents' being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States:

10. Provided, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States:

11. Provided also, That no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed.

12.—§ 5. That all acts heretofore passed respecting naturalization, be, and the same are hereby repealed.

13.—2. An act in addition to an act, entitled "An act to establish an uniform rule of naturalization; and to repeal the acts heretofore passed on that subject." Approved March 26, 1804.

14.—§ 1. *Be it enacted, &c.* That any alien, being a free white person, who was residing within the limits, and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same,

may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act, entitled "An act to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject."

15.—§ 2. That when any alien who shall have complied with the first condition specified in the first section of the said original act, and who shall have pursued the directions prescribed in the second section of the said act, may die, before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States; and shall be entitled to all the rights and privileges as such, upon taking the oaths prescribed by law.

16.—3. An act for the regulation of seamen on board the public and private vessels of the United States.

17.—§ 12. That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years, next preceding his admission as aforesaid, have resided within the United States, without being, at any time during the said five years, out of the territory of the United States. App. March 3, 1813.

18.—4. An act supplementary to the acts heretofore passed on the subject of an uniform rule of naturalization. App. July 30, 1813.

19.—§ 1. *Be it enacted, &c.* That persons resident within the United States, or the territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had, before that day, made a declaration, according to law, of their intentions to become citizens of the United States, or who, by the existing laws of the United States, were, on that day, entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they shall be alien enemies, at the times and in the manner prescribed by the laws heretofore passed on the subject: Provided, That nothing herein contained shall be taken or construed to interfere with, or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the naturalization of such alien.

20.—5. An act relative to evidence

in case of naturalization. App. March 22, 1816.

21.—§ 2. That nothing herein contained shall be construed to exclude from admission to citizenship, any free white person who was residing within the limits and under the jurisdiction of the United States at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who, having continued to reside therein, without having made any declaration of intention before a court of record as aforesaid, may be entitled to become a citizen of the United States according to the act of the twenty-sixth of March, one thousand eight hundred and four, entitled "An act in addition to an act, entitled 'An act to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject.'" Whenever any person, without a certificate of such declaration of intention, as aforesaid, shall make application to be admitted a citizen of the United States, it shall be proved, to the satisfaction of the court, that the applicant was residing within the limits and under the jurisdiction of the United States before the fourteenth day of April, one thousand eight hundred and two, and has continued to reside within the same, or he shall not be so admitted. And the residence of the applicant within the limits and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses. And such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided for at least five years, as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

22.—6. An act in further addition to "An act to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject." App. May 26, 1824.

23.—§ 1. *Be it enacted, &c.* That any alien, being a free white person and a minor,

under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is an addition, three years previous to his admission.

24. Provided, such alien shall make the declaration required therein at the time of his or her admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for three years next preceding, it has been the bona fide intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization.

25.—§ 2. That no certificates of citizenship, or naturalization, heretofore obtained from any court of record within the United States, shall be deemed invalid, in consequence of an omission to comply with the requisition of the first section of the act, entitled "An act relative to evidence in cases of naturalization," passed the twenty-second day of March, one thousand eight hundred and sixteen.

26.—§ 3. That the declaration required by the first condition specified in the first section of the act, to which this is an addition, shall, if the same shall be bona fide, made before the clerks of either of the courts in the said condition named, be as valid as if it had been made before the said courts, respectively.

27.—§ 4. That a declaration by any alien, being a free white person, of his intended application to be admitted a citizen of the United States, made in the manner and form prescribed in the first condition specified in the first section of the act to which this is an addition, two years before his admission, shall be a sufficient compliance with said condition; anything in the said act, or in any subsequent act, to the contrary notwithstanding.

28.—7. An act to amend the acts concerning naturalization. App. May 24, 1828.

29.—§ 1. *Be it enacted, &c.* That the second section of the act, entitled "An act

to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject," which was passed on the fourteenth day of April, one thousand eight hundred and two, and the first section of the act, entitled "An act relative to evidence in cases of naturalization," passed on the twenty-second day of March, one thousand eight hundred and sixteen, be, and the same are hereby repealed.

30.—§ 2. That any alien, being a free white person, who has resided within the limits and under the jurisdiction of the United States, between the fourteenth day of April, one thousand eight hundred and two, and the eighteenth day of June, one thousand eight hundred and twelve, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without having made any previous declaration of his intention to become a citizen :

31. Provided, That whenever any person without a certificate of such declaration of intention, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits, and under the jurisdiction of the United States, before the eighteenth day of June, one thousand eight hundred and twelve, and has continued to reside within the same, or he shall not be so admitted ; and the residence of the applicant within the limits and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States, which citizens shall be named in the record as witnesses ; and such continued residence within the limits and under the jurisdiction of the United States when satisfactorily proved, and the place or places where the applicant has resided for at least five years as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant ; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

NATURALIZED CITIZEN. One who, being born an alien, has lawfully become a citizen of the United States under the constitution and laws.

2. He has all the rights of a natural born citizen, except that of being eligible as president or vice-president of the United

States. In foreign countries he has a right to be treated as such, and will be so considered even in the country of his birth, at least for most purposes. 1 Bos. & P. 480. See *Citizen; Domicil; Inhabitant*.

NAUFRAGE, *French mar. law*. When, by the violent agitation of the waves, the impetuosity of the winds, the storm, or the lightning, a vessel is swallowed up, or so shattered that there remain only the pieces, the accident is called *naufnage*.

2. It differs from *échouement*, which is, when the vessel remains whole, but is grounded ; or from *bris*, which is, when it strikes against a rock or a coast ; or from *sombrer*, which is, the sinking of the vessel in the sea, when it is swallowed up, and which may be caused by any accident whatever. Pardes. n. 643. Vide *Wreck*.

NAUTÆ. Strictly speaking, only carriers by water are comprehended under this word. But the rules which regulate such carriers have been applied to carriers by land. 2 Ld. Raym. 917 ; 1 Bell's Com. 467.

NAVAL OFFICER. The name of an officer of the United States, whose duties are prescribed by various acts of congress.

2. Naval officers are appointed for the term of four years, but are removable from office at pleasure. Act of May 15, 1820, § 1, 3 Story, L. U. S. 1790.

8. The act of March 2, 1799, § 21, 1 Story, L. U. S. 590, prescribes that the naval officer shall receive copies of all manifests and entries, and shall, together with the collector, estimate the duties on all goods, wares, and merchandise, subject to duty, (and no duties shall be received without such estimate,) and shall keep a separate record thereof, and shall countersign all permits, clearances, certificates, debentures, and other documents, to be granted by the collector ; he shall also examine the collector's abstracts of duties, and other accounts of receipts, bonds, and expenditures, and, if found right, he shall certify the same.

4. And by § 68, of the same law, it is enacted, that every collector, naval officer, and surveyor, or other person specially appointed, by either of them, for that purpose, shall have full power and authority to enter any ship or vessel, in which they shall have reason to suspect any goods, wares, or merchandise, subject to duty, are concealed, and therein to search for, seize, and secure, any such goods, wares, or merchandise ; and if they shall have cause to suspect a conceal-

ment thereof in any particular dwelling house, store, building, or other place, they or either of them shall, upon proper application, on oath, to any justice of the peace, be entitled to a warrant to enter such house, store, or other place, (in the day time only,) and there to search for such goods; and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid, or secured to be paid, shall be forfeited.

NAVICULARIS, civil law. He who had the management and care of a ship. The same as our sea captain. Bouch. Inst. n. 359. Vide *Captain*.

NAVIGABLE. Capable of being navigated.

2. In law, the term navigable is applied to the sea, to arms of the sea, and to rivers in which the tide flows and reflows. 5 Taunt. R. 705; S. C. Eng. Com. Law Rep. 240; 5 Pick. R. 199; Ang. Tide Wat. 62; 1 Bouv. Inst. n. 428.

3. In North Carolina; 1 M'Cord, R. 580; 2 Dev. R. 30; 3 Dev. R. 59; and in Pennsylvania; 2 Binn. R. 75; 14 S. & R. 71; the navigability of a river does not depend upon the ebb and flow of the tide, but a stream navigable by sea vessels is a navigable river.

4. By the common law, such rivers as are navigable in the popular sense of the word, whether the tide ebb and flow in them or not, are public highways. Ang. Tide Wat. 62; Ang. Wat. Courses, 205; 1 Pick. 180; 5 Pick. 199; 1 Halst. 1; 4 Call, 441; 3 Blackf. 136. Vide *Arm of the sea; Reliction; River*.

NAVIGATION. The act of traversing the sea, rivers or lakes, in ships or other vessels; the art of ascertaining the geographical position of a ship, and directing her course.

2. It is not within the plan of this work to copy the acts of congress relating to navigation, or even an abstract of them. The reader is referred to Story's L. U. S. Index, h. t.; Gordon's Dig. art. 2905, et seq.

NAVY. The whole shipping, taken collectively, belonging to the government of an independent nation; the ships belonging to private individuals are not included in the navy.

2. The constitution of the United States, art. 1, s. 8, vests in congress the power "to provide and maintain a navy."

3. Anterior to the war of 1812, the

navy of the United States had been much neglected, and it was not until during the late war, when it fought itself into notice, that the public attention was seriously attracted to it. Some legislation favorable to it, then took place.

4. The act of January 2, 1813, 2 Story's L. U. S. 1282, authorized the president of the United States, as soon as suitable materials could be procured therefor, to cause to be built, equipped and employed, four ships to rate not less than seventy-four guns, and six ships to rate forty-four guns each. The sum of two millions five hundred thousand dollars is appropriated for the purpose.

5. And by the act of March 3, 1813, 2 Story, L. U. S. 1313, the president is further authorized to have built six sloops of war, and to have built or procured such a number of sloops of war or other armed vessels, as the public service may require on the lakes. The sum of nine hundred thousand dollars is appropriated for this purpose, and to pay two hundred thousand dollars for vessels already procured on the lakes.

6. The act of March 3, 1815, 2 Story, L. U. S. 1511, appropriates the sum of two hundred thousand dollars annually for three years, towards the purchase of a stock of materials for ship building.

7. The act of April 29, 1816, may be said to have been the first that manifested the fostering care of congress. By this act the sum of one million of dollars per annum for eight years, including the sum of two hundred thousand dollars per annum appropriated by the act of March 3, 1815, is appropriated. And the president is authorized to cause to be built nine ships, to rate not less than seventy-four guns each, and twelve ships to rate not less than forty-four guns each, including one seventy-four and three forty-four gun ships, authorized to be built by the act of January 2d, 1813. The third section of this act authorizes the president to procure steam engines and all the imperishable materials for building three steam batteries.

8. The act of March 3, 1821, 3 Story's L. U. S. 1820, repeals the first section of the act of the 29th April, 1816, and instead of the appropriation therein contained, appropriates the sum of five hundred thousand dollars per annum for six years, from the year 1821 inclusive, to be applied to carry into effect the purposes of the said act.

9. To repress piracy in the gulf of Mexico, the Act of 22d December, 1822, was passed, 3 St. L. U. S. 1873. It authorizes the president to purchase or construct a sufficient number of vessels to repress piracy in that gulf and the adjoining seas and territories. It appropriates one hundred and sixty thousand dollars for the purpose.

10. The act of May 17, 1826, authorizes the suspension of the building of one of the ships above authorized to be built, and authorizes the president to purchase a ship of not less than the smallest class authorized to be built by the act of 29th April, 1816.

11. The act of March 3, 1827, 3 St. L. U. S. 2070, appropriates five hundred thousand dollars per annum for six years for the gradual improvement of the navy of the United States, and authorizes the president to procure materials for ship building. A further appropriation is made by the act of March 2, 1833, 4 Sharsw. con. of St. L. U. S. 2346, of five hundred thousand dollars annually for six years from and after the third of March, 1833, for the gradual improvement of the navy of the United States; and the president is authorized to cause the above mentioned appropriation to be applied as directed by the act of March 3, 1827.

12. For the rules and regulations of the navy of the United States, the reader is referred to the act "for the better government of the navy of the United States." 1 St. L. U. S. 761.

Vide article *Names of Ships*.

NE DISTURBA PAS, *pleading*. The general issue in *quare impedit*. Hob. 162; Vide Rast, 517; Winch. Ent. 703.

NE BAILA PAS. He did not deliver. This is a plea in detinue, by which the defendant denies the delivery to him of the thing sued for.

NE DONA PAS, or NON DEDIT, *pleading*. The general issue in formedon; and is in the following formula: "And the said C D, by J K, his attorney, comes and defends the right, when, &c., and says, that the said E F did not give the said manor, with the appurtenances, or any part thereof, to the said G B, and the heirs of his body issuing, in manner and form as the said A B hath in his count above alleged. And of this the said C D puts himself upon the country." 10 Went. 182.

NE EXEAT REPUBLICA, *practice*. The name of a writ issued by a court of chancery, directed to the sheriff, reciting

that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that he the sheriff, do commit the defendant to prison.

2. This writ is used to prevent debtors from escaping from their creditors. It amounts in ordinary civil cases, to nothing more than process to hold to bail, or to compel a party to give security to abide the decree to be made in his case. 2 Kent, Com. 32; 1 Clarke, R. 551; Beames' Ne Exeat; 13 Vin. Ab. 537; 1 Supp. to Ves. jr. 33, 352, 467; 4 Ves. 577; 5 Ves. 91; Bac. Ab. Prerogative, C; 8 Com. Dig. 232; 1 Bl. Com. 138; Blake's Ch. Pr. Index, h. t.; Madd. Ch. Pr. Index, h. t.; 1 Smith's Ch. Pr. 576; Story's Eq. Index, h. t.

3. The subject may be considered under the following heads.

4.—1. *Against whom a writ of ne exeat may be issued*. It may be issued against foreigners subject to the jurisdiction of the court, citizens of the same state, or of another state, when it appears by a positive affidavit that the defendant is about to leave the state, or has threatened to do so, and that the debt would be lost or endangered by his departure. 3 Johns. Ch. R. 75, 412; 7 Johns. Ch. R. 192; 1 Hopk. Ch. R. 499. On the same principle which has been adopted in the courts of law that a defendant could not be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against a defendant who had been held to bail in an action at law. 8 Ves. jr. 594.

5.—2. *For what claims*. This writ can be issued only for equitable demands. 4 Desaus. R. 108; 1 Johns. Ch. R. 2; 6 Johns. Ch. R. 138; 1 Hopk. Ch. R. 499. It may be allowed in a case to prevent the failure of justice. 2 Johns. Chanc. Rep. 191. When the demand is strictly legal, it cannot be issued, because the court has no jurisdiction. When the court has concurrent jurisdiction with the courts of common law, the writ may, in such case, issue, unless the party has been already arrested at law. 2 Johns. Ch. R. 170. In all cases, when a writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill. 3 Johns. Ch. R. 414.

6.—3. *The amount of bail.* The amount of bail is assessed by the court itself; and a sum is usually directed sufficient to cover the existing debt, and a reasonable amount of future interest, having regard to the probable duration of the suit. 1 Hopk. Ch. R. 501.

NE LUMINIBUS OFFICIATUR, *civil law.* The name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house. Dig. 8, 4, 15, 17.

NE RECIPIATUR. That it be not received. A caveat or words of caution given to a law officer, by a party in a cause, not to receive the next proceedings of his opponent. 1 Sell. Br. 7.

NE RELESSA PAS. The name of a replication to a plea of release, by which the plaintiff insists he *did not release*. 2 Buls. 55.

NE UNJUSTE VEXES, *old Engl. law.* The name of a writ which issued to relieve a tenant upon whom his lord had distrained for more services than he was bound to perform.

2. It was a prohibition to the lord, *not unjustly* to distrain or *vex* his tenant. F. N. B. h. t.

NE UNQUES ACCOUPLE, *pleading.* A plea by which the party denies that he ever was lawfully married to the person to whom it refers. See the form, 2 Wils. R. 118; Morg. 582; 10 Went. Prec. Pl. 158; 2 H. Bl. 145; 3 Chit. Pl. 599.

NE UNQUES EXECUTOR, *pleading.* A plea by which the party who uses it denies that the plaintiff is an executor, as he claims to be; or that the defendant is executor, as the plaintiff in his declaration charges him to be. 1 Chit. Pl. 484; 1 Saund. 274, n. 3; Com. Dig. Pleader, 2 D, 2; 2 Chit. Pl. 498.

NE UNQUES SEISIE QUE DOWER, *pleading.* A plea by which a defendant denies the right of a widow who sues for, and demands her dower in lands, &c., late of her husband, because the husband was not, on the day of her marriage with him, or any time afterwards, seised of such estate, so that she could be endowed of the same. See 2 Saund. 329; 10 Went. 159; 3 Chitt. Pl. 598, and the authorities there cited.

NE UNQUES SON RECEIVER, *pleading.* The name of a plea in an action of account render, by which the defendant affirms that he never was receiver of the plaintiff. 12 Vin. Ab. 183.

NE VARIETUR. These words, which literally signify that it be not varied or changed, are sometimes written by notaries public upon bills or notes, for the purpose of identifying them. This does not destroy their negotiability. 8 Wheat. 338.

NEAT or NET, *contracts.* The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped.

NEATNESS, *pleading.* The statement, in apt and appropriate words, of all the necessary facts, and no more. Lawes on Pl. 62.

NECESSARIES. Such things as are proper and requisite for the sustenance of man.

2. The term necessities is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties. 7 S. & R. 247. Ornaments and superfluities of dress, such as are usually worn by the party's rank and situation in life, have been classed among necessities. 1 Campb. R. 120; 7 C. & P. 52; 1 Hodges, R. 31; 8 T. R. 578; 3 Campb. 326; 1 Leigh's N. P. 135.

3. Persons incapable of making contracts generally, may, nevertheless, make legal engagements for necessities for which they, or those bound to support them, will be held responsible. The classes of persons who, although not bound by their usual contracts, can bind themselves or others for necessities, are infants and married women.

4.—1. Infants are allowed to make binding contracts whenever it is for their interest; when, therefore, they are unprovided with necessities, which, Lord Coke says, include victuals, clothing, medical aid, and "good teaching and instruction, whereby he may profit himself afterwards," they may buy them, and their contracts will be binding. Co. Litt. 172 a. Necessaries for the infant's wife and children, are necessities for himself. Str. 168; Com. Dig. Infant, B 5; 1 Sid. 112; 2 Stark. Ev. 725; 3 Day, 37; 1 Bibb, 519; 2 Nott & McC. 524; 9 John. R. 141; 16 Mass. 31; Bac. Ab. Infancy, I.

5.—2. A wife is allowed to make contracts for necessities, and her husband is generally responsible upon them, because his assent is presumed, and even if notice

be given not to trust her, still he would be liable for all such necessities as she stood in need of; but in this case, the creditor would be required to show she did stand in need of the articles furnished. 1 Salk. 118; Ld. Raym. 1006. But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessities; the very fact of the elopement and separation, is sufficient to put persons on inquiry, and whoever gives credit to the wife afterwards, gives it at his peril. 1 Salk. 119; Str. 647; 1 Sid. 109; S. C. 1 Lev. 4; 12 John. R. 293; 3 Pick. R. 289; 2 Halst. 146; 11 John. R. 281; 2 Kent, Com. 123; 2 St. Ev. 696; Bac. Ab. Baron and Feme, H; Chit. Contr. Index, h. t.; 1 Hare & Wall. Sel. Dec. 104, 106; Ham. on Parties, 217.

NECESSARY AND PROPER. The Constitution of the United States, art. 1, s. 8, vests in congress the power "to make all laws, which shall be *necessary and proper*, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, in any department or officer thereof."

2. This power has ever been viewed with perhaps unfounded jealousy and distrust. It is a power expressly given, which, without this clause, would be implied. The plain import of the clause is, that congress shall have all incidental and instrumental powers, necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted, nor is it a grant of any new power to congress. It is merely a declaration for the removal of all uncertainty, that the means of carrying into execution those already granted, are included in the grant.

3. Some controversy has taken place as to what is to be considered "necessary;" it has been contended that by this must be understood what is indispensable; but it is obvious the term necessary means no more than useful, needful, requisite, incidental, or conducive to. It is in this sense the word appears to have been used, when connected with the word "proper." 4 Wheat. 418-420; 3 Story, Const. § 1231 to 1253.

NECESSARY INTROMISSION, Scotch law. When the husband or wife continues, after the decease of his or her companion, in possession of the decedent's goods, for their preservation.

NECESSITY. In general, whatever makes the contrary of a thing impossible, whatever may be the cause of such impossibilities.

2. Whatever is done through necessity, is done without any intention, and as the act is done without will, (q. v.) and is compulsory, the agent is not legally responsible. Bac. Max. Reg. 5. Hence the maxim, necessity has no law; indeed necessity is itself a law which cannot be avoided nor infringed. Clef des Lois Rom. h. t.; Dig 10, 3, 10, 1; Com. Dig. Pleader, 3 M 20, 3 M 30.

3. It follows, then, that the acts of a man in violation of law, or to the injury of another, may be justified by necessity, because the actor has no will to do or not to do the thing, he is a mere tool; but, it is conceived, this necessity must be absolute and irresistible, in fact, or so presumed in point of law.

4. The cases which are justified by necessity, may be classed as follows:

1. For the preservation of life; as if two persons are on the same plank, and one must perish, the survivor is justified in having thrown off the other, who was thereby drowned. Bac. Max. Reg. 5.

5.—2. Obedience by a person subject to the power of another; for example, if a wife should commit a larceny with her husband, in this case the law presumes she acted by coercion of her husband, and, being compelled by necessity, she is justifiable. 1 Russ. Cr. 16, 20; Bac. Max. Reg. 5.

6.—3. Those cases which arise from the act of God, or inevitable accident, or from the act of man, as public enemies. Vide *Act of God; Inevitable Accident*; and also 15 Vin. Ab. 534; Dane's Ab. h. t.; 2 Stark. Ev. 718; Marsh. Ins. b. 1, c. 6, s. 3; Jacob's Intr. to Com. Law, Reg. 74.

7.—4. There is another species of necessity. The actor in these cases is not compelled to do the act whether he will or not, but he has no choice left but to do the act which may be injurious to another, or to lose the total use of his property. For example, when a man's lands are surrounded by those of others, so that he cannot enjoy them without trespassing on his neighbors. The way which is thus obtained, is called a *way of necessity*. Gale and Whatley on Easements, 71; 11 Co. 52; Hob. 234; 1 Saund. 323, note. See 3 Rawle, R. 495; 3 M'Cord, R. 131; Id. 170; 14 Mass. R. 56; 2 B. & C. 96; 2

Bing. R. 76; 8 T. R. 50; Cro. Jac. 170; 2 Roll. Ab. 60; 3 Kent, Com. 423; 3 Rawle's R. 492; 1 Taunt. R. 279; 8 Taunt. R. 24; 8 T. R. 50; Ham. N. P. 198; Cro. Jac. 170; 2 Bouv. Inst. n. 1637; and *Way*.

NEGATION. Denial. Two negations are construed to mean one affirmation. Dig. 50, 16, 137.

NEGATIVE. This word has several significations. 1. It is used in contradistinction to giving *assent*; thus we say the president has put his negative upon such a bill. Vide *Veto*. 2. It is also used in contradistinction to *affirmative*; as, a negative does not always admit of the simple and direct proof of which an affirmative is capable. When a party affirms a negative in his pleadings, and without the establishment of which, by evidence, he cannot recover or defend himself, the burden of the proof lies upon him, and he must prove the negative. 8 Toull. n. 18. Vide 2 Gall. Rep. 485; 1 McCord, R. 573; 11 John. R. 513; 19 John. R. 345; 1 Pick. R. 375; Gilb. Ev. 145; 1 Stark. Ev. 376; Bull. N. P. 298; 15 Vin. Ab. 540; Bac. Ab. Pleas, &c. I.

2. Although as a general rule the affirmative of every issue must be proved, yet this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it. 2 Selw. N. P. 709. Vide *Affirmative; Innocence*.

NEGATIVE AVERMENT, pleading, evidence. An averment in some of the pleadings in a case in which a negative is asserted.

2. It is a general rule, established for the purpose of shortening and facilitating investigations, that the point in issue is to be proved by the party who asserts the affirmative; 1 Phil. Ev. 184; Bull. N. P. 298; but as this rule is not founded on any presumption of law in favor of the party, but is merely a rule of practice and convenience, it ceases in all cases when the presumption of law is thrown into the opposite scale. Gilb. Ev. 145. For example, when the issue is on the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting its illegitimacy to prove it. 2 Selw. N. P. 709.

3. Upon the same principle, when the negative averment involves a charge of

criminal neglect of duty, whether official or otherwise, it must be proved, for the law presumes every man to perform the duties which it imposes. 2 Gall. R. 498; 19 John. R. 345; 10 East, R. 211; 3 B. & P. 302; 3 East, R. 192; 1 Mass. R. 54; 3 Campb. R. 10; Greenl. Ev. § 80; 3 Bouv. Inst. n. 3089. Vide *Onus Probandi*.

NEGATIVE CONDITION, contracts, wills. One where the thing which is the subject of it must not happen; as, if I do not marry. Poth. Ob. n. 200; 1 Bouv. Inst. n. 751.

NEGATIVE PREGNANT, pleading. Such form of negative expression, in pleading, as may imply or carry within it an affirmative.

2. This is faulty, because the meaning of such form of expression is ambiguous. Example: in trespass for entering the plaintiff's house, the defendant pleaded, that the plaintiff's daughter gave him license to do so; and that he entered by that license. The plaintiff replied that he did not enter by her license. This was considered as a negative pregnant, and it was held the plaintiff should have traversed the entry by itself, or the license by itself, and not both together. Cro. Jac. 87.

3. It may be observed that this form of traverse may imply, or carry within it, that the license was given, though the defendant did not enter by that license. It is therefore in the language of pleading said to be pregnant with the admission, namely, that a license was given: at the same time, the license is not expressly admitted, and the effect therefore is, to leave it in doubt whether the plaintiff means to deny the license, or to deny that the defendant entered by virtue of that license. It is this ambiguity which appears to constitute the fault. 28 H. VI. 7; Hob. 295; Style's Pr. Reg. Negative Pregnant; Steph. Pl. 381; Gould, Pl. c. 6, § 29-37.

4. This rule, however, against a negative pregnant, appears, in modern times at least, to have received no very strict construction; for many cases have occurred in which, upon various grounds of distinction from the general rule, that form of expression has been free from objection. See several instances in Com. Dig. Pleader, R. 6; 1 Lev. 88; Steph. Pl. 383. Vide Arch. Civ. Pl. 213; Doct. Pl. 317; Lawe's Civ. Pl. 114; Gould, Pl. c. 6, § 36.

NEGATIVE STATUTE. One which is enacted in negative terms, and which so controls the common law, that it has no force

in opposition to the statute. Bro. Parl. pl. 72; Bac. Ab. Statutes, G.

NEGLIGENCE, contracts, torts. When considered in relation to contracts, negligence may be divided into various degrees, namely, ordinary, less than ordinary, more than ordinary. 1 Miles' Rep. 40.

2. Ordinary negligence is the want of ordinary diligence; slight or less than ordinary negligence, is the want of great diligence; and gross or more than ordinary negligence, is the want of slight diligence.

3. Three great principles of responsibility, seem naturally to follow this division.

4.—1. In those contracts which are made for the sole benefit of the creditor, the debtor is responsible only for gross negligence, good faith alone being required of him; as in the case of a depository, who is a bailee without reward; Story, Bailm. § 62; Dane's Ab. c. 17, a, 2; 14 Serg. & Rawle, 275; but to this general rule, Pothier makes two exceptions. The first, in relation to the contract of a mandate, and the second, to the quasi contract negotiorum gestorum; in these cases, he says, the party undertaking to perform these engagements, is bound to use necessary care. Observation Générale, printed at the end of the *Traité des Obligations*.

5.—2. In those contracts which are for the reciprocal benefit of both parties, such as those of sale, of hiring, of pledge, and the like, the party is bound to take, for the object of the contract, that care which a prudent man ordinarily takes of his affairs, and he will therefore be held responsible for ordinary neglect. Jones' Bailment, 10, 119; 2 Lord Raym. 909; Story, Bailm. § 23; Pothier, Obs. Génér. ubi supra.

6.—3. In those contracts made for the sole interest of the party who has received, and is to return the thing which is the object of the contract, such, for example, as loan for use, or *commodatum*, the slightest negligence will make him responsible. Jones' Bailm. 64, 65; Story's Bailm. § 237; Pothier, Obs. Gén. ubi supra.

7. In general, a party who has caused an injury or loss to another, in consequence of his negligence, is responsible for all the consequence. Hob. 134; 3 Wils. 126; 1 Chit. Pl. 129, 130; 2 Hen. & Munf. 423; 1 Str. 596; 3 East, R. 596. An example of this kind may be found in the case of a person who drives his carriage during a dark night on the wrong side of the road,

by which he commits an injury to another. 3 East, R. 593; 1 Campb. R. 497; 2 Campb. 466; 2 New Rep. 119. Vide Gale and Whatley on Easements, Index, h. t.; 6 T. R. 659; 1 East, R. 106; 4 B. & A. 590; S. C. 6 E. C. L. R. 528; 1 Taunt. 568; 2 Stark. R. 272; 2 Bing. R. 170; 5 Esp. R. 35, 263; 5 B. & C. 550. Whether the incautious conduct of the plaintiff will excuse the negligence of the defendant, see 1 Q. B. 29; 4 P. & D. 642; 3 M. Lyr. & Sc. 9; *Fault*.

8. When the law imposes a duty on an officer, whether it be by common law or statute, and he neglects to perform it, he may be indicted for such neglect; 1 Salk. R. 380; 6 Mod. R. 96; and in some cases such neglect will amount to a forfeiture of the office. 4 Bl. Com. 140. See Bouv. Inst. Index, h. t.

NEGLECTFUL ESCAPE. The omission to take such a care of a prisoner as a gaoler is bound to take, and in consequence of it, the prisoner departs from his confinement, without the knowledge or consent of the gaoler, and eludes pursuit.

2. For a negligent escape, the sheriff or keeper of the prison is liable to punishment in a criminal case; and in a civil case, he is liable to an action for damages at the suit of the plaintiff. In both cases, the prisoner may be retaken. 3 Bl. Com. 415.

NEGOTIABLE. That which is capable of being transferred by assignment; a thing, the title to which may be transferred by a sale and indorsement or delivery.

2. A chose in action was not assignable at common law, and therefore contracts or agreements could not be negotiated. But exceptions have been allowed to this rule in relation to simple contracts, and others have been introduced by legislative acts. So that, now, bills of exchange, promissory notes, bills of lading, bank notes, payable to order, or to bearer, and, in some states, bonds and other specialties, may be transferred by assignment, indorsement, or by delivery, when the instrument is payable to bearer.

3. When a claim is assigned which is not negotiable at law, such, for example, as a book debt, the title to it remains at law in the assignor, but the assignee is entitled to it in equity, and he may therefore recover it in the assignor's name. See, generally, Hare & Wall. Sel. Dec. 158 to 194; *Negotiable paper*.

NEGOTIABLE PAPER, contracts. This

term is applied to bills of exchange and promissory notes, which are assignable by indorsement or delivery.

2. The statute of 3 & 4 Anne (the principles of which have been generally adopted in this country, either formally, or in effect,) made promissory notes payable to a person, or to his order, or bearer, negotiable like inland bills, according to the custom of merchants.

3. This negotiable quality transfers the debt from the party to whom it was originally owing, to the holder, when the instrument is properly indorsed, so as to enable the latter to sue in his own name, both the maker of a promissory note, or the acceptor of a bill of exchange, and the other parties to such instruments, such as the drawer of a bill, and the indorser of a bill or note, unless the holder has been guilty of laches in giving the required notice of non-acceptance or non-payment. But in order to make paper negotiable, it is essential that it be payable in money only, at all events, and not out of a particular fund. 1 Cowen, 691; 6 Cowen, 108; 2 Whart. 233; 1 Bibb, 490, 503; 1 Ham. 272; 3 J. J. Marsh, 174, 542; 3 Halst. 262; 4 Blackf. 47; 6 J. J. Marsh, 170; 4 Monr. 124. See 1 W. C. C. R. 512; 1 Miles, 294; 6 Munf. 3; 10 S. & R. 94; 4 Watts, 400; 4 Whart. R. 252; 9 John. 120; 19 John. 144; 11 Verm. 268; 21 Pick. 140. Vide *Promissory note*. Vide 3 Kent. Com. Lecture 44; Com. Dig. Merchant, F 15, 16; 2 Hill, R. 59; 13 East, 509; 3 B. & C. 47; 7 Bing. 284; 5 T. R. 683; 7 Taunt. 265, 278; 3 Burr. 1516; 6 Cowen, 151.

4. To render a bill or note negotiable, it must be payable to *order*, or to *bearer*. When it is payable "to A B *only*," it cannot be negotiated so as to give the indorsee a claim against any one but his indorser. Dougl. 615. An indorsement to A B, without adding "or order," is not restrictive to A B alone, he may, therefore, assign it to another; Str. 557; or he may indorse it in blank, when any attempt, afterwards, to restrain its negotiability will be unavailing. Esp. N. P. Cas. 180; 1 Bl. Rep. 295. Vide *Blank Indorsement*; *Indorsement*.

NEGOTIATION, *contracts* The deliberation which takes place between the parties touching a proposed agreement.

2. That which transpires in the negotiation makes no part of the agreement, unless introduced into it. It is a general rule that no evidence can be given to add, di-

minish, contradict or alter a written instrument. 1 Dall. 426; 4 Dall. 340; 3 S. & R. 609; 7 S. & R. 114. See *Pourparler*.

NEGOTIATION, *merc. law*. The act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.

2. Until an accommodation bill or note has been negotiated, there is no contract which can be enforced on the note: the contract, either express or implied, that the party accommodated will indemnify the other, is, till then, conditional. 2 Man. & Gr. 911.

NEGOTIORUM GESTOR, *contracts*. In the civil law, the negotiorum gestor is one who spontaneously, and without authority, undertakes to act for another during his absence, in his affairs.

2. In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract, but the civil law raises a *quasi* mandate by implication, for the benefit of the owner in many such cases. Poth. App. Negot. Gest. Mandat. n. 167, &c.; Dig. 3, 5, 1, 9; Code, 2, 19, 2.

3. Nor is an implication of this sort wholly unknown to the common law, where there has been a subsequent ratification of acts of this kind by the owner; and sometimes, when unauthorized acts are done, positive presumptions are made by law for the benefit of particular parties. For example, if a person enters upon a minor's lands, and takes the profits, the law will oblige him to account to the minor for the profits, as his bailiff, in many cases. Dane's Abr. ch. 8, art. 2, § 10; Bac. Abr. Account; Com. Dig. Account, A 3.

4. There is a case which has undergone decisions in our law, which approaches very near to that of *negotiorum gestorum*. A master had gratuitously taken charge of, and received on board of his vessel a box, containing doubloons and other valuables, belonging to a passenger, who was to have worked his passage, but was accidentally left behind. During the voyage, the master opened the box, in the presence of the passengers, to ascertain its contents, and whether there were contraband goods in it; and he took out the contents and lodged them in a bag in his own chest in his cabin, where his own valuables were kept. After his arrival in port, the bag was missing. The master was held responsible for the loss, on the ground that he had imposed

on himself the duty of carefully guarding against all peril to which the property was exposed by means of the alteration in the place of custody, although as a bailee without hire, he might not otherwise have been bound to take more than a prudent care of them; and that he had been guilty of negligence in guarding the goods. 1 Stark. R. 237. See Story, Bailm. § 189; Story, Agency, § 142; Poth. Pand. l. 3, t. 5, n. 1 to 14; Poth. Ob. n. 113; 2 Kent, Com. 616, 3d ed; Ersk. Inst. B. 1, t. 3, § 52; Stair, Inst. by Brodie, B. 1, t. 8, § 3 to 6.

NEIF, *old Eng. law*. A woman who was born a villain, or a bond woman.

NEMINE CONTRADICENTE, *legislation*. These words, usually abbreviated *nem. con.*, are used to signify the unanimous consent of the house to which they are applied. In England they are used in the house of commons; in the house of lords, the words to convey the same idea are *nemine dissentiente*.

NEPHEW, *dom. rel.* The son of a person's brother or sister. Amb. 514; 1 Jacob's Ch. R. 207.

NEPOS. A grandson. This term is used in making genealogical tables.

NEUTRAL PROPERTY, *insurance*. The words "neutral property" in a policy of insurance, have the effect of warranting that the property insured is neutral; that is, that it belongs to the citizens or subjects of a state in amity with the belligerent powers.

2. This neutrality must be complete; hence the property of a citizen or subject of a neutral state, domiciled in the dominions of one of the belligerents, and carrying on commerce there, is not neutral property; for though such person continue to owe allegiance to his country, and may at any time by returning there recover all the privileges of a citizen or subject of that country; yet while he resides in the dominion of a belligerent he contributes to the wealth and strength of such belligerent, and is not therefore entitled to the protection of a neutral flag; and his property is deemed enemy's property, and liable to capture as such by the other belligerent. Marsh. Ins. B. 1, c. 9, s. 6; 1 John. Cas. 363; 3 Bos. & Pull. 207, n. 4; Esp. R. 108; 1 Caines' R. 60; 16 Johns. R. 128. See also 2 Johns. Cas. 478; 1 Caines' C. Err. xxv; 1 Johns. Cas. 360; 2 Johns. Cas. 191.

3. If the warranty of neutrality be false

at the time it is made, the policy will be void *ab initio*. But if the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutral property, and a subsequent declaration of war will not be a breach of it. Dougl. 705. See 1 Blinn. 293; 8 Mass. 808; 14 Johns. R. 308; 5 Binn. 464; 2 Serg. & Rawle, 119; 4 Cranch, 185; 7 Cranch, 506; 2 Dall. 274.

NEUTRALITY, *international law*. The state of a nation which takes no part between two or more other nations at war with each other.

2. Neutrality consists in the observance of a strict and honest impartiality, so as not to afford advantage in the war to either party; and particularly in so far restraining its trade to the accustomed course, which is held in time of peace, as not to render assistance to one of the belligerents in escaping the effects of the other's hostilities. Even a loan of money to one of the belligerent parties is considered a violation of neutrality. 9 Moore's Rep. 586. A fraudulent neutrality is considered as no neutrality.

3. In policies of insurance there is frequently a warranty of neutrality. The meaning of this warranty is, that the property insured is neutral in fact, and it shall be so in appearance and conduct; that the property does belong to neutrals; that it is or shall be documented so as to prove its neutrality, and that no act of the insured or his agents shall be done which can legally compromise its neutrality. 3 Wash. C. C. R. 117. See 1 Caines, 548; 2 S. & R. 119; Bee, R. 5; 7 Wheat. 471; 9 Cranch, 205; 2 John. Cas. 180; 2 Dall. 270; 1 Gallis. 274; Bee, R. 67.

4. The violation of neutrality by citizens of the United States, contrary to the provisions of the act of congress of April 20, 1818, § 3, renders the individual liable to an indictment. One fitting out and arming a vessel in the United States, to commit hostilities against a foreign power at peace with them, is therefore indictable. 6 Pet. 445; Pet. C. C. R. 487. Vide Marsh. Ins. 384 a; Park's Ins. Index, h. t.; 1 Kent, Com. 116; Burlamaqui, pt. 4, c. 5, s. 16 & 17; Bynk. lib. 1, c. 9; Cobbett's Parliamentary Debates, 406; Chitty, Law of Nat., Index, h. t.; Mann. Comm. B. 3, c. 1; Vattel, l. 3, c. 7, § 104; Martens, Précis. liv. 8, c. 7, § 306; Bouch. Inst. n. 1826-1831.

NEW. Something not known before.

2. To be patented, an invention must be new. When an invention has been described in a printed book which has been publicly circulated, and afterwards a person takes out a patent for it, his patent is invalid, because the invention was not new. 7 Mann. & Gr. 818. See *New and Useful Invention*.

NEW AND USEFUL INVENTION. This phrase is used in the act of congress relating to granting patents for inventions.

2. The invention to be patented must not only be new, but useful; that is, useful in contradistinction to frivolous or mischievous inventions. It is not meant that the invention should in all cases be superior to the modes now in use for the same purposes. 1 Mason's C. C. R. 182; 1 Mason's C. C. R. 302; 4 Wash. C. C. R. 9; 1 Pet. C. C. R. 480, 481; 1 Paine's C. C. R. 203; 3 Mann. Gr. & Scott, 425. The law as to the usefulness of the invention is the same in France. Renouard, c. 5, s. 16, n. 1, page 177.

NEW FOR OLD. A term used in the law of insurance in cases of adjustment of a loss, when it has been but partial. In making such adjustment the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one-third *new for old* upon the balance. See 1 Cowen, 265; 4 Cowen, 245; 4 Ohio, 284; 7 Pick. 259; 14 Pick. 141.

NEW OR NOVEL ASSIGNMENT, pleading. Declarations are conceived in very general terms, and sometimes, from the nature of the action, are so framed as to be capable of covering several injuries. The effect of this is, that, in some cases, the defendant is not sufficiently guided by the declaration to the real cause of complaint; and is, therefore, led to apply his answer to a different matter from that which the plaintiff has in view. For example, it may happen that the plaintiff has been twice assaulted by the defendant, and one of the assaults is justifiable, being in self-defence, while the other may have been committed without legal excuse. Supposing the plaintiff to bring an action for the latter; from the generality of the statement in the declaration, the defendant is not informed to which of the two assaults the plaintiff means to refer. The defendant may, therefore, suppose, or affect to suppose, that the first is the assault intended,

and will plead *son assault demesne*. This plea the plaintiff cannot safely traverse, because an assault was in fact committed by the defendant, under the circumstances of excuse here alleged; the defendant would have a right under the issue joined upon such traverse, to prove these circumstances, and to presume that such assault, and no other, was the cause of action. The plaintiff, therefore, in the supposed case, not being able safely to traverse, and having no ground either for demurrer, or for pleading in confession and avoidance, has no course, but, by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action not for the *first* but for the *second* assault; and this is called a *new assignment*. Steph. Pl. 241-243.

2. As the object of a new assignment is to correct a mistake occasioned by the generality of the declaration, it always occurs in answer to a plea, and is therefore in the nature of a replication. It is not used in any other part of the pleading.

3. Several new assignments may occur in the course of the same series of pleading.

4. Thus in the above example, if it be supposed that *three* distinct assaults had been committed, two of which were justifiable, the defendant might plead as above to the declaration, and then, by way of plea to the new assignment, he might again justify, in the same manner, another assault; upon which it would be necessary for the plaintiff to new-assign a third; and this upon the first principle by which the first new assignment was required. 1 Chit. Pl. 614; 1 Saund. 299 c.

5. A new assignment is said to be in the nature of a new declaration. Bac. Abr. Trespass I, 4, 2; 1 Saund. 299 c. It seems, however, more properly considered as a repetition of the declaration; 1 Chit. Pl. 602; differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is consequently to be framed with as much certainty or specification of circumstances, as the declaration itself. In some cases, indeed, it should be even more particular. Bac. Abr. Trespass, I 4, 2; 1 Chitt. Pl. 610; Steph. Pl. 245. See 3 Bl. Com. 311; Arch. Civ. Pl. 286; Doct. Pl. 318; Lawes' Civ. Pl. 163.

NEW HAMPSHIRE. The name of

one of the original states of the United States of America. During its provincial state, New Hampshire was governed, down to the period of the Revolution, by the authority of royal commissions. Its general assembly enacted the laws necessary for its welfare, in the manner provided for by the commission under which they then acted. 1 Story on the Const. Book, 1, c. 5, §§ 78 to 81.

2. The constitution of this state was altered and amended by a convention of delegates, held at Concord, in the said state, by adjournment, on the second Wednesday of February, 1792.

3. The powers of the government are divided into three branches, the legislative, the executive, and the judicial.

4.—1st. The supreme *legislative* power is vested in the senate and house of representatives, each of which has a negative on the other.

5. The senate and house are required to assemble on the first Wednesday in June, and at such times as they may judge necessary; and are declared to be dissolved seven days next preceding the first Wednesday in June. They are styled *The General Court of New Hampshire*.

6.—1. The *senate*. It will be considered with reference to the qualifications of the electors; the qualifications of the members; the number of members; the duration of their office; and the time and place of their election.

7.—1. Every male inhabitant of each town, and parish with town privileges, and places unincorporated, in this state, of twenty-one years of age and upwards, excepting paupers, and persons excused from paying taxes at their own request, have a right at the annual or other town meetings of the inhabitants of said towns and parishes, to be duly warned and holden annually forever in the month of March, to vote in the town or parish wherein he dwells, for the senators of the county or district whereof he is a member.

8.—2. No person shall be capable of being elected a senator, who is not seised of a freehold estate, in his own right, of the value of two hundred pounds, lying within this state, who is not of the age of thirty years, and who shall not have been an inhabitant of this state for seven years immediately preceding his election, and at the time thereof he shall be an inhabitant of the district for which he shall be chosen.

9.—3. The senate is to consist of twelve members.

10.—4. The senators are to hold their offices from the first Wednesday in June next ensuing their election. 5. The senators are elected by the electors in the month of March.

11.—2. The *house of representatives* will be considered in relation to its constitution, under the same divisions which have been made in relation to the senate.

12.—1. The electors are the same who vote for senators.

13.—2. Every member of the house of representatives shall be chosen by ballot; and for two years at least next preceding his election, shall have been an inhabitant of this state; shall have an estate within the district which he may be chosen to represent, of the value of one hundred pounds, one half of which to be a freehold, whereof he is seised in his own right; shall be, at the time of his election, an inhabitant of the district he may be chosen to represent, and shall cease to represent such district immediately on his ceasing to be qualified as aforesaid.

14.—3. There shall be in the legislature of this state, a representation of the people, annually elected, and founded upon principles of equality; and in order that such representation may be as equal as circumstances will admit, every town, parish, or place, entitled to town privileges, having one hundred and fifty rateable male polls, of twenty-one years of age, and upwards, may elect one representative; if four hundred and fifty rateable male polls, may elect two representatives; and so, proceeding in that proportion, make three hundred such rateable polls, the mean of increasing number, for every additional representative. Such towns, parishes, or places, as have less than one hundred and fifty rateable polls, shall be classed by the general assembly, for the purpose of choosing a representative, and seasonably notified thereof. And in every class formed for the above mentioned purpose, the first annual meeting shall be held in the town, parish, or place, wherein most of the rateable polls reside; and afterwards in that which has the next highest number; and so on, annually, by rotation, through the several towns, parishes, or places forming the district. Whenever any town, parish, or place entitled to town privileges, as aforesaid, shall not have one hundred and fifty rateable polls, and be so situated as

to render the classing thereof with any other town, parish, or place very inconvenient; the general assembly may, upon application of a majority of the voters of such town, parish, or place, issue a writ for their selecting and sending a representative to the general court.

15.—4. The members are to be chosen annually.

16.—5. The election is to be in the month of March.

17.—2. The *executive* power consists of a governor and a council.

18.—1. Of the *governor*. 1. The qualifications of electors of governor, are the same as those of senators.

19.—2. The governor, at the time of his election, must have been an inhabitant of this state for the seven years next preceding, be of the age of thirty years, and have an estate of the value of five hundred pounds, one-half of which must consist of a freehold in his own right, within the state.

20.—3. He is elected annually.

21.—4. The election is in the month of March.

22.—5. His general powers and duties are as follows, namely: 1. In case of any infectious distemper prevailing in the place where the general court at any time is to convene, or any other cause whereby dangers may arise to the health or lives of the members from their attendance, the governor may direct the session to be holden at some other. 2. He is invested with the veto power. 3. He is commander-in-chief of the army and navy, and is invested with power on this subject very minutely described in the constitution as follows, namely: The governor of the state for the time being shall be commander-in-chief of the army and navy, and all the military forces of this state, by sea and land: and shall have full power, by himself or by any chief commander, or other officer or officers, from time to time, to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of this state, to assemble in martial array, and put in warlike posture the inhabitants thereof, and to lead and conduct them, and with them encounter, repulse, repel, resist, and pursue, by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprise and means, all and every such person and persons as shall at any time hereafter in a hostile manner attempt

or enterprise the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law martial in time of war, invasion, and also in rebellion, declared by the legislature to exist, as occasion shall necessarily require. And surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall in a hostile manner invade, or attempt the invading, conquering, or annoying this state: And, in fine, the governor is hereby entrusted with all other powers incident to the office of captain-general and commander-in-chief, and admiral, to be exercised agreeably to the rules and regulations of the constitution, and the laws of the land: Provided, that the governor shall not at any time hereafter, by virtue of any power by this constitution granted, or hereafter to be granted to him by the legislature, transport any of the inhabitants of this state, or oblige them to march out of the limits of the same, without their free and voluntary consent, or the consent of the general court, nor grant commissions for exercising the law martial in any case, without the advice and consent of the council.

23. Whenever the chair of the governor shall become vacant, by reason of his death, absence from the state or otherwise, the president of the senate shall, during such vacancy, have and exercise all the powers and authorities which, by this constitution, the governor is vested with, when personally present; but when the president of the senate shall exercise the office of governor, he shall not hold his office in the senate.

24.—2. The *council*. 1. This body is elected by the freeholders and other inhabitants qualified to vote for senators. 2. No person shall be capable of being elected a councillor who has not an estate of the value of five hundred pounds within this state, three hundred pounds of which (or more) shall be a freehold in his own right, and who is not thirty years of age; and who shall not have been an inhabitant of this state for seven years immediately preceding his election; and at the time of his election an inhabitant of the county in which he is elected. 3. The council consists of five members. 4. They are elected annually. 5. The election is in the month of March. 6. Their principal duty is to advise the governor.

25.—3. The *governor and council* jointly. Their principal powers and duties are as follows: 1. They may adjourn the general court not exceeding ninety days at one time, when the two houses cannot agree as to the time of adjournment. 2. They are required to appoint all judicial officers, the attorney-general, solicitors, all sheriffs, coroners, registers of probate, and all officers of the navy, and general and field-officers of the militia; in these cases the governor and council have a negative on each other. 3. They have the power of pardoning offences, after conviction, except in cases of impeachment.

26.—2d. The *judicial* power is distributed as follows:

The tenure that all commissioned officers shall have by law in their offices, shall be expressed in their respective commissions—all judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behaviour, excepting those concerning whom there is a different provision made in this constitution: Provided, nevertheless, the governor, with consent of council, may remove them upon the address of both houses of the legislature.

27. Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the superior court, upon important questions of law, and upon solemn occasions.

28. In order that the people may not suffer from the long continuance in place of any justice of the peace, who shall fail in discharging the important duties of his office with ability and fidelity, all commissions of justices of the peace shall become void at the expiration of five years from their respective dates; and upon the expiration of any commission, the same may, if necessary, be renewed, or another person appointed, as shall most conduce to the well being of the state.

29. All causes of marriage, divorce, and alimony, and all appeals from the respective judges of probate, shall be heard and tried by the superior court until the legislature shall by law make other provision.

30. The general court are empowered to give to justices of the peace jurisdiction in civil causes, when the damages demanded shall not exceed four pounds, and title of real estate is not concerned; but with right of appeal to either party, to some other court, so that a trial by jury in the last resort may be had.

31. No person shall hold the office of a judge in any court, or judge of probate, or sheriff of any county, after he has attained the age of seventy years.

32. No judge of any court, or justice of the peace, shall act as attorney, or be of counsel, to any party, or originate any civil suit, in matters which shall come or be brought before him as judge, or justice of the peace.

33. All matters relating to the probate of wills, and granting letters of administration, shall be exercised by the judges of probate, in such manner as the legislature have directed, or may hereafter direct; and the judges of probate shall hold their courts at such place or places, on such fixed days as the conveniency of the people may require, and the legislature from time to time appoint.

34. No judge or register of probate, shall be of counsel, act as advocate, or receive any fees as advocate or counsel, in any probate business which is pending or may be brought into any court of probate in the county of which he is judge or register.

NEW JERSEY. The name of one of the original states of the United States of America. This state, when it was first settled, was divided into two provinces, which bore the names of East Jersey and West Jersey. They were granted to different proprietaries. Serious dissensions having arisen between them, and between them and New York, induced the proprietaries of both provinces to make a formal surrender of all their powers of government, but not of their lands, to Queen Anne, in April, 1702; they were immediately reunited in one province, and governed by a governor appointed by the crown, assisted by a council, and an assembly of the representatives of the people, chosen by the freeholders. This form of government continued till the American Revolution.

2. A constitution was adopted for New Jersey on the second day of July, 1776, which continued in force till the first day of September, 1844, inclusive. A convention was assembled at Trenton on the 14th of May, 1844; it continued in session till the 29th day of June, 1844, when the new constitution was adopted, and it is provided by art. 8, s. 4, that this constitution shall take effect and go into operation on the second day of September, 1844.

3. By art. 3, the powers of the government are divided into three distinct depart-

ments, the legislative, executive and judicial. It further provided that no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as therein expressed.

4.—§ 1. The *legislative power* shall be vested in a senate and general assembly. Art. 4, s. 1, n. 1.

5.—1st. In treating of the *senate*, it will be proper to consider, 1. The qualifications of senators. 2. Of the electors of senators. 3. Of the number of senators. 4. Of the time for which they are elected.

6.—1. No person shall be a member of the senate, who shall not have attained the age of thirty years, and have been a citizen and inhabitant of the state for four years, and of the county for which he shall be chosen one year, next before his election. And he must be entitled to suffrage at the time of his election. Art. 4, s. 1, n. 2.

7.—2. Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state one year, and of the county in which he claims his vote five months next before the election, shall be entitled to vote for all officers that now are, or hereafter may be elective by the people; provided, that no person in the military, naval, or marine service of the United States, shall be considered a resident in this state, by being stationed in any garrison, barrack, or military or naval place or station within this state; and no pauper, idiot, insane person, or person convicted of a crime which now excludes him from being a witness, unless pardoned or restored by law to the right of suffrage, shall enjoy the right of an elector.

8.—3. The senate shall be composed of one senator from each county in the state. Art. 4, s. 2, n. 1.

9.—4. The senators are elected on the second Tuesday of October, for three years. Art. 4, s. 2, n. 1. As soon as the senate shall meet after the first election to be held in pursuance of this constitution, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the first year; of the second class at the expiration of the second year; and of the third class at the expiration of the third year; so that one class may be elected every year; and if vacancies happen, by resignation or otherwise, the person elected to supply such vacancies

shall be elected for the unexpired terms only. Art. 4, s. 2, n. 2.

10.—2d. The *general assembly* will be considered in the same order that has been observed in speaking of the senate.

11.—1. No person shall be a member of the general assembly, who shall not have attained the age of twenty-one years, and have been a citizen and inhabitant of the state for two years, and of the county for which he shall be chosen one year next before his election. He must be entitled to the right of suffrage. Art. 4, s. 1, n. 2.

12.—2. The same persons who elect senators elect members of the general assembly.

13.—3. The general assembly shall be composed of members annually elected by the legal voters of the counties, respectively, who shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. The present apportionment shall continue until the next census of the United States shall have been taken, and an apportionment of members of the general assembly shall be made by the legislature, at its first session after the next and every subsequent enumeration or census, and when made shall remain unaltered until another enumeration shall have been taken; provided, that each county shall at all times be entitled to one member: and the whole number of members shall never exceed sixty.

14.—4. Members of the legislature are elected yearly on the second Tuesday of October.

15.—3d. The powers of the respective houses are as follows:

16.—1. Each house shall direct writs of election for supplying vacancies, occasioned by death, resignation, or otherwise; but if vacancies occur during the recess of the legislature, the writs may be issued by the governor, under such regulations as may be prescribed by law.

17.—2. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

18.—3. Each house shall choose its own officers, determine the rules of its proceedings, punish its members for disorderly

behaviour, and, with the concurrence of two-thirds, may expel a member.

19.—4. Each house shall keep a journal of its proceedings, and from time to time publish the same; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

20.—5. Neither house, during the session of the legislature, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

21.—6. All bills and joint resolutions shall be read three times in each house, before the final passage thereof; and no bill or joint resolution shall pass, unless there be a majority of all the members of each house personally present and agreeing thereto: and the yeas and nays of members voting on such final passage shall be entered on the journal.

22.—7. Members of the senate and general assembly shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the state; which compensation shall not exceed the sum of three dollars per day for the period of forty days from the commencement of the session; and shall not exceed the sum of one dollar and fifty cents per day for the remainder of the session. When convened in extra session by the governor, they shall receive such sum as shall be fixed for the first forty days of the ordinary session. They shall also receive the sum of one dollar for every ten miles they shall travel, in going to and returning from their place of meeting, on the most usual route. The president of the senate, and the speaker of the house of assembly shall, in virtue of their offices, receive an additional compensation equal to one-third of their per diem allowance as members.

23.—8. Members of the senate and of the general assembly shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same: and for any speech or debate, in either house, they shall not be questioned in any other place.

24.—§ 2. By the fifth article of the constitution, the *executive power* is vested in a governor. It will be convenient to consider, 1. The qualifications of the governor. 2. By whom he is elected. 3. The duration

of his office. 4. His powers: and 5. His salary.

25.—1. The governor shall be not less than thirty years of age, and shall have been for twenty years, at least, a citizen of the United States, and a resident of this state seven years next before his election, unless he shall have been absent during that time on the public business of the United States or of this state.

26.—2. He is chosen by the legal voters of the state.

27.—3. The governor holds his office for three years, to commence on the third Tuesday of January next ensuing the election of governor by the people, and to end on the Monday preceding the third Tuesday of January, three years thereafter; and he cannot nominate nor appoint to office during the last week of his term. He is not re-eligible without an intermission of three years. Art. 5, n. 3.

28.—4. His powers are as follows: He shall be the commander-in-chief of all the military and naval forces of the state; he shall have power to convene the legislature, whenever, in his opinion, public necessity requires it; he shall communicate, by message, to the legislature, at the opening of each session, and at such other times as he may deem necessary, the condition of the state, and recommend such measures as he may deem expedient; he shall take care that the laws be faithfully executed, and grant, under the great seal of the state, commissions to all such officers as shall be required to be commissioned.

29. Every bill which shall have passed both houses shall be presented to the governor: if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it; if, after such reconsideration, a majority of the whole number of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved of by a majority of the whole number of that house, it shall become a law; but in neither house shall the vote be taken on the same day on which the bill shall be returned to it; and in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the jour-

nal of each house respectively. If any bill shall not be returned by the governor, within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

30. The governor, or person administering the government, shall have power to suspend the collection of fines and forfeitures, and to grant reprieves, to extend until the expiration of a time not exceeding ninety days after conviction; but this power shall not extend to cases of impeachment.

31. The governor, or person administering the government, the chancellor, and the six judges of the court of errors and appeals, or a major part of them, of whom the governor or person administering the government shall be one, may remit fines and forfeitures, and grant pardons after conviction, in all cases except impeachment.

32.—5. The governor shall, at stated times, receive for his services a compensation which shall be neither increased nor diminished during the period for which he shall have been elected.

33.—§ 3. The *judicial power* shall be vested in a court of errors and appeals in the last resort in all causes, as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require.

34.—1. The court of errors and appeals shall consist of the chancellor, the justices of the supreme court, and six judges, or a major part of them; which judges are to be appointed for six years.

35.—2. Immediately after the court shall first assemble, the six judges shall arrange themselves in such manner that the seat of one of them shall be vacated every year, in order that thereafter one judge may be annually appointed.

36.—3. Such of the six judges as shall attend the court shall receive, respectively, a per diem compensation, to be provided by law.

37.—4. The secretary of state shall be the clerk of this court.

38.—5. When an appeal from an order or decree shall be heard, the chancellor

shall inform the court, in writing, of the reasons for his order or decree; but he shall not sit as a member, or have a voice in the hearing or final sentence.

39.—6. When a writ of error shall be brought, no justice who has given a judicial opinion in the cause, in favor of or against any error complained of, shall sit as a member, or have a voice on the hearing, or for its affirmance or reversal; but the reasons for such opinion shall be assigned to the court in writing.

40.—1. The house of assembly shall have the sole power of impeaching, by a vote of a majority of all the members; and all impeachments shall be tried by the senate: the members, when sitting for that purpose, to be on oath or affirmation "truly and impartially to try and determine the charge in question according to evidence:" and no person shall be convicted without the concurrence of two-thirds of all the members of the senate.

41.—2. Any individual officer impeached shall be suspended from exercising his office until his acquittal.

42.—3. Judgment, in cases of impeachment, shall not extend farther than to removal from office and to disqualification to hold and enjoy any office of honor, profit, or trust under this state; but the party convicted shall nevertheless be liable to indictment, trial, and punishment, according to law.

43.—4. The secretary of state shall be the clerk of this court.

44.—1. The court of chancery shall consist of a chancellor.

45.—2. The chancellor shall be the ordinary, or surrogate general, and judge of the prerogative court.

46.—3. All persons aggrieved by any order, sentence, or decree of the orphans' court may appeal from the same, or from any part thereof, to the prerogative court; but such order, sentence, or decree shall not be removed into the supreme court, or circuit court, if the subject matter thereof be within the jurisdiction of the orphans' court.

47.—4. The secretary of state shall be the register of the prerogative court, and shall perform the duties required of him by law in that respect.

48.—1. The supreme court shall consist of a chief justice and four associate justices. The number of associate justices may be increased or decreased by law, but shall never be less than two.

49.—2. The circuit courts shall be held in every county of this state, by one or more of the justices of the supreme court, or a judge appointed for that purpose; and shall in all cases within the county, except in those of a criminal nature, have common law jurisdiction concurrent with the supreme court; and any final judgment of a circuit court may be docketed in the supreme court, and shall operate as a judgment obtained in the supreme court, from the time of such docketing.

50.—3. Final judgments in any circuit court may be brought by writ of error into the supreme court, or directly into the court of errors and appeals.

51.—1. There shall be no more than five judges of the inferior court of common pleas in each of the counties in this state after the terms of the judges of said court now in office shall terminate. One judge for each county shall be appointed every year, and no more, except to fill vacancies, which shall be for the unexpired term only.

52.—2. The commissions for the first appointments of judges of said court shall bear date and take effect on the first day of April next; and all subsequent commissions for judges of said court shall bear date and take effect on the first day of April in every successive year, except commissions to fill vacancies, which shall bear date and take effect when issued.

53.—1. There may be elected under this constitution two, and not more than five, justices of the peace in each of the townships of the several counties of this state, and in each of the wards, in cities that may vote in wards. When a township or ward contains two thousand inhabitants, or less, it may have two justices; when it contains more than two thousand inhabitants, and not more than four thousand, it may have four justices; and when it contains more than four thousand inhabitants, it may have five justices; provided, that whenever any township, not voting in wards, contains more than seven thousand inhabitants, such township may have an additional justice for each additional three thousand inhabitants above four thousand.

54.—2. The population of the townships in the several counties of the state and of the several wards shall be ascertained by the last preceding census of the United States, until the legislature shall provide by law some other mode of ascertaining it.

NEW MATTER, pleading. All facts alleged in pleading, which go in avoidance of what is before pleaded, on the opposite side, are called *new matter*. In other words, every allegation made in the pleadings, subsequent to the declaration, and which does not go in denial of what is before alleged on the other side, is an allegation of new matter; generally all new matter must be followed by a verification. (q. v.) Gould, Pl. c. 3, § 195; 1 Saund. 103, n. 1; Steph. Pl. 251; Com. Dig. Pleader, E 32; 2 Lev. 5; Vent. 121; 1 Chit. Pl. 538; 3 Bouv. Inst. n. 2983. In proceedings in equity, when *new matter* has been discovered by either plaintiff or defendant, before a *decree* has been pronounced, a cross-bill has been permitted to bring such matter before the court to answer the purposes of justice. After the answer has been filed, it cannot be introduced by amendment; the only way to introduce it, is by filing a supplemental bill. 4 Bouv. Inst. n. 4385-87; 1 Paige 200; Harring. Ch. 438.

NEW PROMISE. A contract made, after the original promise has for some cause been rendered invalid, by which the promiser agrees to fulfil such original promise.

2. When a debtor has been discharged under the bankrupt laws, the remedy against him is clearly gone; so when an infant has made a contract prejudicial to his interest, he may avoid it; and when by lapse of time a debt is barred by the act of limitations, the debtor may take advantage of the act, but in all these cases there remains a moral obligation, and if the original promiser renews the contract by a new promise, this is a sufficient consideration. See 8 Mass. 127; 2 S. & R. 208; 2 Rawle, 351; 5 Har. & John. 216; 2 Esp. C. 736; 2 H. Bl. 116; 8 Moore, 261; 1 Bing. 281; 1 Dougl. 192; Cowp. 544; Bac. Ab. Infancy and Age, I; Bac. Ab. Limitation of actions, E 8.

3. Formerly the courts construed the slightest admission of the debtor as evidence of a new promise to pay; but of late years a more reasonable construction is put upon men's contracts, and the promise must be express, or at least, the acknowledgment of indebtedness must not be inconsistent with a promise to pay. 4 Greenl. 41, 413; 2 Hill's S. C. 326; 2 Pick. 368; 1 South. 153; 14 S. & R. 195; 1 McMull. R. 197; 3 Harring. 508; 7 Watts & Serg. 180; 10 Watts, 172; 6 Watts & Serg. 213; 5 Shep.

349; 5 Smed. & Marsh. 564; 1 Bouv. Inst. n. 866.

NEW TRIAL, practice. A reëxamination of an issue in fact, before a court and jury, which had been tried, at least once, before the same court and a jury.

2. The origin of the practice of granting new trials is concealed in the night of time.

3. Formerly new trials could be obtained only with the greatest difficulties, but by the modern practice, they are liberally granted in furtherance of justice.

4. The reasons for granting new trials are numerous, and may be classed as follows; namely:

1. Matters which arose before and in the course of trial. These are, 1st. Want of due notice. Justice requires that the defendant should have sufficient notice of the time and place of trial; and the want of it, unless it has been waived by an appearance and making defence, will, in general, be sufficient to entitle the defendant to a new trial. Bull. N. P. 327; 3 Price's Ex. R. 72; 3 Dougl. 402; 1 Wend. R. 22. But the insufficiency of the notice must have been calculated reasonably to mislead the defendant. 7 T. R. 59. 2d. The irregular impanneling of the jury; for example, if a person not duly qualified to serve be sworn; 4 T. R. 473; or if a juror not regularly summoned and returned personate another. Willes, 484; 8 C. Barnes, 453. In Pennsylvania, by statutory provision, going on to trial will cure the defect, both in civil and criminal cases. 3d. The admission of illegal testimony. 3 Cowen's Rep. 712; 2 Hall's R. 40; 4 Chit. Pr. 33. 4th. The rejection of legal testimony. 6 Mod. 242; 3 B. & C. 494; 1 Bingham R. 38; 1 John. R. 508; 7 Wend. R. 371; 3 Mass. 124; 5 Mass. R. 391. But a new trial will not be granted for the rejection of a witness on the supposed ground of incompetency, when another witness establishes the same fact, and it is not disputed by the other side. 2 East, R. 451; and see other exceptions in 1 John. R. 509; 4 Ohio Rep. 49; 1 Charl. B. 227; 2 John. Cas. 318. 5th. The misdirection of the judge. Vide article *Misdirection*, and 4 Chit. Pr. 38.

5.—2. The acts of the prevailing party, his agents or counsel. For example, when papers, not previously submitted, are surreptitiously handed to the jury, being material on the point in issue. Co. Litt. 227;

1 Sid. 235; 4 W. C. C. R. 149. Or if the party, or one on his behalf, directly approach a juror on the subject of the trial. Cro. Eliz. 189; 1 Serg. & Rawle, 169; 7 Serg. & Rawle, 358; 4 Binn. 150; 13 Mass. R. 218; 2 Bay R. 94; 6 Greenl. R. 140. But if the other party is aware of such attempts, and he neglects to correct them when in his power, this will not be a sufficient reason for granting a new trial. 11 Mod. 118. When indirect measures have been resorted to, to prejudice the jury; 3 Brod. & Bing. 272; 7 Moore's R. 87; 7 East, R. 108; or tricks practiced; 11 Mod. 141; or disingenuous attempts to suppress or stifle evidence, or thwart the proceedings, or to obtain an unconscientious advantage, or to mislead the court and jury, they will be defeated by granting a new trial. Grah. N. T. 56; 4 Chit. Pr. 59.

6.—3. The misconduct of the jury, as if they acted in disregard of their oaths; Cro. Eliz. 778; drinking spirituous liquors, after being charged with the cause; 4 Cowen's R. 26; 7 Cowen's R. 562; or resorting to artifice to get rid of their confinement; 5 Cowen's R. 283; and such like causes will avoid a verdict. Bunb. 51; Barnes, 438; 1 Str. 462; 2 Bl. R. 1299; Comb. 357; 4 Chit. Pr. 48 to 55. See, as to the nature of the evidence to be received to prove misconduct of the jury, 1 T. R. 11; 4 Binn. R. 150; 7 S. & R. 458.

7.—4. Cases in which the verdict is improper, because it is either void, against law, against evidence, or the damages are excessive. 1. When the verdict is contrary to the record; 2 Roll. 691; 2 Co. 4; or it finds a matter entirely out of the issue; Hob. 53; or finds only a part of the issue; Co. Litt. 227; or when it is uncertain; 8 Co. 65; a new trial will be granted. 2. When the verdict is clearly against law, and injustice has been done, it will be set aside. Grah. N. T. 341, 356. 3. And so will a verdict be set aside if given clearly against evidence, and the presiding judge is dissatisfied. Grah. N. T. 368. 4. When the damages are excessive, and appear to have been given in consequence of prejudice, rather than as an act of deliberate judgment. Grah. N. T. 410; 4 Chit. Pr. 63; 1 M. & G. 222; 39 E. C. L. R. 422.

8.—5. Cases in which the party was deprived of his evidence by accident or because he was not aware of it. The non-attendance of witnesses, their mistakes, their interests, their infirmities, their bias, their

partial or perverted views of facts, their veracity, their turpitude, pass in review, and in proportion as they bear upon the merits avoid or confirm the verdict. The absence of a material piece of testimony or the non-attendance of witnesses, contrary to reasonable expectation, and reasonably accounted for, will induce the court to set aside the verdict, and grant a new trial; 6 Mod. 22; 11 Mod. 1; 2 Chit. Rep. 195; 14 John. R. 112; 2 John. Cas. 318; 2 Murph. R. 384; as, if the witness absent himself without the party's knowledge after the cause is called on; 14 John. R. 112; or is suddenly taken sick; 1 McClell. R. 179; and the like. The court will also grant a new trial, when the losing party has discovered *material evidence since the trial*, which would probably produce a different result; this evidence must be accompanied by proof of previous diligence to procure it. To succeed, the applicant must show four things: 1. The names of the new witnesses discovered. 2. That the applicant has been diligent in preparing his case for trial. 3. That the new facts were discovered after the trial and will be important. 4. That the evidence discovered will tend to prove facts which were not directly in issue on the trial, or were not then known and investigated by proof. 3 J. J. Marsh. R. 521; 2 J. J. Marsh. R. 52; 5 Serg. & Rawle, 41; 6 Greenl. R. 479; 4 Ohio Rep. 5; 2 Caines' R. 155; 2 W. C. C. R. 411; 16 Mart. Louis. Rep. 419; 2 Aiken, Rep. 407; 1 Halst. R. 434; Grah. N. T. ch. 13.

9. New trials may be granted in criminal as well as in civil cases, when the defendant is convicted, even of the highest offences. 3 Dall. R. 515; 1 Bay, R. 372; 7 Wend. 417; 5 Wend. 39. But when the defendant is acquitted, the humane influence of the law, in cases of felony, mingling justice with mercy, in *favorem vitæ et libertatis*, does not permit a new trial. In cases of misdemeanor, after conviction a new trial may be granted in order to fulfil the purpose of substantial justice; yet, there are no instances of new trials after acquittal, unless in cases where the defendant has procured his acquittal by unfair practices. 1 Chit. Cr. Law, 654; 4 Chit. Pr. 80.

Vide, generally, 21 Vin. Ab. 474 to 493; 8 Chit. Bl. Com. 387, n.; 18 E. C. L. R. 74, 334; Bac. Ab. Trial, L; 1 Sell. Pr. 482; Tidd's Pr. 934, 939; Graham on New Trials; 3 Chit. Pr. 47; Dane's Ab. h. t.; Com. Dig. Pleader, R. 17; 4 Chitty's Prac-

tice, part 7, ch. 3. The rules laid down to authorize the granting of new trials in Louisiana, will be found in the Code of Practice, art. 557 to 563.

NEW WORK. In Louisiana, by a new work is understood every sort of edifice or other work, which is newly commenced on any ground whatever.

2. When the ancient form of the work is changed, either by an addition being made to it, or by some part of the ancient work being taken away, it is styled also a new work. Civ. Code of Lo. 852; Puff. b. 8, c. 5, § 3; Nov. Rec. L. 1, tit. 32; Asso y Manuel, b. 2, tit. 6, p. 144.

NEW YORK. The name of one of the original states of the United States of America. In its colonial condition this state was governed from the period of the revolution of 1688, by governors appointed by the crown assisted by a council, which received its appointments also from the parental government, and by the representatives of the people. 1 Story, Const. B. 1, ch. 10.

2. The present constitution of the state was adopted by a convention of the people, at Albany, on the ninth day of October, 1846, and went into force from and including the first day of January, 1847. The powers of the government are distributed among three classes of magistrates, the legislative, the executive, and the judicial.

3.—§ 1. The *legislative* power is vested in a senate and assembly. By the second article, section first, of the constitution, the qualifications of the electors are thus described, namely: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this state one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people; but such citizen shall have been for thirty days next preceding the election, a resident of the district from which the officer is to be chosen for whom he offers his vote. But no man of color, unless he shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seised and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incum-

brances, charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at such election. And no person of color shall be subject to direct taxation unless he shall be seised and possessed of such real estate as aforesaid.

4. The third article provides as follows:

Sect. 6. The members of the legislature shall receive for their services, a sum not exceeding three dollars a day, from the commencement of the session; but such pay shall not exceed in the aggregate, three hundred dollars for per diem allowance, except in proceedings for impeachment. The limitation as to the aggregate compensation shall not take effect until the year one thousand eight hundred and forty-eight. When convened in extra session by the governor, they shall receive three dollars per day. They shall also receive the sum of one dollar for every ten miles they shall travel, in going to and returning from their place of meeting on the most usual route. The speaker of the assembly shall, in virtue of his office, receive an additional compensation equal to one-third of his per diem allowance as a member.

Sect. 7. No member of the legislature shall receive any civil appointment within this state, or to the senate of the United States, from the governor, the governor and senate, or from the legislature, during the term for which he shall have been elected; and all such appointments, and all votes given for any such member, for any such office or appointment, shall be void.

Sect. 8. No person being a member of congress, or holding any judicial or military office under the United States, shall hold a seat in the legislature. And if any person shall, after his election as a member of the legislature, be elected to congress, or appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat.

Sect. 9. The elections of senators and members of assembly, pursuant to the provisions of this constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the legislature.

Sect. 10. A majority of each house shall constitute a quorum to do business. Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members, shall choose its own officers, and the senate shall choose a temporary presi-

dent, when the lieutenant governor shall not attend as president, or shall act as governor.

Sect. 11. Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

Sect. 12. For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.

5.—1. The *senate* consists of thirty-two members, chosen by the electors. The state is divided into thirty-two districts, and each district elects one senator.

6. Senators are chosen for two years.

7.—2. The *assembly* shall consist of one hundred and twenty-eight members. Art. 3, s. 2.

8. The state shall be divided into assembly districts as provided by the fifth section of the third article of the constitution as follows:

"The members of assembly shall be apportioned among the several counties of this state, by the legislature, as nearly as may be, according to the number of their respective inhabitants, excluding aliens, and persons of color not taxed, and shall be chosen by single districts.

"The several boards of supervisors in such counties of this state, as are now entitled to more than one member of assembly, shall assemble on the first Tuesday of January next, and divide their respective counties into assembly districts equal to the number of members of assembly to which such counties are now severally entitled by law, and shall cause to be filed in the offices of the secretary of state and the clerks of their respective counties, a description of such assembly districts, specifying the number of each district and the population thereof, according to the last preceding state enumeration, as near as can be ascertained. Each assembly district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed, and shall consist of convenient and contiguous territory; but no town shall be divided in the formation of assembly districts.

"The legislature, at its first session after the return of every enumeration, shall re-

apportion the members of assembly among the several counties of this state, in manner aforesaid, and the boards of supervisors in such counties as may be entitled, under such reapportionment, to more than one member, shall assemble at such time as the legislature making such reapportionment shall prescribe, and divide such counties into assembly districts, in the manner herein directed; and the apportionment and districts so to be made, shall remain unaltered until another enumeration shall be taken under the provisions of the preceding section.

"Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of the assembly, and no new county shall be hereafter erected, unless its population shall entitle it to a member.

"The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, be entitled to a member."

9. The members of assembly are elected annually.

10.—§ 2. The fourth article vests the *executive* power as follows:

"Sect. 1. The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant governor shall be chosen at the same time, and for the same term.

"Sect. 2. No person except a citizen of the United States, shall be eligible to the office of governor; nor shall any person be eligible to that office, who shall not have attained the age of thirty years, and who shall not have been five years next preceding his election, a resident within this state.

"Sect. 3. The governor and lieutenant governor shall be elected at the times and places of choosing members of the assembly. The persons respectively having the highest number of votes for governor and lieutenant governor, shall be elected; but in case two or more shall have an equal and the highest number of votes for governor, or for lieutenant governor, the two houses of the legislature at its next annual session, shall, forthwith, by joint ballot, choose one of the said persons so having an equal and the highest number of votes for governor or lieutenant governor.

"Sect. 4. The governor shall be commander-in-chief of the military and naval

forces of the state. He shall have power to convene the legislature (or the senate only) on extraordinary occasions. He shall communicate by message to the legislature at every session, the condition of the state, and recommend such matters to them as he shall judge expedient. He shall transact all necessary business with the officers of government, civil and military. He shall expedite all such measures, as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed. He shall, at stated times, receive for his services, a compensation to be established by law, which shall neither be increased nor diminished after his election and during his continuance in office.

"Sect. 5. The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation or pardon granted; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.

"Sect. 6. In case of the impeachment of the governor, of his removal from office, death, inability to discharge the powers and duties of the said office, resignation or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the state.

"Sect. 7. The lieutenant governor shall possess the same qualifications of eligibility for office as the governor. He shall be president of the senate, but shall have only a casting vote therein. If during a vacancy of the office of governor, the lieutenant

governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president of the senate shall act as governor, until the vacancy be filled, or the disability shall cease.

"Sect. 8. The lieutenant governor shall, while acting as such, receive a compensation which shall be fixed by law, and which shall not be increased or diminished during his continuance in office.

"Sect. 9. Every bill which shall have passed the senate and assembly, shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it with his objections to that house in which it shall have originated; who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered: and if approved by two-thirds of all the members present, it shall become a law, notwithstanding the objections of the governor. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return; in which case it shall not be a law."

11.—§ 3. The sixth article distributes the *judicial* power as follows:

"Sect. 1. The assembly shall have the power of impeachment, by the vote of a majority of all the members elected. The court for the trial of impeachments, shall be composed of the president of the senate, the senators, or a major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court. No judicial officer shall exercise his office after he shall have been impeached, until he shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation, truly and impartially to try the impeachment, accord-

ing to evidence; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment, in cases of impeachment, shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment, and punishment according to law.

"Sect. 2. There shall be a court of appeals, composed of eight judges, of whom four shall be elected by the electors of the state for eight years, and four selected from the class of justices of the supreme court, having the shortest time to serve. Provision shall be made by law, for designating one of the number elected, as chief judge, and for selecting such justices of the supreme court, from time to time, and for so classifying those elected, that one shall be elected every second year.

"Sect. 3. There shall be a supreme court having general jurisdiction in law and equity.

"Sect. 4. The state shall be divided into eight judicial districts, of which the city of New York shall be one: the others to be bounded by county lines, and to be compact, and equal in population, as nearly as may be. There shall be four justices of the supreme court in each district, and as many more in the district composed of the city of New York, as may from time to time be authorized by law, but not to exceed in the whole such number in proportion to its population, as shall be in conformity with the number of such judges in the residue of the state in proportion to its population. They shall be classified so that one of the justices of each district shall go out of office at the end of every two years. After the expiration of their terms under such classification, the term of their office shall be eight years.

"Sect. 5. The legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity, as they have heretofore possessed.

"Sect. 6. Provisions may be made by law for designating, from time to time, one or more of the said justices, who is not a judge of the court of appeals, to preside at the general terms of the said court to be held in the several districts. Any three or more of the said justices, of whom one of the said justices so designated shall always be one, may hold such general terms. And

any one or more of the justices may hold special terms and circuit courts, and any one of them may preside in courts of oyer and terminer in any county.

"Sect. 7. The judges of the court of appeals and justices of the supreme court, shall severally receive, at stated times, for their services, a compensation to be established by law, which shall not be increased or diminished during their continuance in office.

"Sect. 8. They shall not hold any other office or public trust. All votes for either of them, for any elective office, (except that of justice of the supreme court, or judge of the court of appeals,) given by the legislature or the people, shall be void. They shall not exercise any power of appointment to public office. Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state.

"Sect. 9. The classification of the justices of the supreme court; the times and place of holding the terms of the court of appeals, and of the general and special terms of the supreme court within the several districts, and the circuit courts and courts of oyer and terminer within the several counties, shall be provided for by law.

"Sect. 10. The testimony in equity cases shall be taken in like manner as in cases at law.

"Sect. 11. Justices of the supreme court and judges of the court of appeals, may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to the assembly, and a majority of all the members elected to the senate, concur therein. All judicial officers, except those mentioned in this section, and except justices of the peace, and judges and justices of inferior courts not of record, may be removed by the senate, on the recommendation of the governor: but no removal shall be made by virtue of this section, unless the cause thereof be entered on the journals, nor unless the party complained of, shall have been served with a copy of the complaint against him, and shall have had an opportunity of being heard in his defence. On the question of removal, the ayes and noes shall be entered on the journals.

"Sect. 12. The judges of the court of appeals shall be elected by the electors of

the state, and the justices of the supreme court by the electors of the several judicial districts, at such times as may be prescribed by law.

"Sect. 13. In case the office of any judge of the court of appeals, or justice of the supreme court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the governor, until it shall be supplied at the next general election of judges, when it shall be filled by election, for the residue of the unexpired term.

"Sect. 14. There shall be elected in each of the counties of this state, except the city and county of New York, one county judge, who shall hold his office for four years. He shall hold the county court, and perform the duties of the office of surrogate. The county court shall have such jurisdiction in cases arising in justices' courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases.

"The county judge, with two justices of the peace, to be designated according to law, may hold courts of sessions, with such criminal jurisdiction as the legislature shall prescribe, and perform such other duties as may be required by law.

"The county judge shall receive an annual salary, to be fixed by the board of supervisors, which shall be neither increased nor diminished during his continuance in office. The justices of the peace for services in courts of sessions, shall be paid a per diem allowance out of the county treasury.

"In counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to perform the duties of the office of surrogate.

"The legislature may confer equity jurisdiction in special cases upon the county judge.

"Inferior local courts, of civil and criminal jurisdiction, may be established by the legislature in cities; and such courts, except for the cities of New York and Buffalo, shall have an uniform organization and jurisdiction in such cities.

"Sect. 15. The legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge

the duties of county judge and of surrogate in cases of their inability, or of a vacancy, and to exercise such other powers in special cases as may be provided by law.

"Sect. 16. The legislature may reorganize the judicial districts at the first session after the return of every enumeration under this constitution, in the manner provided for in the fourth section of this article, and at no other time; and they may, at such session, increase or diminish the number of districts, but such increase or diminution shall not be more than one district at any one time. Each district shall have four justices of the supreme court; but no diminution of the districts shall have the effect to remove a judge from office.

"Sect. 17. The electors of the several towns shall, at their annual town meeting, and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts, not of record, and their clerks, may be removed, (after due notice and an opportunity of being heard in their defence) by such county, city or state courts as may be prescribed by law, for causes to be assigned in the order of removal.

"Sect. 18. All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such manner as the legislature may direct.

"Sect. 19. The clerks of the several counties of this state shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law. A clerk for the court of appeals, to be ex-officio clerk of the supreme court, and to keep his office at the seat of government, shall be chosen by the electors of the state; he shall hold his office for three years, and his compensation shall be fixed by law and paid out of the public treasury.

"Sect. 20. No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office.

"Sect. 21. The legislature may authorize the judgments, decrees and decisions of any local inferior court of record of original civil jurisdiction, established in a city, to be

removed for review directly into the court of appeals.

"Sect. 22. The legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person.

"Sect. 23. Tribunals of conciliation may be established, with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment to be obligatory on the parties, except they voluntarily submit their matters in difference and agree to abide the judgment, or assent thereto, in the presence of such tribunal, in such cases as shall be prescribed by law."

"Sect. 25. The legislature, at its first session after the adoption of this constitution, shall provide for the organization of the court of appeals, and for transferring to it the business pending in the court for the correction of errors, and for the allowance of writs of error and appeals to the court of appeals, from the judgments and decrees of the present court of chancery and supreme court, and of the courts that may be organized under this constitution."

12. The sixth article, section 24, provides that the legislature, at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this state, and to report thereon to the legislature, subject to their adoption and modification from time to time.

13. In pursuance of the provisions of this section, commissioners were appointed to revise the laws on the subject of the practice, pleadings and proceedings of the courts of this state, who made a report to the legislature. This report, with some alterations, was enacted into a law on the 12th of April, 1848, ch. 379, by which the forms of action are abolished, and the whole subject is extremely simplified. How it will work in practice, time will make manifest.

NEWLY DISCOVERED EVIDENCE.
That evidence which, after diligent search for it, was not discovered until after the trial of a cause.

2. In general a new trial will be granted on the ground that new, important, and

material evidence has been discovered since the trial of the cause. 2 Wash. C. C. 411. But this rule must be received with the following qualifications: 1. When the evidence is merely cumulative, it is not sufficient ground for a new trial. 1 Sumn. 451; 6 Pick. 114; 4 Halst. 228; 2 Caines, 129; 4 Wend. 579; 1 A. K. Marsh. 151; 8 John. 84; 15 John. 210; 5 Ham. 375; 10 Pick. 16; 7 W. & S. 415; 11 Ohio, 147; 1 Scamm. 490; 1 Green, 177; 5 Pike, 403; 1 Ashm. 141; 2 Ashm. 69; 3 Verm. 72; 3 A. K. Marsh. 104. 2. When the evidence is not material. 5 S. & R. 41, 1 P. A. Browne, Appx. 71; 1 A. K. Marsh. 151. 3. The evidence must be discovered after the trial, for if it be known before the verdict has been rendered, it is not newly discovered. 2 Sumn. 19; 7 Cowen, 369; 2 A. K. Marsh. 42. 4. The evidence must be such, that the party could not by due diligence have discovered it before trial. 2 Binn. 582; 1 Misso. 49; 5 Halst. 250; 1 South. 338; 7 Halst. 225; 1 Blackf. 367; 11 Con. 15; 1 Bay, 263, 491; 4 Yeates, 446; 2 Fairf. 218; 7 Metc. 478; Dudl. G. Rep. 85; 9 Shepl. 246; 14 Verm. 414, 558; 2 Ashm. 41, 69; 6 Mis. 600; 2 Pike, 133; 7 Yerg. 432; 6 Blackf. 496; 1 Harr. 410.

NEWSPAPERS. Papers for conveying news, printed and distributed periodically.

2. To encourage their circulation the act of congress of March 3, 1825, 3 Story's L. U. S. 1994, enacts,

§ 29. That every printer of newspapers may send one paper to each and every other printer of newspapers within the United States, free of postage, under such regulations as the postmaster general shall provide.

3.—§ 30. That all newspapers conveyed in the mail shall be under cover, open at one end, and charged with the postage of one cent each, for any distance not more than one hundred miles, and one and a half cents for any greater distance: Provided, That the postage of a single newspaper, from any one place to another, in the same state, shall not exceed one cent, and the postmaster general shall require those who receive newspapers by post, to pay always the amount of one quarter's postage in advance; and should the publisher of any newspaper, after being three months previously notified that his paper is not taken out of the office, to which it is sent for delivery, continue to forward such paper

in the mail, the postmaster to whose office such paper is sent, may dispose of the same for the postage, unless the publisher shall pay it. If any person employed in any department of the post office, shall improperly detain, delay, embezzle, or destroy any newspaper, or shall permit any other person to do the like, or shall open or permit any other to open, any mail, or packet of newspapers, not directed to the office where he is employed, such offender shall, on conviction thereof, forfeit a sum, not exceeding fifty dollars, for every such offence. And if any other person shall open any mail or packet of newspapers, or shall embezzle or destroy the same, not being directed to such person, or not being authorized to receive or open the same, such offender shall, on the conviction thereof, pay a sum not exceeding twenty dollars for every such offence. And if any person shall take, or steal, any packet, bag, or mail of newspapers, from, or out of any post office, or from any person having custody thereof, such person shall, on conviction, be imprisoned, not exceeding three months, for every such offence, to be kept at hard labor during the period of such imprisonment. If any person shall enclose or conceal a letter, or other thing, or any memorandum in writing, in a newspaper, pamphlet, or magazine, or in any package of newspapers, pamphlets, or magazines, or make any writing or memorandum thereon, which he shall have delivered into any post office, or to any person for that purpose, in order that the same may be carried by post, free of letter postage, he shall forfeit the sum of five dollars for every such offence; and the letter, newspaper, package, memorandum, or other thing, shall not be delivered to the person to whom it is directed, until the amount of single letter postage is paid for each article of which the package is composed. No newspapers shall be received by the postmasters, to be conveyed by post, unless they are sufficiently dried and enclosed in proper wrappers, on which, besides the direction, shall be noted the number of papers which are enclosed for subscribers, and the number for printers: Provided, That the number need not be endorsed, if the publisher shall agree to furnish the postmaster, at the close of each quarter, a certified statement of the number of papers sent in the mail, chargeable with postage. The postmaster general, in any contract he may enter into for the conveyance of the

mail, may authorize the person with whom such contract is to be made, to carry newspapers, magazines, and pamphlets, other than those conveyed in the mail: Provided, That no preference shall be given to the publisher of one newspaper over that of another, in the same place. When the mode of conveyance, and size of the mail, will admit of it, such magazines and pamphlets as are published periodically, may be transported in the mail, to subscribers, at one and a half cents a sheet, for any distance not exceeding one hundred miles, and two and a half cents for any greater distance. And such magazines and pamphlets as are not published periodically, if sent in the mail, shall be charged with a postage of four cents on each sheet, for any distance not exceeding one hundred miles, and six cents for any greater distance.

By the act of March 3, 1851, c. 20, s. 2, it is enacted, That all newspapers not exceeding three ounces in weight sent from the office of publication to actual and *bona fide* subscribers, shall be charged with postage as follows, to wit: weekly only, within the county where published, free; for any distance not exceeding fifty miles out of the county, five cents per quarter; exceeding fifty, and not exceeding three hundred miles, ten cents per quarter; exceeding three hundred and not exceeding one thousand miles, fifteen cents per quarter; exceeding one thousand and not exceeding two thousand miles, twenty cents per quarter; exceeding two thousand and not exceeding four thousand, twenty-five cents per quarter; exceeding four thousand miles, thirty cents per quarter; newspapers published monthly, sent to actual and bona fide subscribers, one-fourth the foregoing rates; published semi-monthly, one-half the foregoing rates; semi-weekly, double those rates; tri-weekly, treble those rates; and oftener than tri-weekly, five times those rates; Provided, That newspapers not containing over three hundred square inches may be transmitted at one-fourth the above rates. See, as to other newspapers, *Postage*.

NEXT FRIEND. One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*. Vide *Amy*; *Prochein Amy*.

NEXT OF KIN. This term is used to signify the relations of a party who has died intestate.

2. In general no one comes within this

term who is not included in the provisions of the statutes of distribution. 3 Atk. 422, 761; 1 Ves. sen. 84. A wife cannot, in general, claim as next of kin of her husband, nor a husband as next of kin of his wife. But when there are circumstances in a will which induce a belief of an intention to include them under this term, they will be so considered, though in the ordinary sense of the word, they are not. *Hov. Fr.* 288, 9; 1 My. & Keen, 82. Vide *Branch*; *Kindred*; *Line*.

NEXUM, Rom. civ. law. Viewed as to its object and legal effect, nexum was either the transfer of the ownership of a thing, or the transfer of a thing to a creditor as a security. Accordingly in one sense nexum included *mancipium*, in another sense *mancipium* and *nexum* are opposed in the same way in which sale and mortgage or pledge are opposed. The formal part of both transactions consisted in a transfer per *aes et libram*. The person who became nexum by the effect of a nexum, placed himself in a servile condition, not becoming a slave, his ingenuitas being only in suspense, and was said nexum inire. The phrases *nexi datio*, *nexi liberatio*, respectively express the contracting and the release from the obligation.

2. The Roman law, as to the payment of borrowed money, was very strict. A curious passage of Gellius (xx. 1) gives us the ancient mode of legal procedure in the case of debt as fixed by the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *iudex*, he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus injectio*, and ultimately to be assigned over to the creditor (*addictus*) by the sentence of the *praetor*. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor, on three *nundinae*, and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or put him to death. If there were several debtors, the letter of the law allowed them to cut the debtor in pieces, and take their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might treat the debtor, who was *addictus*, as a slave, and compel him to work-out his debt, and the treatment was often very severe

In this passage Gellius does not speak of nexi but only of addicti, which is sometimes alleged as evidence of the identity of nexus and addictus, but it proves no such identity. If a nexus is what he is here supposed to be, the laws of the Twelve Tables could not apply; for when a man became nexus with respect to one creditor, he could not become nexus to another; and if he became nexus to several at once, in this case the creditors must abide by their contract in taking a joint security. This law of the Twelve Tables only applied to the case of a debtor being assigned over by a judicial sentence to several debtors, and it provided for a settlement of their conflicting claims. The precise condition of a nexus has, however, been a subject of much discussion among scholars. Smith, Dict. Rom. & Gr. Antiq. h. v., and vide *Mancipium*.

NIECE, domestic relations. The daughter of a person's brother or sister. Amb. 514; 1 Jacob's Ch. R. 207.

NIEF, old Eng. law. A woman born in vassalage. In Latin she was called *Nativa*.

NIENT COMPRISE. Not included. It is an exception taken to a petition, because the thing desired is not contained in that deed or proceeding whereon the petition is founded. Toml. Law Dict.

NIENT CULPABLE. Not guilty; the name of a plea used to deny any charge of a criminal nature, or of a tort.

NIENT DEDIRE. To say nothing.

2. These words are used to signify that judgment be rendered against a party, because he does not deny the cause of action, i. e. by default.

3. When a fair and impartial trial cannot be had in the county where the venue is laid, the practice in the English courts is, on an affidavit of the circumstances, to change it in transitory actions; or in local actions they will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in another county. 1 Tidd's Pr. 655, 8th ed.

NIENT LE FAIT, pleading. The same as *non est factum*, a plea by which the defendant asserts that the deed declared upon is not his deed.

NIGHT. That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which, by its light, the countenance of a man may be discerned. 1 Hale, P. C.

550; 3 Inst. 63; 4 Bl. Com. 224; 1 Hawk. P. C. 101; 3 Chit. Cr. Law, 1093; 2 Leach, 710; Bac. Ab. Burglary, D; 2 East, P. C. 509; 2 Russ. Cr. 32; Rosc. Cr. Ev. 278; 7 Dane's Ab. 134.

NIGHT WALKERS. Persons who sleep by day and walk by night; 5 E. III. c. 14; that is, persons of suspicious appearance and demeanor, who walk by night.

2. Watchmen may undoubtedly arrest them, and it is said that private persons may also do so. 2 Hawk. P. C. 120; but see 3 Taunt. 14; Ham. N. P. 135. Vide 15 Vin. Ab. 555; Dane's Ab. Index, h. t.

NIHIL CAPIAT PER BREVE, practice. That he take nothing by his writ. This is the judgment against the plaintiff in an action, either in bar or in abatement. When the plaintiff has commenced his proceedings by bill, the judgment is *nilhil capiat per billam*. Co. Litt. 363.

NIHIL DICIT. He says nothing. It is the failing of the defendant to put in a plea or answer to the plaintiff's declaration by the day assigned; and in this case judgment is given against the defendant of course, as he says nothing why it should not. Vide 15 Vin. Ab. 556; Dane's Ab. Index, h. t.

NIHIL HABET. The name of a return made by a sheriff, marshal, or other proper officer, to a *scire facias* or other writ, when he has not been able to serve it on the defendant. 5 Whart. 367.

2. Two returns of *nilhil* are in general equivalent to a service. Yelv. 112; 1 Cowen, 70; 1 Car. Law Repos. 491; 4 Blackf. 188; 2 Binn. 40.

NIL DEBET, pleading. The general issue in debt or simple contract. It is in the following form: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, &c. and says, that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." When, in debt on specialty, the deed is the only inducement to the action, the general issue is *nil debet*. Stephens on Pleading, 174, n.; Dane's Ab. Index, h. t.

NIL HABUIT IN TENEMENTIS, pleading. A plea by which the defendant, who is sued by his landlord in debt for rent upon a lease, but by deed indented, by which he denies his landlord's title to the premises, *that he has no interest in the tenements*. 2 Lill. Ab. 214; 12 Vin. Ab. 184; 15 Vin. Ab. 556;

Woodf. L. & T. 380; Com. Dig. Pleader, 2 W 48; Co. Litt. 47 b; Dane's Ab. Index, h. t.; 3 E. C. L. R. 169, n.; 1 Holt's R. 489.

NISI. This word is frequently used in legal proceedings to denote that something has been done, which is to be valid *unless* something else shall be done within a certain time to defeat it. For example, an order may be made that if on the day appointed to show cause, none be shown, an injunction will be dissolved of course, on motion, and production of an affidavit of service of the order. This is called an *order nisi*. Ch. Pr. 547. Under the compulsory arbitration law of Pennsylvania, on the filing of the award, *judgment nisi* is to be entered: which judgment is to be as valid as if it had been rendered on the verdict of a jury, unless an appeal be entered within the time required by the law.

NISI PRIUS. These words, which signify *unless before*, are the name of a court. The name originated as follows: Formerly, an action was triable only in the court where it was brought. But it was provided by Magna Charta, in case of the subject, that assises of novel disseisin and mort d'ancestor (then the most usual remedies,) should thenceforward instead of being tried at Westminster, in the superior court, be taken in their proper counties; and for this purpose justices were to be sent into every county once a year, to take these assises there. 1 Reeves, 246; 2 Inst. 422, 3, 4. These local trials being found convenient, were applied not only to assises, but to other actions; for, by the statute of 13 Edw. I. c. 30, it is provided as the general course of proceeding, that writs of venire for summoning juries in the superior courts, shall be in the following form. *Præcipimus tibi quod veneri facias coram justiciariis nostris apud Westm. in Octabis Scti Michaelis, nisi talis et talis, tali, die et loco ad partes illas venerint, duodesim, &c.* Thus the trial was to be had at Westminster, only in the event of its not previously taking place in the county, before the justices appointed to take the assises. It is this provision of the statute of Nisi Prius, enforced by the subsequent statute of 14 Ed. III. c. 16, which authorizes, in England, a trial before the justices of assises, in lieu of the superior court, and gives it the name of a *trial by nisi prius*. Steph. Pl. App. xxxiv.; 3 Bl. Com. 58; 1 Reeves, 245, 382; 2 Reeves, 170; 2 Com. Dig. Courts, D b, page 316.

2. Where courts bearing this name exist

in the United States, they are instituted by statutory provision. 4 W. & S. 404.

NISI PRIUS ROLL, Eng. practice. A transcript of a case made from the plea roll, and includes the declaration, plea, replication, rejoinder, &c. and the issue. Eunom. Dial. 2, § 28, 29, p. 110, 111. After the nisi prius roll is returned from the trial, it assumes the name of *postea*. (q. v.)

NO AWARD. The name of a plea to an action or award. 1 Stew. 520; 1 Chip. R. 181; 3 Johns. 367. See *Nul Agard*.

NO BILL. These words are frequently used by grand juries. They are endorsed on a bill of indictment when the grand jury have not sufficient cause for finding a true bill. They are equivalent to *Not found*, (q. v.) or *Ignoramus*. (q. v.) 2 Nott & McC. 558.

NOBILITY. An order of men in several countries to whom privileges are granted at the expense of the rest of the people.

2. The constitution of the United States provides that no state shall "grant any title of nobility; and no person can become a citizen of the United States until he has renounced all titles of nobility." The Federalist, No. 84; 2 Story, Laws U. S. 851.

3. There is not in the constitution any general prohibition against any citizen whomsoever, whether in public or private life, accepting any foreign title of nobility. An amendment of the constitution in this respect has been recommended by congress, but it has not been ratified by a sufficient number of states to make it a part of the constitution. Rawle on the Const. 120; Story, Const. § 1346.

NOLLE PROSEQUI, practice. An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further.

2. A *nolle prosequi* may be entered either in a criminal or a civil case. In criminal cases, a *nolle prosequi* may be entered at any time before the finding of the grand jury, by the attorney general, and generally after a true bill has been found; in Pennsylvania, in consequence of a statutory provision, no *nolle prosequi* can be entered after a bill has been found, without leave of the court, except in cases of assault and battery, fornication and bastardy, on agreement between the parties, or in prosecutions for keeping tippling houses. Act of April 29, 1819, s. 4, 7 Smith's Laws, 227.

3. A *nolle prosequi* may be entered as to one of several defendants. 11 East, R. 307.

4. The effect of a *nolle prosequi*, when obtained, is to put the defendant without day, but it does not operate as an acquittal; for he may be afterwards reindicted, and even upon the same indictment, fresh process may be awarded. 6 Mod. 261; 1 Salk. 59; Com. Dig. Indictment. K; 2 Mass. R. 172.

5. In *civil cases*, a *nolle prosequi* is considered, not to be of the nature of a *retraxit* or release, as was formerly supposed, but an agreement only, not to proceed either against some of the defendants, or as to part of the suit. Vide 1 Saund. 207, note 2, and the authorities there cited. 1 Chit. Pl. 546. A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one, is a satisfaction of all the damages sustained by the plaintiff. 3 T. R. 511; 1 Wils. 98.

6. In *civil cases*, a *nolle prosequi* may be entered as to one of several counts; 7 Wend. 301; or to one of several defendants; 1 Pet. R. 80; as in the case of a joint contract, where one of two defendants pleads infancy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other. 1 Pick. 500. See, generally, 1 Pet. R. 74; see 2 Rawle, 334; 1 Bibb, 337; 4 Bibb, 387, 454; 3 Cowen, 374; 5 Gill & John. 489; 5 Wend. 224; 20 John. 126; 3 Cowen, 335; 12 Wend. 110; 3 Watts, 460.

NOMEN COLLECTIVUM. This expression is used to signify that a word in the singular number is to be understood in the plural in certain cases.

2. Misdemeanor, for example, is a word of this kind, and when in the singular, may be taken as *nomen collectivum*, and including several offences. 2 Barn. & Adolp. 75. *Heir*, in the singular, sometimes includes all the heirs.

NOMEN GENERALISSIMUM. A name which applies generally to a number of things; as, land, which is a general name by which everything attached to the freehold will pass.

NOMINAL. Relating to a name.

2. A nominal plaintiff is one in whose name an action is brought, for the use of another. In this case, the nominal plaintiff has no control over the action, nor is he responsible for costs. 1 Dall. 139; 2 Watts, R. 12.

3. A nominal partner is one, who, with-

out having an actual interest in the profits of a concern, allows his name to be used, or agrees that it shall be continued therein, as a partner; such nominal partner is clearly liable to the creditors of the firm, as a general partner, although the creditors were ignorant at the time of dealing, that his name was used. 2 H. Bl. 242, 246; 1 Esp. R. 31; 2 Campb. 302; 16 East, R. 174; 2 B. & C. 411.

NOMINAL PLAINTIFF. One who is named as the plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought.

2. In general, he cannot interfere with the rights of his assignee, nor will he be permitted to discontinue the action, or to meddle with it. 1 Wheat. R. 233; 1 John. Cas. 411; 3 John. Cas. 242; 1 Johns. R. 582, n.; 3 Johns. R. 426; 11 Johns. R. 47; 12 John. R. 237; 1 Phil. Ev. 90; Cowen's note 172; Greenl. Ev. § 173; 7 Cranch, 152.

NOMINATE CONTRACT, civil law. Nominate contracts are those which have a particular name to distinguish them; as, purchase and sale, hiring, partnership, loan for use, deposit, and the like. Dig. 2, 14, 7, 1. Innominate contracts, (q. v.) are those which have no particular name. Dig. 19, 4, 1, 2; Code, 4, 64, 3.

NOMINATION. This word has several significations. 1. An appointment; as, I nominate A B, executor of this my last will. 2. A proposition; the word nominate is used in this sense in the constitution of the United States, art. 2, s. 2, the president "shall nominate, and by and with the consent of the senate, shall appoint ambassadors," &c.

NOMINE PENÆ, contracts. The name of a penalty incurred by the lessee to the lessor, for the non-payment of rent at the day appointed by the lease or agreement for its payment. 2 Lill. Ab. 221. It is usually a gross sum of money, though it may be any thing else, appointed to be paid by the tenant to the reversioner, if the duties are in arrear, in addition to the duties themselves. Ham. N. P. 411, 412.

2. To entitle himself to the *nomine penæ*, the landlord must make a demand of the rent on the very day, as in the case of a reëntury. 1 Saund. 287 b, note; 7 Co. 28 b; Co. Litt. 202 a; 7 T. R. 117. A distress cannot be taken for a *nomine penæ*, unless a special power to distrain be annexed

to it by deed. 3 Bouv. Inst. n. 2451. Vide Bac. Ab. Rent, K 4; Woodf. L. & T. 253; Tho. Co. Litt. Index, h. t.; Dane's Ab. Index, h. t.

NOMINEE. One who has been named or proposed for an office.

NON. Not. When prefixed to other words, it is used as a negative; as non access, non assumpsit.

NON ACCEPIT. The name of a plea to an action of assumpsit brought against the drawee of a bill of exchange upon a supposed acceptance by him. See 4 Mann. & Gr. 561; S. C. 48 E. C. L. R. 292.

NON ACCESS. The non existence of sexual intercourse is generally expressed by the words "non access of the husband to the wife;" which expressions, in a case of bastardy, are understood to mean the same thing. 2 Stark Ev. 218, n.

2. In Pennsylvania, when the husband has access to the wife, no evidence short of absolute impotence of the husband, is sufficient to convict a third person of bastardy with the wife. 6 Binn. 283.

3. In the civil law the maxim is, *Pater est quem nuptiæ demonstrant*. Toull. tom. 2, n. 787. The Code Napoleon, art. 312, enacts, "que l'enfant conçu pendant le mariage a pour père le mari." See also 1 Browne's R. Appx. xlvii.

4. A married woman cannot prove the non access of her husband. Id. See 8 East, 202; 4 T. R. 251; 11 East, 132; 13 Ves. 58; 8 East, R. 193; 12 East, R. 550; 4 T. R. 251, 336; 11 East, R. 132; 6 T. R. 330.

NON AGE. By this term is understood that period of life from the birth till the arrival of twenty-one years. In another sense it means under the proper age to be of ability to do a particular thing; as, when non age is applied to one under the age of fourteen, who is unable to marry.

NON ASSUMPSIT, pleading. The general issue in trespass on the case, in the species of assumpsit. Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, &c., and says, that he did not undertake or promise, in manner and form as the said A B, hath above complained. And of this he puts himself upon the country."

2. Under this plea almost every matter may be given in evidence, on the ground, it is said, that as the action is founded on the contract, and the injury is the non perfor-

mance of it, evidence which disaffirms the obligation of the contract, at the time when the action was commenced, goes to the gist of the action. Gilb. C. P. 65; Salk. 279; 2 Str. 738; 1 B. & P. 481. Vide 12 Vin. Ab. 189; Com Dig. Pleader, 2 G 1.

NON ASSUMPSIT INFRA SEX ANNOS. The name of a plea by which the defendant avers that he did not assume to perform the assumption charged in the declaration within six years.

2. The act of limitation bars the recovery of a simple contract debt after six years; when a defendant is sued on such a contract, and it is more than six years since he entered into the contract, he pleads this plea by the following formula: "and saith that the aforesaid plaintiff the action aforesaid hereof against him he ought not to have, because he saith that he did not undertake, &c., and this he is ready to verify." Vide *Actio non accrevit infra sex annos*.

NON BIS IN IDEM, civil law. This phrase signifies that *no one shall be twice tried for the same offence*; that is, that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not again be tried. Code 9, 2, 9 & 11. Merl. Répert. h. t. Vide art. *Jeopardy*.

NON CEPIT MODO ET FORMA, pleading. The general issue in replevin. Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, &c., and says, that he did not take the said cattle, (or 'goods and chattels,' according to the subject of the action,) in the said declaration mentioned, or any of them, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

2. This issue applies to a case where the defendant has not, in fact, taken the cattle or goods, or where he did not take them, or have them in the *place* mentioned in the declaration. The declaration alleges that the defendant "took certain cattle or goods of the plaintiff, in a certain place called," &c.; and the general issue states, that he did not take the said cattle or goods, "in manner and form as alleged;" which involves a denial of the taking, and of the place in which the taking was alleged to have been, the *place* being a material point in this action. Steph. Pl. 183, 4; 1 Chit. Pl. 490.

NON CLAIM. An omission or neglect by one entitled to make a demand within the time limited by law; as, when a continual claim ought to be made, a neglect to make such claim within a year and a day.

NON COMPOS MENTIS, persons. These words signify not of sound mind, memory, or understanding. This is a generic term, and includes all the species of madness, whether it arise from, 1, idiocy; 2, sickness; 3, lunacy; or 4, drunkenness. Co. Litt. 247; 4 Co. 124; 1 Phillim. R. 100; 4 Com. Dig. 613; 5 Com. Dig. 186; Shelf. on Lunatics, 1; and the articles *Idiocy; Lunacy*.

NON CONCESSIT, Eng. law. The name of a plea by which the defendant denies that the crown granted to the plaintiff by letters patent, the rights which he claims as a concession from the king; as, for example, when a plaintiff sues another for the infringement of his patent right, the defendant may deny that the crown has granted him such a right.

2. The plea of *non concessit* does not deny the grant of a patent, but of the patent as described in the plaintiff's declaration. 3 Burr. 1544; 6 Co. 15, b.

NON CONFORMISTS, English law. A name given to certain dissenters from the rites and ceremonies of the church of England.

NON CONSTAT. It does not appear. These words are frequently used, particularly in argument; as, it was moved in arrest of judgment that the declaration was not good, because *non constat* whether A B was seventeen years of age when the action was commenced. Sw. pt. 4, § 22, p. 331.

NON CULPABILIS, pleading. Not guilty. (q. v.) It is usually abbreviated *non cul.* 16 Vin. Ab. 1.

NON DAMNIFICATUS, pleading. A plea to an action of debt on a bond of indemnity, by which the defendant asserts that the plaintiff has received no damage; in other words that he is *not damnified*. 1 B. & P. 640, n. a; 1 Taunt. R. 428; 1 Saund. 116, n. 1; 2 Saund. 81; 7 Wentw. Pl. 615, 616; 1 H. Bl. 253; 2 Lill. Ab. 224; 14 John. R. 177; 5 John. R. 42; 20 John. Rep. 153; 3 Cowen, R. 313; 10 Wheat R. 396, 405; 3 Halst. R. 1.

NON DEDIT, pleading. The general issue in formedon. See *Ne dona pas*.

NON DEMISIT, pleading. A plea proper to be pleaded to an action of debt for

rent, when the plaintiff declares on a parol lease. Gilb. Debt, 436, 438; Bull. N. P. 177; 1 Chit. Pl. 477.

2. It is improper to plead such plea when the demise is stated to have been by indenture. Id.; 12 Vin. Ab. 178; Com. Dig. Pleader, 2 W 48.

NON DETINET, pleading. The general issue in an action of detinue. Its form is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, &c., and says, that he does not detain the said goods and chattels (or, 'deeds and writings,' according to the subject of the action,) in the said declaration specified, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

2. In debt on simple contract, in the case of executors and administrators, instead of pleading *nil debet*, the plea should be "doth not detain." 6 East, R. 549; Bac. Abr. Pleas, I; 1 Chit. Pl. 476.

3. The plea of non detinet merely puts in issue the simple fact of detainer; when the defendant relies upon a justifiable detainer, he must plead it specially. 8 D. P. C. 347.

NON EST FACTUM, pleading. The general issue in debt on bond or other specialty, and is, in form, as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, &c., and says, that the said supposed writing obligatory, (or 'indenture,' or 'articles of agreement,' according to the subject of the action,) is not his deed. And of this he puts himself upon the country." 6 Rand. Rep. 86; 1 Litt. R. 158.

2. Though *non est factum* is, in most cases, the general issue in debt on specialty, yet, when the deed is only inducement to the action, the general issue is *nil debet*. Steph. Pl. 174, n.

3. In covenant the general issue is *non est factum*; and its form is similar to that in debt on a specialty. Id. 174. It is, however, said, that in covenant there is, strictly speaking, no general issue, as the plea of *non est factum* only puts the deed in issue, as in debt on a specialty, and not the breach of covenant or any other matter of defence. 1 Chit. Pl. 482. See, generally, 1 Harring. R. 230; 6 Munf. R. 462; Minor, R. 103; 1 Harr. & Gill, 324; 13 John. R. 430; 12 John. R. 337; 2 N. H. Rep. 74; 4 Wend. R. 519; 2 N. &

M. 492. See *Issint*; *Special non est factum*.

NON EST INVENTUS, practice. The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is *not to be found* within his jurisdiction. The return is usually abbreviated *N. E. I.* Chit. Pr. Index, h. t.

NON FEASANCE, torts, contracts. The non-performance of some act which ought to be performed.

2. When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment; as, if a statute require the supervisors of the highways to repair such highways, the neglect to repair them may be punished. Vide 1 Russ. on Cr. 48.

3. Mere non-feasance does not imply malice; this is strongly exemplified in the case of a plaintiff, who, having issued a writ of *capias* against his debtor, afterwards received the debt, and neglected to countermand the writ, in consequence of which the defendant was afterwards arrested. On a suit brought by the former defendant against the former plaintiff, it was held that the law did not impose on the first plaintiff the duty of countermanding his writ. If he had *refused* to give the countermand when requested, it might have been evidence of malice, but in such case there would have been something beyond mere non-feasance, an actual refusal. 1 B & P. 388; 3 East, B. 314; 2 Bos. & P. 129.

4. There is a difference between non-feasance and misfeasance, (q. v.) or malfeasance. (q. v.) Vide 2 Kent, Com. 443; Story on Bailm. § 9, 165; 2 Vin. Ab. 35; 1 Hawk. P. C. 13; Bouv. Inst. Index, h. t.

NON FECIT. He did not make it. The name of a plea, for example, in an action of *assumpsit* on a promissory note. 3 Mann. & Gr. 446.

NON FECIT VASTUM CONTRA PROHIBITIONEM. The name of a plea to an action founded on a writ of *estrepement*, that the defendant did not commit waste contrary to the prohibition. 3 Bl. Com. 226, 227.

NON INFREGIT CONVENTIONEM, pleading. A plea in an action of covenant. This plea is not a general issue, it merely denies that the defendant has broken the covenants on which he is sued. It being in the negative, it cannot be used where the breach is also in the negative. Bac. Ab. Covenant L; 3 Lev. 19; 2 Taunt. 278;

1 Aik. R. 150; 4 Dall. 436; 7 Cowen, R. 71.

NON JOINDER, pleading, practice. The omission of some one of the persons who ought to have been made a plaintiff or defendant along with others is called a non joinder.

2. In actions upon contracts, where the contract has been made with several, if their interest were joint, they must all, if living, join in the action for its breach. 8 S. & R. 308; 10 S. & R. 257; Minor, 167; Hardin, 508. In such case the non joinder must be pleaded in abatement. Id.; 3 Bouv. Inst. n. 2749.

NON JURORS, English law. Persons who refuse to take the oaths, required by law, to support the government. 1 Dall. 170.

NON LIQUET. It is not clear.

NON MODERATE CASTIGAVIT. The name of a faulty replication to a plea of *moderate castigavit*. (q. v.) This replication, in such a case, is a negative pregnant. Gould, Pl. ch. 7, § 37.

NON OBSTANTE, Engl. law. These words, which literally signify *notwithstanding*, are used to express the act of the English king, by which he dispenses with the law, that is, authorizes its violation.

2. He cannot by his license or dispensation make an offence punishable which is *malum in se*; but in certain matters which are *mala prohibita*, he may, to certain persons and on special occasions, grant a *non obstante*. 1 Th. Co. Litt. 76, n. 19; Vaugh. 330 to 359; Lev. 217; Sid. 6, 7; 12 Co. 18; Bac. Ab. Prerogative, D. 7. Vide *Judgment non obstante veredicto*.

NON OBSTANTE VEREDICTO. Notwithstanding the verdict. See *Judgment non obstante veredicto*.

NON OMITTAS, English practice. The name of a writ directed to the sheriff Where the bailiff of a liberty or franchise, who has the return of writs, neglects or refuses to serve a process, this writ issues commanding the sheriff to enter into the franchise and execute the process himself, or by his officer, *non omittas propter aliquam libertatem*. For the despatch of business a *non omittas* is commonly directed in the first instance. 3 Chit. Pr. 190, 310.

NON PROS, or NON PROSEQUITUR. The name of a judgment rendered against a plaintiff for neglecting to prosecute his suit agreeably to law and the rules of the court. Vide Grah. Pr. 763; 3 Chit. Pr.

910; 1 Sell. Pr. 359; 1 Penna. Pr. 84; Caines' Pr. 102; 2 Arch. Pr. 204; and article *Judgment of Non Pros.*

NON RESIDENCE, *eccles. law.* The absence of spiritual persons from their benefices.

NON SUBMISSIT. The name of a plea to an action of debt or a bond to perform an award, by which the defendant pleads that he did not submit. Bac. Ab. Arbitr. &c., G.

NON SUM INFORMATUS, *pleading.* I am not informed. Vide *Informatus non sum.*

NON TENENT INSIMUL, *pleadings.* A plea to an action in partition, by which the defendant denies that he holds the property, which is the subject of the suit, together with the complainant or plaintiff.

NON TENUIT. He did not hold. The name of a plea in bar in replevin, when the plaintiff has avowed for rent arrear, by which the plaintiff avows that he did not hold in manner and form as the avowry alleges.

NON TENURE, *pleading.* A plea in a real action, by which the defendant asserted, that he did not hold the land, or at least some part of it, as mentioned in the plaintiff's declaration. 1 Mod. 250.

2. Non tenure is either a plea in bar or a plea in abatement. 14 Mass. 239; but see 11 Mass. 216. It is in bar, when the plea goes to the *tenure*, as when the tenant denies that he holds of the defendant, and says he holds of some other person. But when the plea goes to the tenancy of the land, as when the defendant pleads that he is not the tenant of the land, it is in abatement only. Id.: Bac. Ab. Pleas, &c., I 9.

NON TERM. The vacation between two terms of a court.

NON USER. The neglect to make use of a thing.

2. A right which may be acquired by use, may be lost by non-user, and an absolute discontinuance of the use for twenty years affords presumption of the extinguishment of the right, in favor of some other adverse right. 5 Whart. Rep. 584; 23 Pick. 141.

3. As an enjoyment for twenty years is necessary to found the presumption of a grant of an easement, the general rule is, there must be a similar non-user to raise the presumption of a release. But in this case the owner of the servient premises must have done some act inconsistent with,

or adverse to the existence of the right. See 2 Evans's Pothier, 136; 10 Mass. R. 183; 3 Campbl. R. 514; 3 Kent, Com. 359; 1 Chit. Pr. 284, 285, 757 to 759, n. (s); 1 Ves. jr. 6, 8; 2 Supp. to Ves. jr. 442; 2 Anstr. 603; S. C. on appeal, 1 Dowl. R. 816; 4 Ad. & Ell 369; 6 Nev. & M. 230. But the dereliction or abandonment of rights affecting lands is not in all cases held to be evidenced by mere non-user.

4. As an exception to the rule may be mentioned rights to mines and minerals, with the incidental privilege of boring and working them. 16 Ves. 390; 19 Ves. 156.

5. In the civil law there is a similar doctrine: on this subject, vide Dig. 8, 6, 5; Voet, Com. ad Pand. lib. 8, tit. 6, s. 5 et 7; 3 Toull. n. 678; Merl. Répert. mot Servitude, § 30, n. 6, and § 33; Civ. Code of Louis. art. 815, 816.

6. Every public officer is required to use his office for the public good; a non-user of a public office is therefore a sufficient cause of forfeiture. 2 Bl. Com. 153; 9 Co. 50. *Non user*, for a great length of time, will have the effect of repealing an old law. But it must be a very strong case which will have that effect. 18 S. & R. 452; 1 Bouv. Inst. n. 94.

NONSENSE, *construction.* That which in a written agreement or will is unintelligible.

2. It is a rule of law that an instrument shall be so construed that the whole, if possible, shall stand. When a matter is written grammatically right, but it is unintelligible, and the whole makes nonsense, some words cannot be rejected to make sense of the rest; 1 Salk. 324; but when matter is nonsense by being contrary and repugnant to some precedent sensible matter, such repugnant matter is rejected. Ib.; 15 Vin. Ab. 560; 14 Vin. Ab. 142. The maxim of the civil law on this subject agrees with this rule: *Quæ in testamento ita sunt scripta, ut intelligi non possent: perinde sunt, ac si scripta non essent.* Dig. 50, 17, 73, 3. Vide articles *Ambiguity; Construction; Interpretation.*

3. In pleading, when matter is nonsense by being contradictory and repugnant to something precedent, the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected; as in ejectment where the declaration is of a demise on the *second* day of January, and that the

defendant *postea scilicet*, on the first of January, ejected him; here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter. 5 East, 255; 1 Salk. 324.

NONSUIT. The name of a judgment given against a plaintiff, when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.

2. It is either voluntary or involuntary.

3. A voluntary nonsuit is an abandonment of his cause by a plaintiff, and an agreement that a judgment for costs be entered against him.

4. An involuntary nonsuit takes place when the plaintiff on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence upon which a jury could find a verdict. 13 John. R. 334.

5. The courts of the United States; 1 Pet. S. C. R. 469, 476; those of Pennsylvania; 1 S. & R. 360; 2 Binn. R. 234, 248; 4 Binn. R. 84; Massachusetts; 6 Pick. R. 117; Tennessee; 2 Overton, R. 57; 4 Yerg. R. 528; and Virginia; 1 Wash. R. 87, 219; cannot order a nonsuit against a plaintiff who has given evidence of his claim. In Alabama, unless authorized by statute, the court cannot order a nonsuit. Minor, R. 75; 3 Stew. R. 42.

6. In New York; 13 John. R. 334; 1 Wend. R. 376; 12 John. R. 299; South Carolina; 2 Bay, R. 126, 445; 2 Bailey, R. 321, 2 McCord, R. 26; and Maine; 2 Greenl. R. 5; 3 Greenl. R. 97; a nonsuit may in general be ordered where the evidence is insufficient to support the action. Vide article *Judgment of Nonsuit*, and Grah. Pr. 269; 3 Chit. Pr. 910; 1 Sell. Pr. 463; 1 Arch. Pr. 787; Rac. Ab. h. t.; 15 Vin. Ab. 560.

NORTH CAROLINA. The name of one of the original states of the United States of America. The territory which now forms this state was included in the grant made in 1663 by Charles II. to Lord Clarendon and others, of a much more extensive country. The boundaries were enlarged by a new charter granted by the same prince to the same proprietaries, in the year 1665. By this charter the proprietaries were authorized to make laws, with the assent of the freemen of the province or their delegates, and they were invested with various other powers. Being dissatisfied

with the form of government, the proprietaries procured the celebrated John Locke to draw a plan of government for the colony, which was adopted and proved to be impracticable; it was highly exceptionable on account of its disregard of the principles of religious toleration and national liberty, which are now universally admitted. After a few years of unsuccessful operation it was abandoned. The colony had been settled at two points, one called the Northern and the other the Southern settlement, which were governed by separate legislatures. In 1729, the proprietaries surrendered their charter, when it became a royal province, and was governed by a commission and a form of government in substance similar to that established in other royal provinces. In 1732, the territory was divided, and the divisions assumed the names of North Carolina and South Carolina.

2. The constitution of North Carolina was adopted December 18, 1776. To this constitution amendments were made in convention, June 4, 1835, which were ratified by the people on the 9th day of November of the same year, and took effect on the 1st day of January, 1836.

3. The powers of the government are distributed into three branches, the legislative, the executive, and the judiciary.

4.—§ 1. The *legislative* power is vested in a senate and in a house of commons, and both are denominated the general assembly. These will be separately considered.

5.—1st. In treating of the *senate*, it will be proper to take a view of, 1. The qualifications of senators. 2. Of electors of senators. 3. Of the number of senators. 4. Of the time for which they are elected.

6.—1. The first article, section 3, of the amendments, provides: All freemen of the age of twenty-one years, (except as is hereinafter declared,) who have been inhabitants of any one district within the state twelve months immediately preceding the day of any election, and possessed of a freehold within the same district of fifty acres of land, for six months next before and at the day of election, shall be entitled to vote for a member of the senate; consequently no free negro or free person of mixed blood, descended from negro ancestors to the fourth generation inclusive, can be a senator, as such persons cannot be voters. The 4th article, sec. 2, of the amendments, declares that no person who shall deny the being of God, or the truth of the Christian

religion, or the divine authority of the Old or New Testament, or who shall hold religious principles incompatible with the freedom or safety of the state, shall be capable of holding any office or place of trust or profit in the civil department within this state. And the fourth section of the article directs that no person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly: Provided, that nothing herein contained shall extend to officers in the militia or justices of the peace. The 31st section of the constitution provides that no clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the senate, house of commons, or council of state, while he continues in the exercise of his pastoral function. 2. The first article of the amendments, provides, section 3, § 2, that all free men of the age of twenty-one years, (except as hereinafter declared,) who have been inhabitants of any one district within the state twelve months immediately preceding the day of any election, and possessed of a freehold within the same district of fifty acres of land, for six months next before and at the day of election, shall be entitled to vote for a member of the senate. And § 3, no negro, free mulatto, or free person of mixed blood, descended from negro ancestors to the fourth generation inclusive, (though one ancestor of each generation may have been a white person,) shall vote for members of the senate or house of commons. 3. The senate consists of fifty representatives. Amendm. art. 1, s. 1. 4. They are chosen biennially by ballot. Id.

7.—2d. The *house of commons* will be considered in the same order which has been observed in speaking of the senate. 1. The sixth section of the constitution requires that each member of the house of commons shall have usually resided in the county in which he is chosen for one year immediately preceding his election, and for six months shall have possessed, and continue to possess, in the county which he represents, not less than one hundred acres of land in fee, or for the term of his own life. The disqualifications of persons for

membership in the house of commons will be found ante, under the head senate. 2. The qualifications of voters for members of the house of commons are, by sect. 8 of the constitution, that all freemen of the age of twenty-one years, who have been inhabitants of any one county within the state twelve months immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the house of commons, for the county in which he resides. And by § 9, that all persons possessed of a freehold, in any town in this state, having a right of representation, and also all freemen, who have been inhabitants of any such town twelve months next before, and at the day of election, and shall have paid public taxes, shall be entitled to vote for a member to represent such town in the house of commons; Provided, always, that this section shall not entitle any inhabitant of such town to vote for members of the house of commons for the county in which he may reside; nor any freeholder in such county, who resides without or beyond the limits of such town, to vote for a member of the said town. But mulattoes, or persons of a mixed blood, are not voters. Amendm. art. 1, sect. 3, § 3. 3. The Amendments, article 1, section 1, §§ 2, 3, and 4, direct how the house of commons shall be composed, as follows: The house of commons shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by counties according to their federal population; that is, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons; and each county shall have at least one member in the house of commons, although it may not contain the requisite ratio of population. This apportionment shall be made by the general assembly, at the respective times and periods when the districts for the senate are hereinbefore directed to be laid off; and the said apportionment shall be made according to an enumeration to be ordered by the general assembly, or according to the census which may be taken by order of congress, next preceding the making such apportionment. In making the apportionment in the house of commons, the ratio of representation shall be ascertained by dividing the amount

of federal population in the state, after deducting that comprehended within those counties which do not severally contain the one hundred and twentieth part of the entire federal population aforesaid, by the number of representatives less than the number assigned to the said counties. To each county containing the said ratio, and not twice the said ratio, there shall be assigned one representative; to each county containing twice, but not three times the said ratio, there shall be assigned two representatives, and so on progressively; and then the remaining representatives shall be assigned severally to the counties having the largest fractions. 4. They are elected biennially.

8.—§ 2. The executive power is regulated by the amendments of the constitution, article 2, as follows, namely: § 1. The governor shall be chosen by the qualified voters for the members of the house of commons, at such time and places as members of the general assembly are elected. § 2. He shall hold his office for the term of two years from the time of his installation, and until another shall be elected and qualified; but he shall not be eligible more than four years in any term of six years. § 3. The returns of every election for governor shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the speaker of the senate, who shall open and publish them in the presence of a majority of the members of both houses of the general assembly. The person having the highest number of votes shall be governor; but if two or more shall be equal and highest in votes, one of them shall be chosen governor by joint vote of both houses of the general assembly. § 4. Contested elections for governor shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law. § 5. The governor elect shall enter on the duties of the office on the first day of January next after his election, having previously taken the oath of office in the presence of the members of both branches of the general assembly, or before the chief justice of the supreme court, who, in case the governor elect should be prevented from attendance before the general assembly, by sickness or other unavoidable cause, is authorized to administer the same.

9.—§ 3. The judicial powers are vested in supreme courts of law and equity, courts of admiralty, and justices of the peace.

NOSOCOMI, *civil law*. Persons who have the management and care of hospitals for paupers. Clef Lois Rom. mot Administrateurs.

NOT FOUND. These words are endorsed on a bill of indictment by a grand jury, when they have not sufficient evidence to find a true bill; the same as Ignoramus. (q. v.)

NOT GUILTY, *pleading*. The general issue in several sorts of actions. It is the general issue.

2. In *trespass*, its form is as follows: "And the said C D, by E F, his attorney, comes and defends the force and injury, when, &c., and says, that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in the manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

3. Under this issue the defendant may give in evidence any matter which directly controverts the truth of any allegation, which the plaintiff on such general issue will be bound to prove; 1 B. & P. 213; and no person is bound to justify who is not, *prima facie*, a trespasser. 2 B. & P. 359; 2 Saund. 284, d. For example, the plea of not guilty is proper in trespass to *persons*, if the defendant have committed no assault, battery, or imprisonment, &c.; and in trespass to *personal* property, if the plaintiff had no property in the goods, or the defendant were not guilty of taking them, &c.; and in trespass to *real* property, this plea not only puts in issue the fact of trespass, &c., but also the title, which, whether freehold or possessory in the defendant, or a person under whom he claims, may be given in evidence under it, which matters show, *prima facie*, that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the person under whom he justifies. 8 T. R. 403; 7 T. R. 354; Willes, 222; Steph. Pl. 178; 1 Chit. Pl. 491, 492.

4. In *trespass on the case in general*, the formula is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury when, &c., and says, that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above complained. And of this the said C D puts himself on the country."

5. This, it will be observed, is a mere traverse, or denial, of the facts alleged in

the declaration; and therefore, on principle, should be applied only to cases in which the defence rests on such denial. But here a relaxation has taken place, for under this plea, a defendant is permitted not only to contest the truth of the declaration, but with some exceptions, to prove any matter of defence, that tends to show that the plaintiff has no cause of action, though such matters be in confession and avoidance of the declaration; as, for example, a release given, or satisfaction made. Steph. Pl. 182-3; 1 Chit. Pl. 486.

6. In *trover*. It is not usual in this action to plead any other plea, except the statute of limitations; and a release, and the bankruptcy of the plaintiff, may be given in evidence under the general issue. 7 T. R. 391.

7. In *debt* on a judgment suggesting a *devastavit*, an executor may plead not guilty. 1 T. R. 462.

8. In *criminal cases*, when the defendant wishes to put himself on his trial, he pleads not guilty.

NOT POSSESSED. A plea sometimes used in actions of *trover*, when the defendant was not possessed of the goods at the commencement of the action. 3 Mann. & Gr. 101, 103.

NOTARY or NOTARY PUBLIC. An officer appointed by the executive, or other appointing power, under the laws of different states.

2. Their duties are generally prescribed by such laws. The most usual of which are, 1. To attest deeds, agreements and other instruments, in order to give them authenticity. 2. To protest notes, bills of exchange, and the like. 3. To certify copies of agreements and other instruments.

3. By act of congress, Sept. 16, 1850, Minot's Statutes at Large, U. S. 458, it is enacted, That, in all cases in which, under the laws of the United States, oaths, or affirmations, or acknowledgments may now be taken or made before any justice or justices of the peace of any state or territory, such oaths, affirmations, or acknowledgments may be hereafter also taken or made by or before any notary public duly appointed in any state or territory, and, when certified under the hand and official seal of such notary, shall have the same force and effect as if taken or made by or before such justice or justices of the peace. And all laws and parts of laws for punishing perjury, or subornation of perjury, com-

mitted in any such oaths or affirmations, when taken or made before any such justice of the peace, shall apply to any such offence committed in any oaths or affirmations which may be taken under this act before a notary public, or commissioner, as hereinafter named: *Provided always*, That on any trial for either of these offences, the seal and signature of the notary shall not be deemed sufficient in themselves to establish the official character of such notary, but the same shall be shown by other and proper evidence.

4. Notaries are of very ancient origin; they were well known among the Romans, and exist in every state of Europe, and particularly on the continent.

5. Their acts have long been respected by the custom of merchants and by the courts of all nations. 6 Toull. n. 211, note. Vide, generally, Chit. Bills, Index, h. t.; Chit. Pr. Index, h. t.; Burn's Eccl. Law, h. t.; Bro. Off. of a Not. *passim*; 2 Har. & John. 396; 7 Verm. 22; 8 Wheat. 326; 6 S. & R. 484; 1 Mis. R. 434.

NOTE, estates, cons., practice. The fourth part of a fine of lands: it is an abstract of the writ of covenant and concord, and is only a docquet taken by the chirographer, from which he draws up the indenture. It is sometimes taken in the old books for the concord. Cruise, Dig. tit. 35, c. 2, 51.

NOTE OF HAND, contracts. Another name, less technical, for a promissory note. (q. v.) 2 Bl. Com. 467. Vide *Bank note*; *Promissory note*; *Reissuable note*.

NOTES, practice. Short statements of what transpires on the trial of a cause; they are generally made by the judge and the counsel, for their own satisfaction.

2. They are not, *per se*, evidence on another trial, not being in the nature of a deposition. 4 Binn. R. 110. But such notes were admitted in a court of equity as evidence of what had been stated by a witness at the trial of an action at law. 3 Y. & C. 413. And a verdict was amended, in a court of law, from the notes of the judges. 11 Ad. & El. 179; S. C. 39 Eng. C. L. R. 38; see 5 Whart. 156; 5 Watts & S. 51.

3. Notaries formerly made notes, *matrix*, by abbreviations, from which they made their records, and engrossed the acts which were passed before them. This original is now called the minutes. The notes of the prothonotaries and clerks of courts are called minutes.

NOTICE. The information given of some act done, or the interpellation by which some act is required to be done. It also signifies, simply, knowledge; as A had notice that B was a slave. 5 How. S. C. Rep. 216; 7 Penn. Law Journ. 119.

2. Notices should always be in writing; they should state, in precise terms, their object, and be signed by the proper person, or his authorized agent, be dated, and addressed to the person to be affected by them.

3. Notices are actual, as when they are directly given to the party to be affected by them; or constructive, as when the party by any circumstance whatever, is put upon inquiry, which amounts in judgment of law to notice, provided the inquiry becomes a duty. Vide 2 Pow. Mortg. 561 to 662; 2 Stark. Ev. 987; 1 Phil. Ev. Index, h. t.; 1 Vern. 364, n.; 4 Kent, Com. 172; 16 Vin. Ab. 2; 2 Supp. to Ves. jr. 250; Grah. Pr. Index, h. t.; Chit. Pl. Index, h. t.; 2 Mason, 531; 14 Pick. 224; 4 N. H. Rep. 397; 14 S. & R. 333; Bouv. Inst. Index, h. t.

4. With respect to the necessity for giving notice, says Mr. Chitty, 1 Pr. 496, the rules of law are most evidently founded on good sense and so as to accord with the intention of the parties. The giving notice in certain cases obviously is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus, in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is, that he will pay the bill or note, provided it be not paid, on presentment at maturity, by the acceptor or maker, (being the party *primarily* liable, and provided that he (the indorser) has due notice of the dishonor, and without which he is discharged from all liability; consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, or some facts dispensing with such notice.

5. Whenever the defendant's liability to perform an act depends on another occurrence, which is *best known* to the plaintiff, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. So in cases of insurances on ships, a notice of abandonment is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something

remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures.

6. To avoid doubt or ambiguity in the terms of the notice, it may be advisable to give it in *writing*, and to preserve evidence of its delivery, as in the case of notices of the dishonor of a bill.

7. The form of the notice may be as subscribed, but it must necessarily vary in its terms according to the circumstances of each case. So, in order to entitle a party to insist upon a strict and exact performance of a contract on the fixed day for completing it, and *a fortiori* to retain a deposit as forfeited, a reasonable notice must be given of the intention to insist on a precise performance, or he will be considered as having waived such strict right. So if a lessee or a purchaser be sued for the recovery of the estate, and he have a remedy over against a third person, upon a covenant for quiet enjoyment, it is expedient (although not absolutely necessary) to give the latter notice of the proceeding, referring to such covenant.

NOTICE, AVERMENT OF, in pleading. This is frequently necessary, particularly in special actions of assumpsit.

2. When the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff, than of the defendant, then the declaration ought to state that the defendant had notice thereof; as when the defendant promised to give the plaintiff as much for a commodity as another person had given, or should give for the like.

3. But where the matter does not lie more properly in the knowledge of the plaintiff, than of the defendant, notice need not be averred. 1 Saund. 117, n. 2; 2 Saund. 62 a, n. 4; Freeman, R. 285. Therefore, if the defendant contracted to do a thing, on the performance of an act by a stranger, notice need not be averred, for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice of it at his peril. Com. Dig. Pleader, C 75. See Com. Dig. Id. C 78, 74, 75; Vin. Abr. Notice; Hardr. R. 42; 5 T. R. 621.

4. The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default; Cro. Jac. 432; but may be aided by verdict; 1 Str. 214, 1 Saund. 228, a; unless in an action against the drawer of a bill, when the omis-

sion of the averment of notice of non-payment by the acceptor is fatal, even after verdict. Doug. R. 679.

NOTICE OF DISHONOR. The notice given by the holder of a bill of exchange or promissory note, to a drawer or endorser on the same, that it has been dishonored, either by not being accepted in the case of a bill, or paid in case of an accepted bill or note.

2. It is proper to consider, 1. The form of the notice; 2. By whom it is to be given; 3. To whom; 4. When; 5. Where; 6. Its effects; 7. When a want of notice will be excused; 8. When it will be waived.

3.—§ 1. Although no precise form of words is requisite in giving notice of dishonor, yet such notice must convey, 1. A true description of the bill or note so as to ascertain its identity; but if the notice cannot mislead the party to whom it is sent, and it conveys the real fact without any doubt, although there may be a small variance, it cannot be material, either to regard his rights or to avoid his responsibility. 11 Wheat. 431, 436; Story on Bills, § 390; 11 Mees. & Wels. 809. 2. The notice must contain an assertion that the bill has been duly presented to the drawee for acceptance, when acceptance has been refused, or to the acceptor of a bill, or maker of a note for payment at its maturity, and dishonored. 4 B. & C. 340; 7 Bing. 530; 1 Bing. N. C. 192; 1 M. & G. 76; 3 Bing. N. C. 688; 10 A. & E. 125. 3. The notice must state that the holder, or other person giving the notice, looks to the person to whom the notice is given, for reimbursement and indemnity. Story on Bills, § 301, 390. Although in strictness this may be required, where the language is otherwise doubtful and uncertain, yet, in general, it will be presumed where in other respects the notice is sufficient. 2 A. & E. N. R. 388, 416; 11 Mees. & Wels. 372; Story on P. N. § 353; 11 Wheat. 431, 437; 2 Pet. 543; 2 John. Cas. 237; 2 Hill, (N. Y.) R. 588; 1 Spear, R. 244.

4.—§ 2. In general the notice may be given by the holder or some one authorized by him; Story on Bills, § 303, 304; or by some one who is a party and liable to pay the bill or note. But notice given by a stranger is not sufficient. Chit. on Bills, 368, 8th edit.; 1 T. R. 170; 8 Miss. 704; 16 S. & R. 157, 160. On the death of the holder, his executor or administrator is required to give notice, and, if none be then appointed, the notice must be given within

a reasonable time after one may be appointed. Story on P. N. § 304. When the bill or note is held by partners, notice by any of them is sufficient; and when joint-holders have the paper, and one dies, the notice may be given by the survivor; the assignee of the holder who is a bankrupt, must give notice, but if no assignee be appointed when the paper becomes due, the notice must be given without delay after his appointment; but it seems the bankrupt holder may himself give the notice. Story on P. N. § 305. If an infant be the holder the notice may be given by him, or if he has a guardian, by the latter.

5.—§ 3. The holder is required to give notice to all the parties to whom he means to resort for payment, and, unless excused in point of law, as will be stated below, such parties will be exonerated, and absolved from all liability on such bill or note. Story on P. N. § 307. But a party who purchases a bill, and, without endorsing it, transmits it on account of goods ordered by him, is not entitled to notice of its dishonor. 1 Wend. 219; 4 Wash. C. C. 1. In cases of partnership, notice to either of the partners is sufficient. Story on Bills, § 299; Story on P. N. § 308; 20 John. 176; 2 How. Sup. Ct. R. 457. Notice should be given to each of several joint endorsers, who are not partners. 1 Conn. 368; 4 Cowen, 126; 5 Hill, (N. Y.) R. 232; Story on Bills, § 299. Notice to an absent endorser may be given to his general agent. 1 M. & Selw. 545; 16 Martin, (Lo.) R. 87. See 12 Wheat. 599; 4 Wash. C. C. 464; 3 Wend. 276.

6.—§ 4. The notice of dishonor must be given to the parties to whom the holder means to resort, within a reasonable time after the dishonor of the bill, when it is dishonored for non-acceptance, and he must not delay giving notice until the bill has been protested for non-payment. Bull. N. P. 271; 12 East, 434; 1 Harr. & J. 187; 1 Dall. 235; 2 Dall. 219, 233; 1 Yeates, 147; 3 Wash. C. C. 396; 1 Bay, 177; 11 John. 187; 10 Wend. 304; 13 Wend. 133; 5 Halst. 139; 4 J. J. Marsh. 61; Paine, 156; 2 Hayw. 332; 2 Marsh. 616. Though formerly it was doubtful whether the court or jury were to judge as to the reasonableness of the notice in respect to time; 1 T. R. 168; yet, it seems now to be settled, that when the facts are ascertained, it is a question for the court and not for the jury. 10 Mass. 84, 86; 6 Watts & S. 399; 3

Marsh. 262; 2 Harris R. 488; Penn. 916; 1 N. H. Rep. 140; 17 Mass. 449, 453; 2 Aik. 9; Rice, R. 240; 2 Hayw. 45.

7.—§ 5. In considering as to *where* the notice should be given, a difference is made between cases, where the parties reside in the same town, and where they do not. 1. When both parties reside in the *same town or city*, the notice should either be personal or at the domicile or place of business of the party notified, so that it may reach him on the very day he is entitled to notice. 1 M. & S. 545, 554; 2 Pet. 100; 1 Pet. 578, 583; Story on Bills, §§ 284-290; 1 Rob. Lo. R. 572; 3 Rob. Lo. 261; 20 John. 372; 1 Conn. 329; 17 Mart. Lo. 137, 158, 359; 19 Mart. Lo. 492; Story on P. N. § 322. But see 23 Pick. 805; 6 Watts & Serg. 262; 2 Aik. 268; 8 Ohio, 507, 510; Rice, R. 240, 243; 1 Litt. R. 194. If the notice be put in the post office, the holder must prove it reached the endorser. 2 Pet. 121. But in those towns where they have letter carriers, who carry letters from the post office and deliver them at the houses or places of business of the parties, if the notice be put in the post office in time to be delivered on the same day, it will be sufficient. Chit. on Bills, 504, 508, 513, 8th edit.; 1 Pet. 578; 11 John. 231. 2. When the parties reside in *different towns or cities*, the notice may be sent by the post, or a special messenger, or a private person, or by any other suitable or ordinary conveyance. Chit. on Bills, 518, 8th ed.; Story on P. N. § 324; Bayl. on Bills, ch. 7, § 2; 1 Pet. 582. When the post is resorted to, the holder has the whole day on which the bill becomes due to prepare his notice, and if it be put in the post office on the next day in time to go by either mails, when there is more than one, it will in general be sufficient. 17 Mass. 449, 454; 1 Hill, (N. Y.) R. 263; but see contra, 2 Rob. Lo. R. 117.

8.—§ 6. The *effect* of the notice of dishonor, when properly given, and when it is followed by a protest, when a protest is requisite, will render the drawer and endorsers of a bill or the endorsers of a note liable to the holder. But the drawer and endorsers may tender the money at any time before a writ has been issued; though the acceptor must pay the bill on presentment, and cannot plead a subsequent tender. 1 Marsh. 36; 5 Taunt. 240; S. C. 8 East, 168.

9.—§ 7. The same reasons which will

excuse the want of a presentment, will in general excuse a want of protest. See *Presentment*, contracts, n. 8, 9.

10.—§ 8. A want of notice may be waived by the party to be affected, after a full knowledge of the facts that the holder has no just cause for the neglect or omission. Story on P. N. § 358. See *Presentment*, contracts, n. 9.

NOTICE TO PRODUCE PAPERS, *practice, evidence*. When it is intended to give secondary evidence of a written instrument or paper, which is in the possession of the opposite party, it is, in general, requisite to give him notice to produce the same on the trial of the cause, before such secondary evidence can be admitted.

2. To this general rule there are some exceptions: 1st. In cases where, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond. 14 East, R. 274; 4 Taunt. R. 865; 6 S. & R. 154; 4 Wend. 626; 1 Camp. 143. 2d. When the party in possession has obtained the instrument by fraud. 4 Esp. R. 256. Vide 1 Phil. Ev. 425; 1 Stark. Ev. 362; Rosc. Civ. Ev. 4.

3. It will be proper to consider the form of the notice; to whom it should be given; when it must be served; and its effects.

4.—1. In general, a notice to produce papers ought to be given in writing, and state the title of the cause in which it is proposed to use the papers or instruments required. 2 Stark. R. 19; S. C. 3 E. C. L. R. 222. It seems, however, that the notice may be by parol. 1 Campb. R. 440. It must describe with sufficient certainty the papers or instruments called for, and must not be too general, and by that means be uncertain. R. & M. 341; McCl. & Y. 139.

5.—2. The notice may be given to the party himself, or to his attorney. 3 T. R. 306; 2 T. R. 203, n.; R. & M. 327; 1 M. & M. 96.

6.—3. The notice must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument or paper in question. 1 Stark. R. 283; S. C. 2 E. C. L. R. 391; R. & M. 47, 327; 1 M. & M. 96, 335, n.

7.—4. When a notice to produce an instrument or paper in the cause has been

proved, and it is also proved that such paper or instrument was, at the time of the notice, in the hands of the party or his privy, and, upon request in court, he refuses or neglects to produce it, the party having given such notice, and made such proof, will be entitled to give secondary evidence of such paper or instrument thus withheld.

8. The 15th section of the judiciary act of the United States provides, "that all the courts of the United States shall have power, in the trial of actions at law, on motion, and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if the defendant fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default."

9. The proper course to pursue under this act, is to move the court for an order on the opposite party to produce such books or papers. See, as to the rules in courts of equity to compel the production of books and papers, 1 Baldw. Rep. 388, 9; 1 Vern. 408, 425; 1 Sch. & Lef. 222; 1 P. Wms. 731, 732; 2 P. Wms. 749; 3 Atk. 360. See *Evidence, secondary*.

NOTICE TO QUIT. A request from a landlord to his tenant, to quit the premises leased, and to give possession of the same to him, the landlord, at a time therein mentioned.

2. It will be proper to consider, 1. The form of the notice. 2. By whom it is to be given. 3. To whom. 4. The mode of serving it. 5. At what time it must be served. 6. What will amount to a waiver of it.

3.—§ 1. *The form of the notice.* The notice or demand of possession should contain a request from the landlord to the tenant or person in possession, to quit the premises which he holds from the landlord, (which premises ought to be particularly described, as being situate in the street and city or place, or township and county,) and

to deliver them to him on or before a day certain, generally, when the lease is for a year, the same day of the year on which the lease commences. But where there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." 2 Esp. N. P. C. 589. It should be dated, signed by the landlord himself, or by some person in his name, who has been authorized by him, and directed to the tenant. The notice must include all the premises under the same demise; for the landlord cannot determine the tenancy as to part of the premises demised, and continue it as to the residue. For the purpose of bringing an ejectment, it is not necessary that the notice should be in writing, except when required to be so under an express agreement between the parties. Com. Dig. Estate by Grant, G 11, n. p. But it is the general and safest practice to give written notices, and it is a precaution which should always, when possible, be observed, as it prevents mistakes, and renders the evidence certain and correct. Care should be taken that the words of a notice be clear and decisive, without ambiguity, or giving an alternative to the tenant, for if it be really ambiguous or optional, it will be invalid. Adams on Ej. 122.

4.—§ 2. *As to the person by whom the notice is to be given.* It must be given by the person interested in the premises, or his agent properly appointed. Adams on Ej. 120. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should, therefore, be binding upon all the parties concerned at the time it is given. Where, therefore, several persons are jointly interested in the premises, they all must join in the notice, and if any of them be not a party at the time no subsequent ratification by him will be sufficient by relation to render the notice valid. 5 East, 491; 2 Phil. Ev. 184. But if the notice be given by an agent, it is sufficient if his authority is afterwards recognized. 3 B. & A. 689.

5.—§ 3. *As to the person to whom the notice should be given.* When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant, of the party serving the notice, notwithstanding a part may have been underlet, or the whole of the premises may have been assigned;

Adams on Ej. 119; 2 New Rep. 330, and vide 14 East, 234; unless, perhaps, the lessor has recognized the sub-tenant as his tenant. 10 Johns. 270. When the premises are in possession of two or more as joint-tenants or tenants in common, the notice should be to all; a notice addressed to all, and served upon one only, will, however, be a good notice. Adams on Ej. 123.

6.—§ 4. *As to the mode of serving the notice.* The person about serving the notice should make two copies of it, both signed by the proper person, then procure one or more respectable persons for witnesses, to whom he should show the copies, who, upon comparing them, and finding them alike, are to go with the person who is to serve the notice. The person serving the notice then in their presence, should deliver one of these copies to the tenant personally, or to one of his family, at his usual place of abode, although the same be not upon the demised premises; 2 Phil. Ev. 185; or serve it upon the person in possession; and where the tenant is not in possession, a copy may be served on him if he can be found, and another on the person in possession. The witnesses should then, for the sake of security, sign their names on the back of the copy of the notice retained, or otherwise mark it so as to identify it, and they should also state the manner in which the notice was served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of the service of the notice upon him has been held to be sufficient ground for the jury to presume that the notice so served upon the premises, has reached the other who resided in another place. 7 East, 553; 5 Esp. N. P. C. 196.

7.—§ 5. *At what time it must be served.* It must be given three months before the expiration of the lease. Difficulties sometimes arise as to the period of the commencement of the tenancy, and when a regular notice to quit on any particular day is given, and the time when the term began is unknown, the effect of such notice as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery; if the tenant having been applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of such information, a notice to quit on that day is given at a subsequent period, the

tenant is concluded by his act, and will not be permitted to prove that in point of fact, the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into error. Adams on Ej. 130; 2 Esp. N. P. C. 635; 2 Phil. Ev. 186. In like manner if the tenant at the time of delivery of the notice, assent to the terms of it, it will waive any irregularity as to the period of its expiration, but such assent must be strictly proved. 4 T. R. 361; 2 Phil. Ev. 183. When the landlord is ignorant of the time when the term commenced, a notice to quit may be given not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises, at the end of the current year of his tenancy thereof, which shall expire next after the end of three months from the date of the notice. See 2 Esp. N. P. C. 589.

8.—§ 6. *What will amount to a waiver of the notice.* The acceptance of rent accruing subsequently to the expiration of the notice is the most usual means by which a waiver of it may be produced, but the acceptance of such rent is open to explanation; and it is the province of the jury to decide with what views, and under what circumstances the rent is paid and received. Adams on Ej. 139. If the money be taken with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance; the rent must be paid and received *as rent*, or the notice will remain in force. Cowp. 243. The notice may also be waived by other acts of the landlord; but they are generally open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it. 2 East, 236; 10 East, 13; 1 T. R. 53. It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease, that is, to clear and fence the land and pay the taxes. 1 Binn. 333. In cases, however, where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the ten-

ancy, as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and occupation, the notice of course will be waived. *Adams on Ej.* 144; 1 H. Bl. 311.

NOTING. The name of the minute made by a notary on a bill of exchange, after it has been presented for acceptance or payment, consisting of the initials of his name, the date of the day, month and year when such presentment was made, and the reason, if any has been assigned, for non-acceptance or non-payment, together with his charge. The noting is not indispensable, it being only a part of the protest; it will not supply the protest. 4 T. R. 175; *Chit. on Bills*, 280, 398. See *Protest*.

NOTORIETY, evidence. That which is generally known.

2. This notoriety is of fact or of law. In general, the notoriety of a *fact* is not sufficient to found a judgment or to rely on its truth; 1 Ohio Rep. 207; but there are some facts of which, in consequence of their notoriety, the court will, *suo motu*, take cognizance; for example, facts stated in ancient histories; *Skin. R.* 14; 1 Ventr. R. 149; 2 East, Rep. 464; 9 Ves. jr. 347; 10 Ves. jr. 354; 3 John. Rep. 385; 1 Binn. R. 399; recitals in statutes; *Co. Lit.* 19 b; 4 M. & S. 542; and in the law text books; 4 Inst. 240; 2 Russ. 313; and the journals of the legislatures, are considered of such notoriety that they need not be otherwise proved.

3. The courts of the United States take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows. 3 Dall. 297; 9 Wheat. 374; 10 Wheat. 428; 7 Pet. 342. They take like notice of the boundaries of the several states and judicial districts. It would be altogether unnecessary, if not absurd, to prove the fact that London in Great Britain or Paris in France, is not within the jurisdiction of an American court, because the fact is notoriously known.

4. It is difficult to say what will amount to such notoriety as to render any other proof unnecessary. This must depend upon many circumstances; in one case, perhaps upon the progress of human knowledge in the fields of science; in another, on the extent of information on the state of foreign countries, and in all such instances upon the accident of their being little known or publicly communicated. The notoriety of the *law* is such that the judges are always

bound to take notice of it; statutes, precedents and text books are therefore evidence, without any other proof than their production. *Gresley, Ev.* 293. The courts of the United States take judicial notice of all laws and jurisprudence of the several states, in which they exercise original or appellate jurisdiction. 9 Pet. 607, 624.

5. The doctrine of the civil and canon laws is similar to this. *Boehmer in tit.* 10, de probat. lib. 2, t. 19, n. 2; *Mascardus, de probat. conclus.* 1106, 1107, et seq.; *Menock. de præsumpt. lib.* 1, quæst. 63, &c.; *Toullier, Dr. Civ. Fran.* liv. 3, c. 6, n. 13; *Dict. de Jurisp. mot Notoriété*; 1 Th. Co. Lit. 26, n. 16; 2 Id. 63, n. A; Id. 334, n. 6; Id. 513, n. T 3; 9 Dana, 23; 12 Verm. 178; 5 Port. 382; 1 Chit. Pl. 216, 225.

NOVA CUSTOMA. The name of an imposition or duty in England. *Vide Antiqua Customa.*

NOVA STATUTA. New statutes. The name given to the statutes commencing with the reign of Edward III. *Vide Vetera Statuta.*

NOVÆ NARRATIONES. The title of an ancient English book, written during the reign of Edward III. It consists of declarations and some other pleadings.

NOVATION, civil law. 1. Novation is a substitution of a new for an old debt. The old debt is extinguished by the new one contracted in its stead; a novation may be made in three different ways, which form three distinct kinds of novations.

2. The first takes place, without the intervention of any new person, where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. This kind has no appropriate name, and is called a novation generally.

3. The second is that which takes place by the intervention of a new debtor, where another person becomes a debtor instead of a former debtor, and is accepted by the creditor, who thereupon discharges the first debtor. The person thus rendering himself debtor for another, who is in consequence discharged, is called *expromissor*; and this kind of novation is called *expromissio*.

4. The third kind of novation takes place by the intervention of a new creditor where a debtor, for the purpose of being discharged from his original creditor, by order of that creditor, contracts some obligation in favor of a new creditor. There is also a particular kind of novation called a *delegation*.

Poth. Obl. pt. 3, c. 2, art. 1. See *Delegation*.

5.—2. It is a settled principle of the common law, that a mere agreement to substitute any other thing in lieu of the original obligation is void, unless actually carried into execution and accepted as satisfaction. No action can be maintained upon the new agreement, nor can the agreement be pleaded as a bar to the original demand. See *Accord*. But where an agreement is entered into by deed, that deed gives, in itself, a substantive cause of action, and the giving such deed may be sufficient accord and satisfaction for a simple contract debt. 1 Burr. 9; Co. Litt. 212, b.

6. The general rule seems to be that if one indebted to another by simple contract, give his creditor a promissory note, drawn by himself, for the same sum, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor. 15 Serg. & Rawle, 162; 1 Hill's N. Y. R. 516; 2 Wash. C. C. Rep. 191; 1 Wash. C. C. R. 156, 321; 2 John. Cas. 438; Pet. C. C. Rep. 266; 2 Wash. C. C. R. 24, 512; 3 Wash. C. C. R. 396: Addis. 39; 5 Day, 511; 15 John. 224; 1 Cowen, 711; see 3 Greenl. 298; 2 Greenl. 121; 4 Mason, 343; 9 Watts, 273; 10 Pet. 532; 6 Watts & Serg. 165, 168. But if he transfer the note, he cannot sue on the original contract as long as the note is out of his possession. 1 Peters' R. 267. See generally *Discharge*; 4 Mass. Rep. 93; 6 Mass. R. 371; 1 Pick. R. 415; 5 Mass. R. 11; 13 Mass. R. 148; 2 N. H. Rep. 525; 9 Mass. 247; 8 Pick. 522; 8 Cowen, 390; Coop. Just. 582; Gow. on Partn. 185; 7 Vin. Abr. 367; Louis. Code, art. 2181 to 2194; 3 Watts & S. 276; 9 Watts, 280; 10 S. & R. 307; 4 Watts, 378; 1 Watts & Serg. 94; Toull. h. t.; Domat, h. t.; Dalloz. Dict. h. t.; Merl. Rép. h. t.; Clef des Lois Romaines, h. t.; Azo & Man. Inst. t. 11, c. 2, § 4; Burge on Sur. B. 2, c. 5, p. 166.

NOVEL ASSIGNMENT. Vide *New Assignment*.

NOVEL DISSEISIN. The name of an old remedy which was given for a new or recent disseisin.

2. When tenant in fee simple, fee tail, or for term of life, was put out, and disseised of his lands or tenements, rents, and the like, he might sue out a writ of assise or novel disseisin; and if, upon trial, he could prove his title, and his actual seisin,

and the disseisin by the present tenant, he was entitled to have judgment to recover his seisin and damages for the injury sustained. 3 Bl. Com. 187. This remedy is obsolete.

NOVELLÆ LEONIS. The ordinances of the emperor Leo, which were made from the year 887 till the year 893, are so called. These novels changed many rules of the Justinian law. This collection contains one hundred and thirteen novels, written originally in Greek, and afterwards, in 1560, translated into Latin, by Agilæus.

NOVELS, civil law. The name given to some constitutions or laws of some of the Roman emperors; this name was so given because they were *new* or posterior to the laws which they had before published. The novels were made to supply what had not been foreseen in the preceding laws, or to amend or alter the laws in force.

2. Although the novels of Justinian are the best known, and when the word novels only is mentioned, those of Justinian are always intended, he was not the first who gave the name of novels to his constitution and laws. Some of the acts of Theodosius, Valentinien, Leo, Severus, Anthemius, and others, were also called novels. But the novels of the emperors who preceded Justinian had not the force of law, after the enactment of the law by order of that emperor. Those novels are not, however, entirely useless, because the code of Justinian having been composed mainly from the Theodosian code and the novels, the latter frequently remove doubts which arise on the construction of the code. The novels of Justinian form the fourth part of the Corpus Juris Civilis. They are directed either to some officer, or an archbishop or bishop, or to some private individual of Constantinople; but they all had the force and authority of law. The number of the novels is uncertain. The 118th novel is the foundation and groundwork of the English statute of distribution of intestate's effects, which has been copied into many states of the Union. Vide 1 P. Wms. 27; Pr. in Chan. 593.

NOVUS HOMO. A new man; this term is applied to a man who has been pardoned of a crime, by which he is restored to society, and is rehabilitated.

NOXAL ACTION, civil law. A personal, arbitrary, and indirect action in favor of one who has been injured by the slave of another, by which the owner or master of the slave was compelled either to pay the

damages or abandon the slave. Vide *Abandonment for torts*, and Inst. 4, 8; Dig. 9, 4; Code, 8, 41.

NUBILIS, civil law. One who is of a proper age to be married. Dig. 82, 51.

NUDE. Naked. Figuratively, this word is applied to various subjects.

2. A nude contract, *nudum pactum*, (q. v.) is one without a consideration; nude matter, is a bare allegation of a thing done, without any evidence of it.

NUDE MATTER. A bare allegation unsupported by evidence.

NUDUM PACTUM, contracts. A contract made without a consideration; it is called a nude or naked contract, because it is not clothed with the consideration required by law, in order to give an action. 3 McLean, 380; 2 Denio, 408; 6 Iredell, 480; 1 Strobbh. 329; 1 Kelly, 294; 1 Dougl. Mich. R. 188.

2. There are some contracts which, in consequence of their forms, import a consideration, as sealed instruments, and bills of exchange, and promissory notes, which are generally good although no consideration appears.

3. A nudum pactum may be avoided, and is not binding.

4. Whether the agreement be verbal or in writing, it is still a nude pact. This has been decided in England, 7 T. R. 350, note; 7 Bro. P. C. 550; and in this country; 4 John. R. 235; 5 Mass. R. 301, 392; 2 Day's R. 22. But if the contract be under seal, it is valid. 2 B. & A. 551. It is a rule that no action can be maintained on a naked contract; *ex nudo pacto non oritur actio*. 2 Bl. Com. 445; 16 Vin. Ab. 16.

5. This term is borrowed from the civil law, and the rule which decides upon the nullity of its effects, yet the common law has not in any degree been influenced by the notions of the civil law, in defining what constitutes a nudum pactum. Dig. 19, 5, 5. See on this subject a learned note in Fonbl. Eq. 385, and 2 Kent, Com. 364. Toullier defines nudum pactum to be an agreement not executed by one of the parties, Com. 6, n. 13, page 10. Vide 16 Vin. Ab. 16; 1 Supp. to Ves. jr. 514; 3 Kent, Com. 364; 1 Chit. Pr. 118; 8 Ala. 131; and art. *Consideration*.

NUISANCE, crim. law, torts. This word means literally annoyance; in law, it signifies, according to Blackstone, "anything that worketh hurt, inconvenience, or damage." 3 Comm. 216.

2. Nuisances are either public or common, or private nuisances.

3.—1. A public or common nuisance is such an inconvenience or troublesome offence, as annoys the whole community in general, and not merely some particular person. 1 Hawk. P. C. 197; 4 Bl. Com. 166–7. To constitute a public nuisance, there must be such a number of persons annoyed, that the offence can no longer be considered a private nuisance: this is a fact, generally, to be judged of by the jury. 1 Burr. 337; 4 Esp. C. 200; 1 Str. 686, 704; 2 Chit. Cr. Law, 607, n. It is difficult to define what degree of annoyance is necessary to constitute a nuisance. In relation to offensive trades, it seems that when such a trade renders the enjoyment of life and property uncomfortable, it is a nuisance; 1 Burr. 333; 4 Rog. Rec. 87; 5 Esp. C. 217; for the neighborhood have a right to pure and fresh air. 2 Car. & P. 485; S. C. 12 E. C. L. R. 226; 6 Rogers' Rec. 61.

4. A thing may be a nuisance in one place, which is not so in another; therefore the situation or *locality* of the nuisance must be considered. A tallow chandler setting up his business among other tallow chandlers, and increasing the noxious smells of the neighborhood, is not guilty of setting up a nuisance, unless the annoyance is much increased by the new manufactory. Peake's Cas. 91. Such an establishment might be a nuisance in a thickly populated town of merchants and mechanics, where no such business was carried on.

5. Public nuisances arise in consequence of following *particular trades*, by which the air is rendered offensive and noxious. Cro. Car. 510; Hawk. B. 1, c. 75, s. 10; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Str. 686. From acts of public *indecenty*; as bathing in a public river, in sight of the neighboring houses; 1 Russ. Cr. 302; 2 Campb. R. 89; Sid. 168; or for acts tending to a *breach of the public peace*, as for drawing a number of persons into a field for the purpose of pigeon-shooting, to the disturbance of the neighborhood; 3 B. & A. 184; S. C. 23 Eng. C. L. R. 52; or keeping a *disorderly house*; 1 Russ. Cr. 298; or a *gaming house*; 1 Russ. Cr. 299; Hawk. b. 1, c. 75, s. 6; or a *badly house*; Hawk. b. 1, c. 74, s. 1; Bac. Ab. Nuisance, A; 9 Conn. R. 350; or a *dangerous animal*, known to be such, and suffering him to go at large, as a large bull-dog accustomed to bite people; 4 Burn's Just. 578; or *exposing a person*

having a contagious disease, as the small-pox, in public; 4 M. & S. 73, 272; and the like.

6.—2. A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com. 215; Finch, L. 188.

7. These are such as are injurious to corporeal inheritances; as, for example, if a man should build his house so as to throw the rain water which fell on it, on my land; F. N. B. 184; or erect his building, without right, so as to obstruct my ancient lights; 9 Co. 58; keep hogs or other animals so as to incommode his neighbor and render the air unwholesome. 9 Co. 58.

8. Private nuisances may also be injurious to incorporeal hereditaments. If, for example, I have a way annexed to my estate, across another man's land, and he obstruct me in the use of it, by plowing it up, or laying logs across it, and the like. F. N. B. 183; 2 Roll. Ab. 140.

9. The remedies for a public nuisance are by indicting the party. Vide, generally, Com. Dig. Action on the case for a nuisance; Bac. Ab. h. t.; Vin. Ab. h. t.; Nels. Ab. h. t.; Selw. N. P. h. t.; 3 Bl. Com. c. 13; Russ. Cr. b. 2, c. 30; 10 Mass. R. 72; 7 Pick. R. 76; 1 Root's Rep. 129; 1 John. R. 78; 1 S. & R. 219; 3 Yeates' R. 447; 3 Amer. Jurist, 185; 3 Harr. & McH. 441; Rosc. Cr. Ev. h. t.; Chit. Cr. L. Index, h. t.; Chit. Pr. Index, h. t., and vol. 1, p. 383; Bouv. Inst. Index, h. t.

NUL, *law French*. A barbarous word which means to convey a negative; as, Nul tiel record, Nul tiel award.

NUL AGARD: No award. A plea to an action on an arbitration bond, when the defendant avers that there was no legal award made. 3 Burr. 1780; 2 Stra. 928.

NUL DISSEISIN, *pleading*. No disseisin. A plea in a real action, by which the defendant denies that there was any disseisin: it is a species of the general issue.

NUL TIEL RECORD, *pleading*. No such record.

2. When a party claims to recover on the evidence of a record, as in an action on *scire facias*, or when he sets up his defence on matter of record, as a former acquittal or former recovery, the opposite party may plead or reply *nul tiel record*, there is no such record; in which case the issue thus raised is called an issue of *nul tiel record*, and it is tried by the court by the inspection of the record. Vide 1 Saund. 92, n. 3;

12 Vin. Ab. 188; 1 Phil. Ev. 807, 8; Com. Dig. Bail, R. 8—Certiorari, A 1—Pleader, 2 W 18, 38—Record, C; 2 McLean, 511; 7 Port. 110; 1 Spencer, 114.

NUL TORT, *pleading*. No wrong.

2. This is a plea to a real action, by which the defendant denies that he committed any wrong. It is a species of general issue.

NUL WASTE, *pleading*. This is the general issue in an action of waste. Co. Entr. 700 a, 708 a. The plea of *nul waste* admits nothing, but puts the whole declaration in issue; and in support of this plea the defendant may give in evidence anything which proves that the act charged is no waste, as that it happened by tempest, lightning, and the like. Co. Litt. 283 a; 3 Saund. 238, n. 5.

NULL. Properly, that which does not exist; that which is not in the nature of things. In a figurative sense it signifies that which has no more effect than if it did not exist. 8 Toull. n. 320.

NULLA BONA. The return made to a writ of fieri facias, by the sheriff, when he has not found any goods of the defendant on which he could levy. 3 Bouv. Inst. n. 3393.

NULLITY. Properly, that which does not exist; that which is not properly in the nature of things. In a figurative sense, and in law, it means that which has no more effect than if it did not exist, and also the defect which prevents it from having such effect. That which is absolutely void.

2. It is a rule of law that what is absolutely null produces no effects whatever; as, if a man had a wife in full life, and both aware of the fact, he married another woman, such second marriage would be null and without any legal effect. Vide Chit. Contr. 228; 3 Chit. Pr. 522; 2 Archb. Pr. K. B. 4th edit. 888; Bayl. Ch. Pr. 97.

3. Nullities have been divided into absolute and relative. Absolute nullities are those which may be insisted upon by any one having an interest in rendering the act, deed or writing null, even by the public authorities, as a second marriage while the former was in full force. Everything fraudulent is null and void. Relative nullities can be invoked only by those in whose favor the law has been established, and, in fact, such power is less a nullity of the act than a faculty which one or more persons have to oppose the validity of the act.

4. The principal causes of nullities are,

1. Defect of form; as, for example, when the law requires that a will of lands shall be attested by three witnesses, and it is only attested by two. *Vide Will.*

5.—2. Want of will; as if a man be compelled to execute a bond by duress, it is null and void. *Vide Duress.*

6.—3. The incapacities of the parties; as in the cases of persons non compos mentis, of married women's contracts, and the like.

7.—4. The want of consideration in simple contracts; as a verbal promise without consideration.

8.—5. The want of recording, when the law requires that the matter should be recorded; as, in the case of judgments.

9.—6. Defect of power in the party who entered into a contract in behalf of another; as, when an attorney for a special purpose makes an agreement for his principal in relation to another thing. *Vide Attorney; Authority.*

10.—7. The loss of a thing which is the subject of a contract; as, when A sells B his horse, both supposing him to be alive, when in fact he was dead. *Vide Contract; Sale.*

Vide Perrin, Traité des Nullités; Henrion, Pouvoir Municipal, liv. 2, c. 18; Merl. Rép. h. t.; Dall. Dict. h. t. See art. Void.

NULLIUS FILIUS. The son of no one; a bastard.

2. A bastard is considered *nullius filius* as far as regards his right to inherit. But the rule of *nullius filius* does not apply in other respects.

3. The mother of a bastard, during its age of nurture, is entitled to the custody of her child, and is bound to maintain it. 6 S. & R. 255; 2 John. R. 375; 15 John. R. 208; 2 Mass. R. 109; 12 Mass. R. 387, 433; 1 New Rep. 148; *sed vide* 5 East, 224 n.

4. The putative father, too, is entitled to the custody of the child as against all but the mother. 1 Ashm. 55. And, it seems, that the putative father may maintain an action, as if his child were legitimate, for marrying him without his consent, contrary to law. Addis. 212. See *Bastard; Child; Father; Mother; Putative Father.*

NULLUM ARBITRIUM, pleading. The name of a plea to an action on an arbitration bond for not fulfilling the award, by which the defendant asserts that there is no award.

NULLUM FECERUNT ABBITRIUM.

The name of a plea to an action of debt upon an obligation for the performance of an award, by which the defendant denies that he submitted to arbitration, &c. *Bac. Ab. Arbitr. &c. G.*

NUMBER. A collection of units.

2. In pleading, numbers must be stated truly, when alleged in the recital of a record, written instrument, or express contract. *Lawes' Pl. 48; 4 T. R. 314; Cro. Car. 262; Dougl. 669; 2 Bl. Rep. 1104.* But in other cases, it is not in general requisite that they should be truly stated, because they are not required to be strictly proved. If, for example, in an action of trespass the plaintiff proves the wrongful taking away of any part of the goods duly described in his declaration, he is entitled to recover *pro tanto*. *Bac. Ab. Trespass, I 2; Lawes' Pl. 48.*

3. And sometimes, when the subject to be described is supposed to comprehend a multiplicity of particulars, a general description is sufficient. A declaration in trover alleging the conversion of "a library of books," without stating their number, titles, or quality, was held to be sufficiently certain; 3 Bulst. 31; *Carth. 110; Bac. Ab. Trover, F 1*; and in an action for the loss of goods, by burning the plaintiff's house, the articles may be described by the simple denomination of "goods" or "divers goods." 1 Keb. 825; *Plowd. 85, 118, 123; Cro. Eliz. 837; 1 H. Bl. 284.*

NUNC PRO TUNC, practice. This phrase, which signifies *now for then*, is used to express that a thing is done at one time which ought to have been performed at another. Leave of court must be obtained to do things *nunc pro tunc*, and this is granted to answer the purposes of justice, but never to do injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court. 3 Man. Gr. & Sc. 970. *Vide* 1 V. & B. 312; 1 Moll. R. 462; 13 Price, R. 604; 1 Hogan, R. 110.

NUNCIO. The name given to the Pope's ambassador. Nuncios are ordinary or extraordinary; the former are sent upon usual missions, the latter upon special occasions.

NUNCIUS, international law. A messenger, a minister; the pope's legate, commonly called a *nuncio*.

NUNCUPATIVE. It is used to express that a will or testament has been made verbally, and not in writing. *Vide Testa-*

ment nuncupative; Will, nuncupative; 1 Williams on Exec. 59; Swinb. Index, h. t.; Ayl. Pand. 359; 1 Bro. Civ. Law, 288; Roberts on Wills, h. t.; 4 Kent, Com. 504; 2 Bouv. Inst. n. 436.

NUNQUAM INDEBITATUS, pleading. A plea to an action of indebitatus assumpsit, by which the defendant asserts that he is not indebted to the plaintiff. 6 Carr. & P. 545; S. C. 25 English Com. Law Rep. 585; 1 Mees. & Wels. 542; 1 Q. B. 77.

NUPER OBIT, practice. He or she lately died. The name of a writ, which in the English law, lies for a sister co-heiress, dispossessed by her coparcener of lands and tenements, whereof their father, brother, or

any common ancestor died seised of an estate in fee simple. Termes de la Ley, h. t.; F. N. B. 197.

NURTURE. The act of taking care of children and educating them: the right to the nurture of children generally belongs to the father till the child shall arrive at the age of fourteen years, and not longer. Till then, he is guardian by nurture. Co. Litt. 38 b. But in special cases the mother will be preferred to the father; 5 Binn. R. 520; 2 S. & R. 174; and after the death of the father, the mother is guardian by nurture. Fl. l. 1, c. 6; Com. Dig. Guardian, D.

NURUS. A daughter-in-law. Dig. 50, 16, 50.

O.

OATH. A declaration made according to law, before a competent tribunal or officer, to tell the truth; or it is the act of one who, when lawfully required to tell the truth, takes God to witness that what he says is true. It is a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or in other words to punish his perjury if he shall be guilty of it. 10 Toull. n. 348 & 348; Puff. book 4, c. 2, s. 4; Grot. book 2, c. 13, s. 1; Ruth. Inst. book 1, ch. 14, s. 1; 1 Stark. Ev. 80; Merl. Répert. Convention; Dalloz, Dict. Serment; Dur. n. 592, 593; 3 Bouv. Inst. n. 3180.

2. It is proper to distinguish two things in oaths; 1. The invocation by which the God of truth, who knows all things, is taken to witness. 2. The imprecation by which he is asked as a just and all-powerful being, to punish perjury.

3. The commencement of an oath is made by the party taking hold of the book, after being required by the officer to do so, and ends generally with the words, "so help you God," and kissing the book, when the form used is that of swearing on the Evangelists. 9 Car. & P. 137.

4. Oaths are taken in various forms; the most usual is upon the Gospel by taking the book in the hand; the words commonly used are, "You do swear that," &c., "so help you God," and then kissing the book. The origin of this oath may be

traced to the Roman law, Nov. 8, tit. 8; Nov. 74, cap. 5; Nov. 124, cap. 1; and the kissing the book is said to be an imitation of the priest's kissing the ritual as a sign of reverence, before he reads it to the people. Rees, Cycl. h. v.

5. Another form is by the witness or party promising holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the searcher of hearts, that," &c., "And this as you shall answer to God at the great day."

6. In another form of attestation commonly called an affirmation, (q. v.) the officer repeats, "You do solemnly, sincerely, and truly declare and affirm, that," &c.

7. The oath, however, may be varied in any other form, in order to conform to the religious opinions of the person who takes it. 16 Pick. 154, 156, 157; 6 Mass. 262; 2 Gallis. 346; Ry. & Mo. N. P. Cas. 77; 2 Hawks, 458.

8. Oaths may conveniently be divided into promissory, assertory, judicial and extra judicial.

9. Among promissory oaths may be classed all those taken by public officers on entering into office, to support the constitution of the United States, and to perform the duties of the office.

10. Custom-house oaths and others required by law, not in judicial proceedings, nor from officers entering into office, may be classed among the assertory oaths, when

the party merely asserts the fact to be true.

11. Judicial oaths, or those administered in judicial proceedings.

12. Extra-judicial oaths are those taken without authority of law, which, though binding *in foro conscientie*, do not render the persons who take them liable to the punishment of perjury, when false.

13. Oaths are also divided into various kinds with reference to the purpose for which they are applied; as oath of allegiance, oath of calumny, oath ad litem, decisory oath, oath of supremacy, and the like. As to the persons authorized to administer oaths, see Gilp. R. 439; 1 Tyler, 347; 1 South. 297; 4 Wash. C. C. R. 555; 2 Blackf. 35.

14. The act of congress of June 1, 1789, 1 Story's L. U. S. p. 1, regulates the time and manner of administering certain oaths as follows:

§ 1. *Be it enacted, &c.*, That the oath or affirmation required by the sixth article of the constitution of the United States, shall be administered in the form following, to wit, "I, A B, do solemnly swear or affirm, (as the case may be,) that I will support the constitution of the United States." The said oath or affirmation shall be administered within three days after the passing of this act, by any one member of the senate, to the president of the senate, and by him to all the members, and to the secretary; and by the speaker of the house of representatives, to all the members who have not taken a similar oath, by virtue of a particular resolution of the said house, and to the clerk: and in case of the absence of any member from the service of either house, at the time prescribed for taking the said oath or affirmation, the same shall be administered to such member when he shall appear to take his seat.

15.—§ 2. That at the first session of congress after every general election of representatives, the oath or affirmation aforesaid shall be administered by any one member of the house of representatives to the speaker; and by him to all the members present, and to the clerk, previous to entering on any other business; and to the members who shall afterwards appear, previous to taking their seats. The president of the senate for the time being, shall also administer the said oath or affirmation to each senator who shall hereafter be elected, previous to his taking his seat; and in any

future case of a president of the senate, who shall not have taken the said oath or affirmation, the same shall be administered to him by any one of the members of the senate.

16.—§ 3. That the members of the several state legislatures, at the next session of the said legislatures respectively, and all executive and judicial officers of the several states, who have been heretofore chosen or appointed, or who shall be chosen or appointed before the first day of August next, and who shall then be in office, shall, within one month thereafter, take the same oath or affirmation, except where they shall have taken it before; which may be administered by any person authorized by the law of the state, in which such office shall be holden, to administer oaths. And the members of the several state legislatures, and all executive and judicial officers of the several states, who shall be chosen or appointed after the said first day of August, shall, before they proceed to execute the duties of their respective offices, take the foregoing oath or affirmation, which shall be administered by the person or persons, who, by the law of the state, shall be authorized to administer the oath of office; and the person or persons so administering the oath hereby required to be taken, shall cause a record or certificate thereof to be made, in the same manner as, by the law of the state, he or they shall be directed to record or certify the oath of office.

17.—§ 4. That all officers appointed or hereafter to be appointed, under the authority of the United States, shall, before they act in their respective offices, take the same oath or affirmation, which shall be administered by the person or persons who shall be authorized by law to administer to such officers their respective oaths of office; and such officers shall incur the same penalties in case of failure, as shall be imposed by law in case of failure in taking their respective oaths of office.

18.—§ 5. That the secretary of the senate, and the clerk of the house of representatives, for the time being, shall, at the time of taking the oath or affirmation aforesaid, each take an oath or affirmation in the words following, to wit; "I, A B, secretary of the senate, or clerk of the house of representatives (as the case may be) of the United States of America, do solemnly swear or affirm, that I will truly and faithfully discharge the duties of my said office

to the best of my knowledge and abilities."

19. There are several kinds of oaths, some of which are enumerated by law.

20. Oath of *calumny*. This term is used in the civil law. It is an oath which a plaintiff was obliged to take that he was not actuated by a spirit of chicanery in commencing his action, but that he had bona fide a good cause of action. Poth. Pand. lib. 5, t. 16 and 17, s. 124. This oath is somewhat similar to our affidavit of a cause of action. Vide Dunlap's Adm. Pr. 289, 290.

21. No instance is known in which the oath of calumny has been adopted in practice in the admiralty courts of the United States; Dunl. Adm. Pr. 290; and by the 102d of the rules of the district court for the southern district of New York, the oath of calumny shall not be required of any party in any stage of a cause. Vide Inst. 4, 16, 1; Code, 2, 59, 2; Dig. 10, 2, 44; 1 Ware's R. 427.

22. *Decisory* oath. By this term in the civil law is understood an oath which one of the parties defers or refers back to the other, for the decision of the cause.

23. It may be deferred in any kind of civil contest whatever, in questions of possession or of claim; in personal actions and in real. The plaintiff may defer the oath to the defendant, whenever he conceives he has not sufficient proof of the fact which is the foundation of his claim; and in like manner, the defendant may defer it to the plaintiff when he has not sufficient proof of his defence. The person to whom the oath is deferred, ought either to take it or refer it back, and if he will not do either, the cause should be decided against him. Poth. on Oblig. P. 4, c. 8, s. 4.

24. The decisory oath has been practically adopted in the district court of the United States, for the district of Massachusetts, and admiralty causes have been determined in that court by the oath decisory; but the cases in which this oath has been adopted, have been where the tender has been accepted; and no case is known to have occurred there in which the oath has been refused and tendered back to the adversary. Dunl. Adm. Pr. 290, 291.

25. A *judicial* oath is a solemn declaration made in some form warranted by law, before a court of justice or some officer authorized to administer it, by which the person who takes it promises to tell the truth,

the whole truth, and nothing but the truth, in relation to his knowledge of the matter then under examination, and appeals to God for his sincerity.

26. In the civil law, a judicial oath is that which is given in judgment by one party to another. Dig. 12, 2, 25.

27. Oath *in litem*, in the civil law, is an oath which was deferred to the complainant as to the value of the thing in dispute on failure of other proof, particularly when there was a fraud on the part of the defendant, and he suppressed proof in his possession. See Greenl. Ev. § 348; Tait on Ev. 280; 1 Vern. 207; 1 Eq. Cas. Ab. 229; 1 Greenl. R. 27; 1 Yeates, R. 34; 12 Vin. Ab. 24. In general the oath of the party cannot, by the common law, be received to establish his claim, but to this there are exceptions. The oath *in litem* is admitted in two classes of cases: 1. Where it has been already proved, that the party against whom it is offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. As, for example, where a trunk of goods was delivered to a shipmaster at one port to be carried to another, and, on the passage, he broke the trunk open and rifled it of its contents; in an action by the owners of the goods against the shipmaster, the facts above mentioned having been proved *aliunde*, the plaintiff was held a competent witness to testify as to the contents of the trunk. 1 Greenl. 27; and see 10 Watts, 335; 1 Greenl. Ev. § 348; 1 Yeates, 34; 2 Watts, 220; 1 Gilb. Ev. by Lofft, 244. 2. The oath *in litem* is also admitted on the ground of public policy, where it is deemed essential to the purposes of justice. Tait on Ev. 280. But this oath is admitted only on the ground of necessity. An example may be mentioned of a case where a statute can receive no execution, unless the party interested be admitted as a witness. 16 Pet. 203.

28. A *promissory* oath is an oath taken, by authority of law, by which the party declares that he will fulfil certain duties therein mentioned, as the oath which an alien takes on becoming naturalized, that he will support the constitution of the United States; the oath which a judge takes that he will perform the duties of his office. The breach of this does not involve the party in the legal crime or punishment of perjury.

29. A *suppletory* oath in the civil and ecclesiastical law, is an oath required by the judge from either party in a cause, upon half proof already made, which being joined to half proof, supplies the evidence required to enable the judge to pass upon the subject. Vide Str. 80; 3 Bl. Com. 270.

30. A *purgatory* oath is one by which one destroys the presumptions which were against him, for he is then said to purge himself, when he removes the suspicions which were against him; as, when a man is in contempt for not attending court as a witness, he may purge himself of the contempt, by swearing to a fact which is an ample excuse. See *Purgation*.

OBEDIENCE. The performance of a command.

2. Officers who obey the command of their superiors, having jurisdiction of the subject-matter, are not responsible for their acts. A sheriff may therefore justify a trespass under an execution, when the court has jurisdiction, although irregularly issued. 3 Chit. Pr. 75; Ham. N. P. 48.

3. A child, an apprentice, a pupil, a mariner, and a soldier, owe respectively obedience to the lawful commands of the parent, the master, the teacher, the captain of the ship, and the military officer having command; and in case of disobedience, submission may be enforced by correction. (q. v.)

OBIT. That particular solemnity or office for the dead, which the Roman Catholic church appoints to be read or performed over the body of a deceased member of that communion before interment; also the office which, upon the anniversary of his death, was frequently used as a commemoration or observance of the day. 2 Cro. 51; Dyer, 313.

OBLATION, eccl. law. In a general sense the property which accrues to the church by any right or title whatever; but, in a more limited sense, it is that which the priest receives at the altar, at the celebration of the eucharist. Ayl. Par. 392.

OBLIGATION. In its general and most extensive sense, obligation is synonymous with duty. In a mere technical meaning, it is a tie which binds us to pay or to do something agreeably to the laws and customs of the country in which the obligation is made. Just. Inst. l. 3, t. 14. The term obligation also signifies the instrument or writing by which the contract is witnessed. And in another sense, an obli-

gation is said to be a bond containing a penalty, with a condition annexed for the payment of money, performance of covenants or the like; it differs from a bill, which is generally without a penalty or condition, though it may be obligatory. Co. Litt. 172. It is also defined to be a deed whereby a man binds himself under a penalty to do a thing. Com. Dig. Obligation, A. The word obligation, in its most technical signification, *ex vi termini*, imports a sealed instrument. 2 S. & R. 502; 6 Verm. 40; 1 Blackf. 241; Harp. R. 434; 2 Porter, 19; 1 Bald. 129. See 1 Bell's Com. b. 3, p. 1, c. 1, page 293; Bouv. Inst. Index, h. t.

2. Obligations are divided into imperfect obligations, and perfect obligations.

3. *Imperfect* obligations are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only; such as charity or gratitude. In this sense an obligation is a mere duty. Poth. Ob. art. Prél. n. 1.

4. A *perfect* obligation is one which gives a right to another to require us to give him something or not to do something. These obligations are either natural or moral, or they are civil.

5. A *natural* or *moral* obligation is one which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice. As for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished. 5 Binn. 573. Although natural obligations cannot be enforced by action, they have the following effect: 1. No suit will lie to recover back what has been paid, or given in compliance with a natural obligation. 1 T. R. 285; 1 Dall. 184. 2. A natural obligation is a sufficient consideration for a new contract. 5 Binn. 33; 2 Binn. 591; Yelv. 41, a, n. 1; Cowp. 290; 2 Bl. Com. 445; 3 B. & P. 249, n.; 2 East, 506; 3 Taunt. 311; 5 Taunt. 36; Yelv. 41, b. note; 3 Pick. 207; Chit. Contr. 10.

6. A *civil* obligation is one which has a binding operation in law, *vinculum juris*, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. 12 Wheat. R. 318, 337; 4 Wheat. R. 197.

7. Civil obligations are divided into

express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, and both real and mixed at the same time.

8. *Express* or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation.

9. An *implied* obligation is one which arises by operation of law; as, for example, if I send you daily a loaf of bread, without any express authority, and you make use of it in your family, the law raises an obligation on your part to pay me the value of the bread.

10. A *pure* or simple obligation is one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, it has been fulfilled.

11. A *conditional* obligation is one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

12. A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should, itself, be the first fulfilled.

13. A *secondary* obligation is one which is contracted, and is to be performed, in case the *primitive* cannot be. For example, if I sell you my house, I bind myself to give a title, but I find I cannot, as the title is in another, then my *secondary* obligation is to pay you damages for my non-performance of my obligation.

14. A *principal* obligation is one which is the most important object of the engagement of the contracting parties.

15. An *accessory* obligation is one which is dependent on the principal obligation; for example, if I sell you a house and lot of ground, the principal obligation on my part is to make you a title for it; the accessory obligation is to deliver you all the title papers which I have relating to it; to take care of the estate till it is delivered to you, and the like.

16. An *absolute* obligation is one which gives no alternative to the obligor, but he is bound to fulfil it according to his engagement.

17. An *alternative* obligation is, where a person engages to do, or to give several things in such a manner that the payment of

one will acquit him of all; as if A agrees to give B, upon a sufficient consideration, a horse, or one hundred dollars. Poth. Obl. Pt. 2, c. 3, art. 6, No. 245.

18. In order to constitute an alternative obligation, it is necessary that two or more things should be promised disjunctively; where they are promised conjunctively, there are as many obligations as the things which are enumerated, but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any of them.

19. The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor. Dougl. 14; 1 Lord Raym. 279; 4 N. S. 167. If one of the acts is prevented by the obligee, or the act of God, the obligor is discharged from both. See 2 Evans' Poth. Ob. 52 to 54; Vin. Ab. Condition, S b; and articles *Conjunctive; Disjunctive; Election*.

20. A *determinate* obligation, is one which has for its object a certain thing; as an obligation to deliver a certain horse named Bucephalus. In this case the obligation can only be discharged by delivering the identical horse.

21. An *indeterminate* obligation is one where the obligor binds himself to deliver one of a certain species; as, to deliver a horse, the delivery of any horse will discharge the obligation.

22. A *divisible* obligation is one which being a unit may nevertheless be lawfully divided with or without the consent of the parties. It is clear it may be divided by consent, as those who made it, may modify or change it as they please. But some obligations may be divided without the consent of the obligor; as, where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire, yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars, and the seller the other hundred. See *Apportionment*.

23. An *indivisible* obligation is one which is not susceptible of division; as, for example, if I promise to pay you one hundred dollars, you cannot assign one half of this to another, so as to give him a right of action against me for his share. See *Divisible*.

24. A *single* obligation is one without any penalty; as, where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal.

25. A *penal* obligation is one to which is attached a penal clause which is to be enforced, if the principal obligation be not performed. In general equity will relieve against a penalty, on the fulfilment of the principal obligation. See *Liquidated damages*; *Penalty*.

26. A *joint* obligation is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint and the obligors do not promise separately to fulfil their engagement they must be all sued, if living, to compel the performance; or, if any be dead, the survivors must all be sued. See *Parties to actions*.

27. A *several* obligation is one by which one individual, or if there be more, several individuals bind themselves separately to perform the engagement. In this case each obligor may be sued separately, and if one or more be dead, their respective executors may be sued. See *Parties to actions*.

28. The obligation is *purely personal* when the obligor binds himself to do a thing; as if I give my note for one thousand dollars, in that case my person only is bound, for my property is liable for the debt only while it belongs to me, and, if I lawfully transfer it to a third person, it is discharged.

29. The obligation is personal in another sense, as when the obligor binds himself to do a thing, and he provides his heirs and executors shall not be bound; as, for example, when he promises to pay a certain sum yearly during his life, and the payment is to cease at his death.

30. The obligation is *real* when real estate, and not the person, is liable to the obligee for the performance. A familiar example will explain this: when an estate owes an easement, as a right of way, it is the thing and not the owner who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage, he is not liable for the debt, though his estate is. In these cases the owner has an interest only because he is seised of the servient estate, or the mortgaged premises, and he may discharge himself by abandoning or parting with the property.

31. The obligation is both *personal* and

real when the obligor has bound himself, and pledged his estate for the fulfilment of his obligation.

OBLIGATION OF CONTRACTS. By this expression, which is used in the constitution of the United States, is meant a legal and not merely a moral duty. 4 Wheat. 107. The obligation of contracts consists in the necessity under which a man finds himself to do, or to refrain from doing something. This obligation consists generally both in *foro legis* and in *foro conscientie*, though it does at times exist in one of these only. It is certainly of the first, that in *foro legis*, which the framers of the constitution spoke, when they prohibited the passage of any law impairing the obligation of contracts. 1 Harr. Lond. Rep. Lo. 161. See *Impairing the obligation of contracts*.

OBLIGEE or CREDITOR, contracts. The person in favor of whom some obligation is contracted, whether such obligation be to pay money, or to do, or not to do something. Louis. Code, art. 3522, No. 11.

2. Obligees are either several or joint, an obligee is several when the obligation is made to him alone; obligees are joint when the obligation is made to two or more, and, in that event, each is not a creditor for his separate share, unless the nature of the subject or the particularity of the expression in the instrument lead to a different conclusion. 2 Evans' Poth. 56; Dyer 350 a, pl. 20; Hob. 172; 2 Brownl. 207; Yelv. 177; Cro. Jac. 251.

OBLIGOR or DEBTOR. The person who has engaged to perform some obligation. Louis. Code, art. 3522, No. 12. The word obligor, in its more technical signification, is applied to designate one who makes a bond.

2. Obligors are joint and several. They are joint when they agree to pay the obligation jointly, and then the survivors only are liable upon it at law, but in equity the assets of a deceased joint obligor may be reached. 1. Bro. C. R. 29; 2 Ves. 101; Id. 371. They are several when one or more bind themselves each of them separately to perform the obligation. In order to become an obligor, the party must actually, either himself or by his attorney, enter into the obligation, and execute it as his own. If a man sign and seal a bond as his own, and deliver it, he will be bound by it, although his name be not mentioned in the bond. 4 Stew. R. 479; 4 Hayw R. 239; 4 McCord, R. 208; 7 Cowen, R. 484; 2

Bail. R. 190; Brayt. 38; 2 H. & M. 398; 5 Mass. R. 538; 2 Dana, R. 463; 4 Munf. R. 380; 4 Dev. 272. When the obligor signs between the penal part and the condition, still the latter will be a part of the instrument. 7 Wend. Rep. 345; 3 H. & M. 144.

3. The execution of a bond by the obligor with a blank, and a verbal authority to fill it up, and it is afterwards filled up, does not bind the obligor, unless it is re-delivered, or acknowledged or adopted. 1 Yerg. R. 69, 149; 1 Hill, Rep. 267; 2 N. & M. 125; 2 Brock. R. 64; 1 Ham. R. 368; 2 Dev. R. 369; 6 Gill & John. 250; but see contra; 17 Serg. & R. 438; and see 6 Serg. & Rawle, 308; Wright, R. 742.

OBREPTION, *civil law*. Surprise. Dig. 3, 5, 8, 1. Vide *Surprise*.

OBSCENITY, *crim. law*. Such indecency as is calculated to promote the violation of the law, and the general corruption of morals.

2. The exhibition of an obscene picture is an indictable offence at common law, although not charged to have been exhibited in public, if it be averred that the picture was exhibited to sundry persons for money. 2 Serg. & Rawle, 91.

TO OBSERVE, *civil law*. To perform that which has been prescribed by some law or usage. Dig. 1, 3, 32.

OBSOLETE. This term is applied to those laws which have lost their efficacy, without being repealed.

2. A positive statute, unrepealed, can never be repealed by non-user alone. 4 Yeates, Rep. 181; Id. 215; 1 Browne's Rep. Appx. 28; 13 Serg. & Rawle, 447. The disuse of a law is at most only presumptive evidence that society has consented to such a repeal; however this presumption may operate on an unwritten law, it cannot in general act upon one which remains as a legislative act on the statute book, because no presumption can set aside a certainty. A written law may indeed become obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists. 1 P. A. Browne's R. App. 28. "It must be a very strong case," says Chief Justice Tilghman, "to justify the court in deciding, that an act standing on the statute book, unrepealed, is obsolete and invalid. I will not say that such case may not exist—where there has been a non-user for a great number of years—where, from a change of times and

manners, an ancient sleeping statute would do great mischief, if suddenly brought into action—where a long practice inconsistent with it has prevailed, and, specially, where from other and latter statutes it might be inferred that in the apprehension of the legislature, the old one was not in force." 13 Serg. & Rawle, 452; Rutherf. Inst. B. 2, c. 6, s. 19; Merl. Répert. mot Désuétude.

OBSTRUCTING PROCESS, *crim. law*. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process.

2. The officer must be prevented by actual violence, or by threatened violence, accompanied by the exercise of force, or by those having capacity to employ it, by which the officer is prevented from executing his writ; the officer is not required to expose his person by a personal conflict with the offender. 2 Wash. C. C. R. 169. See 3 Wash. C. C. R. 335.

3. This is an offence against public justice of a very high and presumptuous nature; and more particularly so where the obstruction is of an arrest upon criminal process: a person opposing an arrest upon criminal process becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason. 4 Bl. Com. 128; 2 Hawk. c. 17, s. 1; 1 Russ. on Cr. 360; vide Ing. Dig. 159; 2 Gallis. Rep. 15; 2 Chit. Criminal Law, 145, note a.

OCCUPANCY. The taking possession of those things corporeal which are without an owner, with an intention of appropriating them to one's own use. Pothier defines it to be the title by which one acquires property in a thing which belongs to nobody, by taking possession of it, with design of acquiring it. Tr. du Dr. de Propriété n. 20. The Civil Code of Lo. art. 3375, nearly following Pothier, defines occupancy to be "a mode of acquiring property by which a thing, which belongs to nobody, becomes the property of the person who took possession of it, with an intention of acquiring a right of ownership in it."

2. To constitute occupancy there must be a taking of a thing corporeal, belonging to nobody, with an intention of becoming the owner of it.

3.—1. The taking must be such as the nature of the thing requires; if, for example, two persons were walking on the sea-shore, and one of them should perceive a precious stone, and say he claimed it as

his own, he would acquire no property in it by occupancy, if the other seized it first.

4.—2. The thing must be susceptible of being possessed; an incorporeal right, therefore, as an annuity, could not be claimed by occupancy.

5.—3. The thing taken must belong to nobody; for if it were in the possession of another the taking would be larceny, and if it had been lost and not abandoned, the taker would have only a qualified property in it, and would hold the possession for the owner.

6.—4. The taking must have been with an intention of becoming the owner; if therefore a person non compos mentis should take such a thing he would not acquire a property in it, because he had no intention to do so. Co. Litt. 41, b.

7. Among the numerous ways of acquiring property by occupancy, the following are considered as the most usual.

8.—1. Goods captured in war, from public enemies, were, by the common law, adjudged to belong to the captors. Finch's law, 28, 178; 1 Wills. 211; 1 Chit. Com. Law, 377 to 512; 2 Wooddes. 435 to 457; 2 Bl. Com. 401. But by the law of nations such things are now considered as primarily vested in the sovereign, and as belonging to individual captors only to the extent and under such regulations as positive laws may prescribe. 2 Kent's Com. 290. By the policy of law, goods belonging to an enemy are considered as not being the property of any one. Leçon's Elem. du Dr. Rom. § 348; 2 Bl. Com. 401.

9.—2. When movables are casually lost by the owner and unreclaimed, or designedly abandoned by him, they belong to the fortunate finder who seizes them, by right of occupancy.

10.—3. The benefit of the elements, the light, air, and water, can only be appropriated by occupancy.

11.—4. When animals *feræ naturæ* are captured, they become the property of the occupant while he retains the possession; for if an animal so taken should escape, the captor loses all the property he had in it. 2 Bl. Com. 403.

12.—5. It is by virtue of his occupancy that the owner of lands is entitled to the emblements.

13.—6. Property acquired by accession, is also grounded on the right of occupancy.

14.—7. Goods acquired by means of confusion may be referred to the same right.

15.—8. The right of inventors of ma-

chines or of authors of literary productions is also founded on occupancy.

Vide, generally, Kent, Com. Lect. 36; 16 Vin. Ab. 69; Bac. Ab. Estate for life and occupancy; 1 Brown's Civ. Law, 234; 4 Toull. n. 4; Leçons du Droit Rom. § 342, et seq.; Bouv. Inst. Index, h. t.

OCCUPANT or OCCUPIER. One who has the actual use or possession of a thing.

2. He derives his title of occupancy either by taking possession of a thing without an owner, or by purchase, or gift of the thing from the owner, or it descends to him by due course of law.

3. When the occupiers of a house are entitled to a privilege in consequence of such occupation, as to pass along a way, to enjoy a pew, and the like, a person who occupies a part of such house, however small, is entitled to some right, and cannot be deprived of it. 2 B. & A. 164; S. C. Eng. C. L. R. 50; 1 Chit. Pr. 209, 210; 4 Com. Dig. 64; 5 Com. Dig. 199.

OCCUPATION. Use or tenure; as, the house is in the occupation of A B. A trade, business or mystery; as the occupation of a printer. *Occupancy*. (q. v.)

2. In another sense occupation signifies a putting out of a man's freehold in time of war. Co. Litt. s. 412. See *Dependency*; *Possession*.

OCCUPAVIT. The name of a writ, which lies to recover the possession of lands, when they have been taken from the possession of the owner by occupation. (q. v.) 3 Tho. Co. Litt. 41.

OCCUPIER. One who is in the enjoyment of a thing.

2. He may be the occupier by virtue of a lawful contract, either express or implied, or without any contract. The occupier is, in general, bound to make the necessary repairs to premises he occupies: the cleansing and repairing of drains and sewers, therefore, is *primâ facie* the duty of him who occupies the premises. 3 Q. B. R. 449; S. C. 43 Eng. C. L. R. 814.

OCHLOCRACY. A government where the authority is in the hands of the multitude; the abuse of a democracy. Vau-mène, Dict. du Language Politique.

ODHALL RIGHT. The same as *allodial*.

OF COURSE. That which may be done, in the course of legal proceedings, without making any application to the court; that which is granted by the court without further inquiry, upon its being

asked; as, a rule to plead is a matter of course.

OFFENCE, crimes. The doing that which a penal law forbids to be done, or omitting to do what it commands; in this sense it is nearly synonymous with crime. (q. v.) In a more confined sense, it may be considered as having the same meaning with misdemeanor, (q. v.) but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty. 1 Chit. Prac. 14.

OFFER, contracts. A proposition to do a thing.

2. An offer ought to contain a right, if accepted, of compelling the fulfilment of the contract, and this right when not expressed, is always implied.

3. By virtue of his natural liberty, a man may change his will at any time, if it is not to the injury of another; he may, therefore, revoke or recall his offers, at any time before they have been accepted; and, in order to deprive him of this right, the offer must have been accepted on the terms in which it was made. 10 Ves. 438; 2 C. & P. 558.

4. Any qualification of, or departure from those terms, invalidates the offer, unless the same be agreed to by the party who made it. 4 Wheat. R. 225; 3 John. R. 534; 7 John. 470; 6 Wend. 103.

5. When the offer has been made, the party is presumed to be willing to enter into the contract for the time limited, and, if the time be not fixed by the offer, then until it be expressly revoked, or rendered nugatory by a contrary presumption. 6 Wend. 103. See 8 S. & R. 243; 1 Pick. 278; 10 Pick. 326; 12 John. 190; 9 Porter, 605; 1 Bell's Com. 326, 5th ed.; Poth. Vente, n. 32; 1 Bouv. Inst. n. 577, et seq.; and see *Acceptance of contracts*; *Assent*; *Bid*.

OFFICE. An office is a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. Shelf. on Mortm. 797; Cruise, Dig. Index, h. t.; 3 Serg. & R. 149.

2. Offices may be classed into civil and military.

3.—1. Civil offices may be classed into political, judicial, and ministerial.

4.—1. The political offices are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer; the office of the president of the United States, of

the heads of departments, of the members of the legislature, are of this number.

5.—2. The judicial offices are those which relate to the administration of justice, and which must be exercised by persons of sufficient skill and experience in the duties which appertain to them.

6.—3. Ministerial offices are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. 7 Mass. 280. See 5 Wend. 170; 10 Wend. 514; 8 Verm. 512; Breese, 280. It is a general rule, that a judicial office cannot be exercised by deputy, while a ministerial may.

7. In the United States, the tenure of office never extends beyond good behaviour. In England, offices are public or private. The former affect the people generally, the latter are such as concern particular districts, belonging to private individuals. In the United States, all offices, according to the above definition, are public; but in another sense, employments of a private nature are also called offices; for example, the office of president of a bank, the office of director of a corporation. For the incompatibility of office, see *Incompatibility*; 4 S. & R. 277; 4 Inst. 100; Com Dig. h. t., B. 7; and vide, generally, 3 Kent, Com. 362; Cruise, Dig. tit. 25; Ham. N. P. 283; 16 Vin. Ab. 101; Aycliffe's Parerg. 395; Poth. Traité des Choses, § 2; Amer. Dig. h. t.; 17 S. & R. 219.

8.—2. Military offices consist of such as are granted to soldiers or naval officers.

9. The room in which the business of an officer is transacted is also called an office, as the land office. Vide *Officer*.

OFFICE BOOK, evidence. A book kept in a public office, not appertaining to a court, authorized by the law of any state.

2. An *exemplification*, (q. v.) of any such office book, when authenticated under the act of congress of 27th March, 1804, Ingers. Dig. 77, is to have such faith and credit given to it in every court and office within the United States, as such exemplification has by law or usage in the courts or offices of the state from whence the same has been taken.

OFFICE COPY. A transcript of a record or proceeding filed in an office established by law, certified under the seal of the proper officer.

OFFICE FOUND, Eng. law. When an inquisition is made to the king's use of anything, by virtue of office of him who inquires,

and the inquisition is found, it is said to be *office found*.

OFFICE, INQUEST OF. An examination into a matter by an officer in virtue of his office. Vide *Inquisition*.

OFFICER. He who is lawfully invested with an office,

2. Officers may be classed into, 1. Executive; as the president of the United States of America, the several governors of the different states. Their duties are pointed out in the national constitution, and the constitutions of the several states, but they are required mainly to cause the laws to be executed and obeyed.

3.—2. The legislative; such as members of congress; and of the several state legislatures. These officers are confined in their duties by the constitution, generally to make laws, though sometimes in cases of impeachment, one of the houses of the legislature exercises judicial functions, somewhat similar to those of a grand jury, by presenting to the other articles of impeachment; and the other house acts as a court in trying such impeachments. The legislatures have, besides, the power to inquire into the conduct of their members, judge of their elections, and the like.

4.—3. Judicial officers; whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with a violation of the law.

5.—4. Ministerial officers, or those whose duty it is to execute the mandates, lawfully issued, of their superiors.

6.—5. Military officers, who have commands in the army; and

7.—6. Naval officers, who are in command in the navy.

8. Officers are required to exercise the functions which belong to their respective offices. The neglect to do so, may, in some cases, subject the offender to an indictment; 1 Yeates, R. 519; and in others, he will be liable to the party injured. 1 Yeates, R. 506.

9. Officers are also divided into public officers and those who are not public. Some officers may bear both characters; for example, a clergyman is a public officer when he acts in the performance of such a public duty as the marriage of two individuals; 4 Conn. 209; and he is merely a private person when he acts in his more ordinary calling of teaching his congregation. See 4 Conn. 134; 1 Apple. 155.

OFFICIAL, civil and canon laws. In the ancient civil law, the person who was the minister of, or attendant upon a magistrate, was called the *official*.

2. In the canon law, the person to whom the bishop generally commits the charge of his spiritual jurisdiction, bears this name. Wood's Inst. 30, 505; Merl. Répert. h. t.

OFFICINA JUSTITIÆ, Eng. law. The chancery is so called, because all writs issue from it, under the great seal, returnable into the courts of common law.

OFFICIO, EX. By virtue of one's office. Vide *Ex officio*; 3 Bl. Com. 447.

OHIO. The name of one of the new states of the United States of America. It was admitted into the Union by virtue of the act of congress, entitled "An act to enable the people of the eastern division of the territory north-west of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes," approved, May 30, 1802, 2 Story's L. U. S. 869; by which it is enacted,

§ 1. That the inhabitants of the eastern division of the territory north-west of the river Ohio, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union, upon the same footing with the original states, in all respects whatever.

2.—§ 2. That the said state shall consist of all the territory included within the following boundaries, to wit: Bounded on the east by the Pennsylvania line, on the south by the Ohio river, to the mouth of the Great Miami river, on the west by the line drawn due north from the mouth of the Great Miami aforesaid, and on the north by an east and west line drawn through the southerly extreme of lake Michigan, running east, after intersecting the due north line aforesaid, from the mouth of the Great Miami, until it shall intersect lake Erie, or the territorial line, and thence, with the same, through lake Erie, to the Pennsylvania line aforesaid: Provided, That congress shall be at liberty, at any time hereafter, either to attach all the territory lying east of the line to be drawn due north from the mouth of the Miami aforesaid to the territorial line, and north of an east and west line

drawn through the southerly extreme of lake Michigan, running east as aforesaid to lake Erie, to the aforesaid state, or dispose of it otherwise, in conformity to the fifth article of compact between the original states and the people and states to be formed in the territory north-west of the river Ohio.

3. By virtue of the authority given them by the act of congress, the people of the eastern division of said territory met in convention at Chillicothe, on Monday, the first day of November, 1802, by which they did ordain and establish the constitution and form of government, and did mutually agree with each other to form themselves into a free and independent state, by the name of *The State of Ohio*. This constitution has been superseded by the present one, which was adopted in 1851. The powers of the government are separated into three distinct branches, the legislative, the executive, and the judicial.

4.—1st. By article 2, the *legislative* department is constituted as follows :

5.—§ 1. The legislative power of this state shall be vested in a general assembly, which shall consist of a senate, and house of representatives.

6.—§ 2. Senators and representatives shall be elected biennially, by the electors in the respective counties or districts, on the second Tuesday of October; their term of office shall commence on the first day of January next thereafter, and continue two years.

7.—§ 3. Senators and representatives shall have resided in their respective counties, or districts, one year next preceding their election, unless they shall have been absent on the public business of the United States, or of this state.

8.—§ 4. No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in, the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia.

9.—§ 5. No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this state; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the general assembly, until he shall have accounted for, and paid such money into the treasury.

10.—§ 6. All regular sessions of the

general assembly shall commence on the first Monday of January, biennially. The first session, under this constitution, shall commence on the first Monday of January, one thousand eight hundred and fifty-two.

11.—§ 7. The style of the laws of this state, shall be, "*Be it enacted by the General Assembly of the State of Ohio.*"

12.—§ 8. The apportionment of this state for members of the general assembly, shall be made every ten years, after the year one thousand eight hundred and fifty-one, in the following manner: The whole population of the state, as ascertained by the federal census, or in such other mode as the general assembly may direct, shall be divided by the number "one hundred," and the quotient shall be the ratio of representation in the house of representatives, for ten years next succeeding such apportionment.

13.—§ 9. Every county, having a population equal to one-half of said ratio, shall be entitled to one representative; every county, containing said ratio, and three-fourths over, shall be entitled to two representatives; every county, containing three times said ratio, shall be entitled to three representatives: and so on, requiring after the first two, an entire ratio for each additional representative.

14.—§ 10. When any county shall have a fraction above the ratio, so large, that being multiplied by five, the result will be equal to one or more ratios, additional representatives shall be apportioned for such ratios, among the several sessions of the decennial period, in the following manner: If there be only one ratio, a representative shall be allotted to the fifth session of the decennial period; if there are two ratios, a representative shall be allotted to the fourth and third sessions, respectively; if three, to the third, second, and first sessions, respectively; if four, to the fourth, third, second, and first sessions, respectively.

15.—§ 11. Any county, forming with another county or counties, a representative district, during one decennial period, if it have acquired sufficient population at the next decennial period, shall be entitled to a separate representation, if there shall be left, in the district from which it shall have been separated, a population sufficient for a representative; but no such change shall be made, except at the regular decennial period for the apportionment of representatives.

16.—§ 12. If, in fixing any subsequent

ratio, a county, previously entitled to a separate representation, shall have less than the number required by the new ratio for a representative, such county shall be attached to the county adjoining it, having the least number of inhabitants; and the representation of the district, so formed, shall be determined as herein provided.

17.—§ 13. The ratio for a senator shall, forever hereafter, be ascertained, by dividing the whole population of the state, by the number thirty-five.

18.—§ 14. The same rules shall be applied, in apportioning the fractions of senatorial districts, and in annexing districts, which may hereafter have less than three-fourths of a senatorial ratio, as are applied to representative districts.

19.—§ 15. Any county forming part of a senatorial district, having acquired a population equal to a full senatorial ratio, shall be made a separate senatorial district, at any regular decennial apportionment, if a full senatorial ratio shall be left in the district from which it shall be taken.

20.—§ 16. For the first ten years, after the year one thousand eight hundred and fifty-one, the apportionment of representatives shall be as provided in the schedule, and no change shall ever be made in the principles of representation, as herein established, or in the senatorial districts, except as above provided. All territory, belonging to a county at the time of any apportionment, shall, as to the right of representation and suffrage, remain an integral part thereof, during the decennial period.

21.—§ 17. The governor, auditor, and secretary of state, or any two of them, shall, at least six months prior to the October election, in the year one thousand eight hundred and sixty-one, and, at each decennial period thereafter, ascertain and determine the ratio of representation, according to the decennial census, the number of representatives and senators each county or district shall be entitled to elect, and for what years, within the next ensuing ten years, and the governor shall cause the same to be published, in such manner as shall be directed by law.

22.—§ 18. Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications

of an elector, and be entitled to vote at all elections.

23.—§ 19. No person shall be elected or appointed to any office in this state, unless he possess the qualifications of an elector.

24.—§d. By article 3, the executive department is constituted as follows:

25.—§ 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, and an attorney general, who shall be chosen by the electors of the state, on the second Tuesday of October, and at the places of voting for members of the general assembly.

26.—§ 2. The governor, lieutenant governor, secretary of state, treasurer, and attorney general, shall hold their offices for two years; and the auditor for four years. Their terms of office shall commence on the second Monday of January next after their election, and continue until their successors are elected and qualified.

27.—§ 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the president of the senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each house of the general assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

28.—§ 4. Should there be no session of the general assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the secretary of state, and opened, and the result declared by the governor, in such manner as may be provided by law.

29.—§ 5. The supreme executive power of this state shall be vested in the governor.

30.—§ 6. He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices; and shall see that the laws are faithfully executed.

31.—§ 7. He shall communicate at every session, by message, to the general assembly, the condition of the state, and recommend such measures as he shall deem expedient.

32.—§ 8. He may, on extraordinary occasions, convene the general assembly by

proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened.

33.—§ 9. In case of disagreement between the two houses, in respect to the time of adjournment, he shall have power to adjourn the general assembly to such time as he may think proper, but not beyond the regular meetings thereof.

34.—§ 10. He shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.

35.—§ 11. He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offences, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor.

36.—§ 12. There shall be a seal of the state, which shall be kept by the governor, and used by him officially; and shall be called "The Great Seal of the State of Ohio."

37.—§ 13. All grants and commissions shall be issued in the name, and by the authority, of the State of Ohio; sealed with the great seal; signed by the governor, and countersigned by the secretary of state.

38.—§ 14. No member of congress, or other person holding office under the authority of this state, or of the United States, shall execute the office of governor, except as herein provided.

39.—§ 15. In case of the death, impeachment, resignation, removal, or other disability of the governor, the powers and duties of the office, for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor.

40.—§ 16. The lieutenant governor shall be president of the senate, but shall vote

only when the senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president *pro tempore*.

41.—§ 17. If the lieutenant governor, while executing the office of governor, shall be impeached, displaced, resign or die, or otherwise become incapable of performing the duties of the office, the president of the senate shall act as governor, until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.

42.—§ 18. Should the office of auditor, treasurer, secretary, or attorney general, become vacant, for any of the causes specified in the fifteenth section of this article, the governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election, at the first general election that occurs more than thirty days after it shall have happened; and the person chosen shall hold the office for the full term fixed in the second section of this article.

43.—§ 19. The officers mentioned in this article, shall, at stated times, receive, for their services, a compensation to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected.

44.—§ 20. The officers of the executive department, and of the public state institutions, shall, at least five days preceding each regular session of the general assembly, severally report to the governor, who shall transmit such reports, with his message, to the general assembly.

45.—4th. By article 4, the *judicial* department is constituted as follows:

46.—§ 1. The judicial power of the state shall be vested in a supreme court, in district courts, courts of common pleas, courts of probate, justices of the peace, and in such other courts, inferior to the supreme court, in one or more counties, as the general assembly, may from time to time establish.

47.—§ 2. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. It shall have original jurisdiction in quo warranto, mandamus,

habeas corpus, and procedendo, and such appellate jurisdiction as may be provided by law. It shall hold at least one term in each year, at the seat of government, and such other terms, at the seat of government, or elsewhere, as may be provided by law. The judges of the supreme court shall be elected by the electors of the state at large.

48.—§ 3. The state shall be divided into nine common pleas districts, of which the county of Hamilton shall constitute one, of compact territory, and bounded by county lines; and each of said districts, consisting of three or more counties, shall be subdivided into three parts, of compact territory, bounded by county lines, and as nearly equal in population as practicable; in each of which, one judge of the court of common pleas for said district, and residing therein, shall be elected by the electors of said subdivision. Courts of common pleas shall be held, by one or more of these judges, in every county in the district, as often as may be provided by law; and more than one court, or sitting thereof, may be held at the same time in each district.

49.—§ 4. The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law.

50.—§ 5. District courts shall be composed of the judges of the court of common pleas of the respective districts, and one of the judges of the supreme court, any three of whom shall be a quorum, and shall be held in each county therein, at least once in each year; but, if it shall be found inexpedient to hold such court annually, in each county, of any district, the general assembly may, for such district, provide that said court shall hold at least three annual sessions therein, in not less than three places: Provided, that the general assembly may, by law, authorize the judges of each district to fix the times of holding the courts therein.

51.—§ 6. The district court shall have like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law.

52.—§ 7. There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge, elected by the voters of the county, who shall hold his office for the term of three years, and shall receive such compensation, payable out of the county treasury, or by fees, or both, as shall be provided by law.

53.—§ 8. The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators and guardians, and such other jurisdiction, in any county, or counties, as may be provided by law.

54.—§ 9. A competent number of justices of the peace shall be elected, by the electors, in each township in the several counties. Their term of office shall be three years, and their powers and duties shall be regulated by law.

55.—§ 10. All judges, other than those provided for in this constitution, shall be elected by the electors of the judicial district for which they may be created, but not for a longer term of office than five years.

56.—§ 11. The judges of the supreme court shall, immediately after the first election under this constitution, be classified by lot, so that one shall hold for the term of one year, one for two years, one for three years, one for four years, and one for five years; and, at all subsequent elections, the term of each of said judges shall be for five years.

57.—§ 12. The judges of the courts of common pleas shall, while in office, reside in the district for which they are elected; and their term of office shall be for five years.

58.—§ 13. In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened.

59.—§ 14. The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive for their services, such compensation as may be provided by law, which shall not be diminished or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or the United States. All votes for either of them, for any elective office, except a judicial office,

under the authority of this state, given by the general assembly, or the people, shall be void.

60.—§ 15. The general assembly may increase or diminish the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district; change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution, shall vacate the office of any judge.

61.—§ 16. There shall be elected in each county, by the electors thereof, one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be clerk of all other courts of record held therein; but the general assembly may provide by law, for the election of a clerk, with a like term of office, for each or any other of the courts of record, and may authorize the judge of the probate court to perform the duties of clerk for his court, under such regulations as may be directed by law. Clerks of courts shall be removable for such cause, and in such manner, as shall be prescribed by law.

62.—§ 17. Judges may be removed from office, by concurrent resolution of both houses of the general assembly, if two-thirds of the members elected to each house concur therein; but no such removal shall be made, except upon complaint, the substance of which shall be entered on the journal, nor until the party charged shall have had notice thereof, and an opportunity to be heard.

63.—§ 18. The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

64.—§ 19. The general assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

65.—§ 20. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on in the name and by the authority of the state of Ohio; and all

indictments shall conclude, "against the peace and dignity of the state of Ohio."

OLD AGE. This needs no definition. Sometimes old age is the cause of loss of memory and of the powers of the mind, when the party may be found *non compos mentis*. See *Aged witness*; *Senility*.

OLD NATURA BREVIVM. The title of an old English book, (usually cited Vet. N. B.) so called to distinguish it from the F. N. B. It contains the writs most in use in the reign of Edward III., together with a short comment on the application and properties of each of them.

OLD TENURES. The title of a small tract, which, as its title denotes, contains an account of the various tenures by which land was holden in the reign of Edward III. This tract was published in 1719, with notes and additions, with the eleventh edition of the First Institutes, and reprinted in 8vo. in 1764, by Serjeant Hawkins, in a Selection of Coke's Law Tracts.

OLERON LAWS. The name of a maritime code. Vide *Laws of Oleron*.

OLIGARCHY. This name is given to designate the power which a few citizens of a state have usurped, which ought by the constitution to reside in the people. Among the Romans the government degenerated several times into an oligarchy; for example, under the decemvirs, when they became the only magistrates in the commonwealth.

OLOGRAPH. When applied to wills or testaments, this term signifies that they are wholly written by the testator himself. Vide Civil Code of Louisiana, art. 1581: Code Civil, 970; 5 Toull. n. 357; 1 Stuart's (L. C.) R. 327; 2 Bouv. Inst. n. 2139; and see *Testament*, *Olographic*; *Will*, *Olographic*.

OMISSION. An omission is the neglect to perform what the law requires.

2. When a public law enjoins on certain officers duties to be performed by them for the public, and they omit to perform them, they may be indicted: for example, supervisors of the highways are required to repair the public roads; the neglect to do so will render them liable to be indicted.

3. When a nuisance arises in consequence of an omission, it cannot be abated if it be a private nuisance without giving notice, when such notice can be given. Vide *Branches*; *Commission*; *Nuisance*; *Trees*.

OMNIA PERFORMAVIT. A good

plea in bar, where all the covenants are in the affirmative. 1 Greenl. R. 189.

OMNIUM, mercant. law. A term used to express the aggregate value of the different stocks in which a loan is usually funded. 2 Esp. Rep. 361; 7 T. R. 630.

ONERARI NON. The name of a plea by which the defendant says that he ought not to be charged. It is used in an action of debt. 1 Saund. 290, n. a.

ONERIS FERENDI, civil law. The name of a servitude by which the wall or pillar of one house is bound to sustain the weight of the buildings of the neighbor.

2. The owner of the servient building is bound to repair and keep it sufficiently strong for the weight it has to bear. Dig. 8, 2, 23; 2 Bouv. Inst. n. 1627.

ONEROUS CAUSE, civil law. A valuable consideration.

ONEROUS CONTRACT, civil law. One made for a consideration given or promised, however small. Civ. Code of Lo. art. 1767.

ONEROUS GIFT, civil law. The gift of a thing subject to certain charges which the giver has imposed on the donee. Poth. h. t.

ONUS PROBANDI, evidence. The burden of the proof.

2. It is a general rule that the party who alleges the affirmative of any proposition shall prove it. It is also a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant; for example, when to a plea of infancy, the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time. 1 Term. Rep. 648. But where the negative involves a criminal omission by the party, and consequently where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed. Vide 11 Johns. R. 513; 19 Johns. R. 345; 9 M. R. 48; 3 N. S. 576.

3. In general, wherever the law presumes the affirmative, it lies on the party who denies the fact, to prove the negative; as, when the law raises a presumption as to the continuance of life; the legitimacy of children born in wedlock; or the satisfaction of a debt. Vide, generally, 1 Phil. Ev. 156; 1 Stark. Ev. 376; Roscoe's Civ. Ev. 51; Roscoe's Cr. Ev. 55; B. N. P.

298; 2 Gall. 485; 1 McCord, 573; 12 Vin Ab. 201; 4 Bouv. Inst. n. 4411.

4. The party on whom the *onus probandi* lies is entitled to begin, notwithstanding the technical form of the proceedings. 1 Stark. Ev. 584; 3 Bouv. Inst. n. 3043.

TO OPEN—OPENING. To open a case is to make a statement of the pleadings in a case, which is called the opening.

2. The opening should be concise, very distinct and perspicuous. Its use is to enable the judge and jury to direct their attention to the real merits of the case, and the points in issue. 1 Stark. R. 439; S. C. 2 E. C. L. R. 462; 2 Stark. R. 31; S. C. 3 Eng. C. L. R. 230.

3. The *opening address* or *speech* is that made immediately after the evidence has been closed; such address usually states, 1st. The full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable. 2d. At least an outline of the evidence by which those claims are to be established. 3d. The legal grounds and authorities in favor of the claim or of the proposed evidence. 4th. An anticipation of the expected defence, and statement of the grounds on which it is futile, either in law or justice, and the reasons why it ought to fail. 3 Chit. Pr. 881; 3 Bouv. Inst. n. 3044, et seq. To open a judgment, is to set it aside.

TO OPEN A CREDIT. When a banker accepts or pays a bill of exchange drawn on him, by a correspondent, who has not furnished him with funds, he is said to *open a credit* with the drawer. Pardess. n. 29.

OPEN COURT. The term sufficiently explains its meaning. By the constitution of some states, and by the laws and practice of all the others, the courts are required to be kept open, that is, free access is admitted in courts to all persons who have a desire to enter there, while it can be done without creating disorder.

2. In England, formerly, the parties and probably their witnesses were admitted freely in the courts, but all other persons were required to pay in order to obtain admittance. Stat. 13 Edw. I., c. 42, and 44; Barr. on the Stat. 126, 7. See Prin. of Pen. Law, 165.

OPEN POLICY. An open policy is one in which the amount of the interest of the insured is not fixed by the policy, and is to be ascertained in case of loss. Vide *Policy*.

OPENING A JUDGMENT. The act

of the court by which a judgment is so far annulled that it cannot be executed, but which still retains some qualities of a judgment; as, for example, its binding operation or lien upon the real estate of the defendant.

2. The opening of the judgment takes place when some person having an interest makes affidavit to facts, which if true would render the execution of such judgment inequitable. The judgment is opened so as to be in effect an award of a collateral issue to try the facts alleged in the affidavit. 6 Watts & Serg. 493, 494.

OPERATION OF LAW. This term is applied to those rights which are cast upon a party by the law, without any act of his own; as, the right to an estate of one who dies intestate, is cast upon the heir at law, by operation of law; when a lessee for life enfeoffs him in reversion, or when the lessee and lessor join in a feoffment, or when a lessee for life or years accepts a new lease or demise from the lessor, there is a surrender of the first lease by operation of law. 9 B. & C. 298; 5 B. & C. 269; 2 B. & A. 119; 5 Taunt. 518.

OPERATIVE. A workman; one employed to perform labor for another.

2. This word is used in the bankrupt law of 19th August, 1841, s. 5, which directs that any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of wages due to him for such labor, not exceeding twenty-five dollars; provided that such labor shall have been performed within six months next before the bankruptcy of his employer.

3. Under this act it has been decided that an apprentice who had done work beyond a task allotted to him by his master, commonly called overwork, under an agreement on the part of the master to pay for such work, was entitled as an operative. 1 Penn. Law Journ. 368. See 3 Rob. Adm. R. 237; 2 Cranch, 240, 270.

OPINION, practice. A declaration by a counsel to his client of what the law is, according to his judgment, on a statement of facts submitted to him. The paper upon which an opinion is written is, by a figure of speech, also called an opinion.

2. The counsel should as far as practicable give, 1. A direct and positive opinion, meeting the point and effect of the question; and separately, if the questions

proposed were properly divisible into several. 2. The reasons, succinctly stated, in support of such opinion. 3. A reference to the statute, rule or decision on the subject. 4. When the facts are susceptible of a small difference in the statement, a suggestion of the probability of such variation. 5. When some important fact is stated as resting principally on the statement of the party interested, a suggestion ought to be made to inquire how that fact is to be proved. 6. A suggestion of the proper process or pleadings to be adopted. 7. A suggestion of what precautionary measures ought to be adopted. As to the value of an opinion, see 4 Penn. St. R. 28.

OPINION, evidence. An inference made, or conclusion drawn, by a witness from facts known to him.

2. In general a witness cannot be asked his opinion upon a particular question, for he is called to speak of *facts* only. But to this general rule there are exceptions; where matters of skill and judgment are involved, a person competent particularly to understand such matters, may be asked his opinion, and it will be evidence. 4 Hill, 129; 1 Denio, 281; 2 Scam. 297; 2 N. H. Rep. 480; 2 Story, R. 421; see 8 W. & S. 61; 1 McMullan, 56. For example, an engineer may be called to say what, in his opinion, is the cause that a harbor has been blocked up. 3 Dougl. R. 158; S. C. 26 Eng. C. L. Rep. 63; 1 Phil. Ev. 276; 4 T. R. 498. A ship builder may be asked his opinion on a question of sea-worthiness. Peake, N. P. C. 25; 10 Bingh. R. 57; 25 Eng. Com. Law Rep. 28.

3. Medical men are usually examined as to their judgment with regard to the cause of a person's death, who has suffered by violence. Vide *Death*. Of the sanity, 1 Addams, 244, or impotency, 3 Philm. 14, of an individual. Professional men are, however, confined to state facts and opinions within the scope of their professions, and are not allowed to give opinions on things of which the jury can as well judge. 5 Rogers' Rec. 26; 4 Wend. 320; 3 Fairf. 398; 3 Dana, 382; 1 Pennsylv. 161; 2 Halst. 244; 7 Verm. 161; 6 Rand. 704; 4 Yeates, 262; 9 Conn. 102; 3 N. H. Rep. 349; 5 H. & J. 438.

4. The unwritten or common law of foreign countries may be proved by the opinion of witnesses possessing professional skill. Story's Conf. of Laws, 530; 1 Cranch, 12, 38; 2 Cranch, 236; 6 Pet

Rep. 768; Pet. C. C. R. 225; 2 Wash. C. C. R. 175; Id. 1; 5 Wend. Rep. 375; 2 Id. 411; 3 Pick. Rep. 298; 4 Conn. R. 517; 6 Conn. R. 486; 4 Bibb, R. 73; 2 Marsh. Rep. 609; 5 Harr. & John. 86; 1 Johns. Rep. 385; 3 Johns. Rep. 105; 14 Mass. R. 455; 6 Conn. R. 508; 1 Verm. R. 336; 15 Serg. & Rawle, 87; 1 Louis. R. 153; 3 Id. 53; 6 Cranch, 274. Vide also 14 Serg. & Rawle, 137; 3 N. Hamp. R. 349; 3 Yeates, 527; 1 Wheel. C. C. Rep. 205; 6 Rand. R. 704; 2 Russ. on Cr. 623; 4 Camp. R. 155; Russ. & Ry. 456; 2 Esp. C. 58; *Foreign Laws*; 3 Phillim. R. 449; 1 Eccl. R. 291.

OPINION, judgment. A collection of reasons delivered by a judge for giving the judgment he is about to pronounce: the judgment itself is sometimes called an opinion.

2. Such an opinion ought to be a perfect syllogism, the major of which should be the law; the minor, the fact to be decided; and the consequence, the judgment which declares that to be conformable or contrary to law.

3. Opinions are judicial or extra-judicial; a judicial opinion is one which is given on a matter which is legally brought before the judge for his decision; an extra-judicial opinion, is one which although given in court, is not necessary to the judgment; Vaughan, 382; 1 Hale's Hist. 141; and whether given in or out of court, is no more than the prolatum of him who gives it, and has no legal efficacy. 4 Penn. St. R. 28. Vide *Reason*.

OPPOSITION, practice. The act of a creditor who declares his dissent to a debtor's being discharged under the insolvent laws.

OPPRESSOR. One who having public authority uses it unlawfully to tyrannize over another; as, if he keep him in prison until he shall do something which he is not lawfully bound to do.

2. To charge a magistrate with being an oppressor, is therefore actionable. 1 Stark. Sland. 185.

OPPROBRIUM, civil law. Ignominy; shame; ignominy. (q. v.)

OPTION. Choice; Election; (q. v.) where the subject is considered.

OR. This syllable in the termination of words has an active signification, and usually denotes the doer of an act; as, the grantor, he who makes a grant; the vendor, he who makes a sale; the feoffor, he who

makes a feoffment. Litt. s. 57; 1 Bl. Com. 140, n.

ORACULUM, civil law. The name of a kind of decisions given by the Roman emperors.

ORAL. Something spoken in contradistinction to something written; as oral evidence, which is evidence delivered verbally by a witness.

ORATOR, practice. A good man, skilful in speaking well, and who employs a perfect eloquence to defend causes either public or private. Dupin, Profession d'Avocat, tom. 1, p. 19.

2. In chancery, the party who files a bill calls himself in those pleadings *your orator*. Among the Romans, advocates were called orators. Code, 1, 8, 33, 1.

ORDAIN. To ordain is to make an ordinance, to enact a law.

2. In the constitution of the United States, the preamble declares that the people "do ordain and establish this constitution for the United States of America." The 3d article of the same constitution declares, that "the judicial power shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." See 1 Wheat. R. 304, 324; 4 Wheat. R. 316, 402.

ORDEAL. An ancient superstitious mode of trial. When in a criminal case the accused was arraigned, he might select the mode of trial either by God and his country, that is, by jury; or by God only, that is by ordeal.

2. The trial by ordeal was either by fire or by water. Those who were tried by the former passed barefooted and blindfolded over nine hot glowing ploughshares; or were to carry burning irons in their hands; and accordingly as they escaped or not, they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water, the parties suspected were adjudged innocent, if their bodies were not borne up by the water contrary to the course of nature; and if, after putting their bare arms or legs into scalding water they came out unhurt, they were taken to be innocent of the crime.

3. It was impiously supposed that God would, by the mere contrivance of man, exercise his power in favor of the innocent. 4 Bl. Com. 342; 2 Am. Jur. 280. For a detailed account of the trial by ordeal, see Herb. Antiq. of the Inns of Court, 146.

ORDER, government. By this expression is understood the several bodies which compose the state. In ancient Rome, for example, there were three distinct orders; namely, that of the senators, that of the patricians, and that of the plebeians.

2. In the United States there are no orders of men, all men are equal in the eye of the law, except that in some states slavery has been entailed on them while they were colonies, and it still exists, in relation to some of the African race; but these have no particular rights. *Vide Rank.*

ORDER, contracts. An indorsement or short writing put upon the back of a negotiable bill or note, for the purpose of passing the title to it, and making it payable to another person.

2. When a bill or note is payable to order, which is generally expressed by this formula, "to A B, or order," or "to the order of A B," in this case the payee, A B, may either receive the money secured by such instrument, or by his order, which is generally done by a simple indorsement, (q. v.) pass the right to receive it to another. But a bill or note wanting these words, although not negotiable, does not lose the general qualities of such instruments. 6 T. R. 123; 6 Taunt. 328; Russ. & Ry. C. C. 300; 3 Caines, 137; 9 John. 217. *Vide Bill of Exchange; Indorsement.*

3. An informal bill of exchange or a paper which requires one person to pay or deliver to another goods on account of the maker to a third party, is called an order.

ORDER, French law. The act by which the rank of preferences of claims, among creditors who have liens over the price which arises out of the sale of an immovable subject, is ascertained, is called *order*. Dalloz, Dict. h. t.

ORDER OF FILIATION. The name of a judgment rendered by two justices, having jurisdiction in such case, in which a man therein named is adjudged to be the putative father of a bastard child; and it is farther adjudged that he pay a certain sum for its support.

2. The order must bear upon its face, 1st. That it was made upon the complaint of the township, parish, or other place, where the child was born and is chargeable. 2d. That it was made by justices of the peace having jurisdiction. Salk. 122, pl. 6; 2 Ld. Raym. 1197. 3d. The birth place of the child. 4th. The examination

of the putative father and of the mother; but, it is said, the presence of the putative father is not requisite, if he has been summoned. Cald. R. 308. 5th. The judgment that the defendant is the putative father of the child. Sid. 363; Stile, 154; Dalt. 52; Dougl. 662. 6th. That he shall maintain the child as long as he shall be chargeable to the township, parish, or other place, which must be named. Salk. 121, pl. 2; Comb. 232. But the order may be that the father shall pay a certain sum weekly as long as the child is chargeable to the public. Stile, 134; Vent. 210. 7th. It must be dated, signed, and sealed by the justices. Such order cannot be vacated by two other justices. 15 John. R. 208; see 8 Cowen, R. 623; 4 Cowen, R. 253; 12 John. R. 195; 2 Blackf. R. 42.

ORDER NISI. A conditional order which is to be confirmed *unless* something be done, which has been required, by a time specified. Eden. Inj. 122.

ORDERS. Rules made by a court or other competent jurisdiction. The formula is generally in these words: *It is ordered, &c.*

2. Orders also signify the instructions given by the owner to the captain or commander of a ship which he is to follow in the course of the voyage.

ORDINANCE, legislation. A law, a statute, a decree.

2. This word is more usually applied to the laws of a corporation, than to the acts of the legislature; as the ordinances of the city of Philadelphia. The following account of the difference between a statute and an ordinance is extracted from Bac. Ab. Statute, A. "Where the proceeding consisted only of a petition from parliament, and an answer from the king, these were entered on the *parliament roll*; and if the matter was of a public nature, the whole was then styled an *ordinance*; if, however, the petition and answer were not only of a public, but a novel nature, they were then formed into an *act* by the king, with the aid of his council and judges, and entered on the *statute roll*." See Harg. & But. Co. Litt. 159 b, notis; 3 Reeves, Hist. Eng. Law, 146.

3. According to Lord Coke, the difference between a statute and an ordinance is, that the latter has not had the assent of the king, lords, and commons, but is made merely by two of those powers. 4 Inst. 25. See Barr. on Stat. 41, note (x).

ORDINANCE OF 1787. An act of congress which regulates the territories of the United States. It is printed in 8 Story, L. U. S. 2073. Some parts of this ordinance were designed for the temporary government of the territory north-west of the river Ohio, while other parts were intended to be permanent, and are now in force. 1 McLean, R. 337; 2 Missouri R. 20; 2 Missouri R. 144; 2 Missouri R. 214; 5 How. U. S. R. 215.

ORDINARY, civil and eccles. law. An officer who has original jurisdiction in his own right and not by deputation.

2. In England the ordinary is an officer who has immediate jurisdiction in ecclesiastical causes. Co. Litt. 344.

3. In the United States, the ordinary possesses, in those states where such officer exists, powers vested in him by the constitution and acts of the legislature. In South Carolina, the ordinary is a judicial officer. 1 Rep. Const. Ct. 267; 2 Rep. Const. Ct. 384.

ORDINATION, civil and eccles. law. The act of conferring the orders of the church upon an individual. Nov. 137.

ORE TENUS. Verbally; orally. Formerly the pleadings of the parties were *ore tenus*, and the practice is said to have been retained till the reign of Edward the Third. 3 Reeves, 95; Steph. Pl. 29; and vide Bract. 372, b.

2. In chancery practice, a defendant may demur at the bar *ore tenus*; 3 P. Wms. 370; if he has not sustained the demurrer on the record. 1 Swanst. R. 288; Mitf. Pl. 176; 6 Ves. 779; 8 Ves. 405; 17 Ves. 215, 216.

OREGON. The name of a territory of the United States of America. This territory was established by the act of congress of August 14, 1848; and this act is the fundamental law of the territory.

2.—Sect. 2. The executive power and authority in and over said territory of Oregon shall be vested in a governor, who shall hold his office for four years, and until his successors shall be appointed and qualified, unless sooner removed by the president of the United States. The governor shall reside within said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs; he may grant pardons and respites for offences against the laws of said territory, and reprieves for offences against the laws

of the United States until the decision of the president can be made thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, where, by law, such commissions shall be required, and shall take care that the laws be faithfully executed.

3.—Sect. 3. There shall be a secretary of said territory, who shall reside therein, and hold his office for five years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session, and one copy of the executive proceedings and official correspondence, semi-annually, on the first days of January and July, in each year, to the president of the United States, and two copies of the laws to the president of the senate and to the speaker of the house of representatives for the use of congress. And in case of the death, removal, resignation, or absence of the governor from the territory, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy or absence, or until another governor shall be duly appointed and qualified to fill such vacancy.

4.—Sect. 4. The legislative power and authority of said territory shall be vested in a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of nine members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue three years. Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the members of council of the first class shall be vacated at the expiration of the first year; of the second class at the expiration of the second year; and of the third class at the expiration of the third year, so that one-third may be chosen every year, and if vacancies happen by resignation or otherwise, the same shall be filled at the next ensuing election. The house of representatives shall, at its first session, consist of eighteen members, possessing the

same qualifications as prescribed for members of the council, and whose term of service shall continue one year. The number of representatives may be increased by the legislative assembly from time to time, in proportion to the increase of qualified voters: *Provided*, That the whole number shall never exceed thirty. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its qualified voters, as nearly as may be. And the members of the council and of the house of representatives shall reside in and be inhabitants of the district, or county or counties, for which they may be elected respectively. Previous to the first election, the governor shall cause a census or enumeration of the inhabitants and qualified voters of the several counties and districts of the territory to be taken by such persons, and in such mode as the governor shall designate and appoint; and the persons so appointed shall receive a reasonable compensation therefor; and the first election shall be held at such time and places, and be conducted in such manner, both as to the person who shall superintend such election, and the returns thereof, as the governor shall appoint and direct; and he shall, at the same time, declare the number of members of the council and house of representatives to which each of the counties or districts shall be entitled under this act; and the governor shall, by his proclamation, give at least sixty days' previous notice of such apportionment, and of the time, places, and manner of holding such election. The persons having the highest number of legal votes in each of said council districts for members of the council shall be declared by the governor to be duly elected to the council; and the persons having the highest number of legal votes for the house of representatives shall be declared by the governor to be duly elected members of said house: *Provided*, That, in case two or more persons voted for shall have an equal number of votes, and in case a vacancy shall otherwise occur, in either branch of the legislative assembly, the governor shall order a new election, and the persons thus elected to the legislative assembly shall meet at such place, and on such day, within ninety days after such elections, as the governor shall appoint;

but, thereafter, the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties or districts to the council and house of representatives, according to the number of qualified voters, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the legislative assembly: *Provided*, That no session in any one year shall exceed the term of sixty days, except the first session, which shall not be prolonged beyond one hundred days.

5.—Sect. 5. Every white male inhabitant, above the age of twenty-one years, who shall have been a resident of said territory at the time of the passage of this act, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly: *Provided*, That the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and those above that age who shall have declared, on oath, their intention to become such, and shall have taken an oath to support the constitution of the United States, and the provisions of this act: And, further, provided, That no officer, soldier, seaman, or marine, or other person in the army or navy of the United States, or attached to troops in the service of the United States, shall be allowed to vote in said territory, by reason of being on service therein, unless said territory is and has been for the period of six months, his permanent domicile: *Provided*, further, That no person belonging to the army or navy of the United States shall ever be elected to, or hold any civil office or appointment in, said territory.

6.—Sect. 6. The legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly shall be submitted to the congress of the United States, and, if disapproved, shall be

null and of no effect: Provided, That nothing in this act shall be construed to give power to incorporate a bank, or any institution with banking powers, or to borrow money in the name of the territory, or to pledge the faith of the people of the same for any loan whatever, either directly or indirectly. No charter granting any privilege of making, issuing, or putting into circulation any notes or bills in the likeness of bank notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the legislative assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said territory; nor shall said legislative assembly authorize the issue of any obligation, scrip, or evidence of debt by said territory, in any mode or manner whatever, except certificates for services to said territory; and all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void; and all taxes shall be equal and uniform, and no distinction shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences which may result from intermixing in one and the same act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

7.—Sect. 7. All township, district, and county officers, not herein otherwise provided for, shall be appointed or elected, in such manner as shall be provided by the legislative assembly of the territory of Oregon.

8.—Sect. 8. No member of the legislative assembly shall hold, or be appointed to, any office which shall have been created, or the salary or emoluments of which shall have been increased, while he was a member, during the term for which he was elected, and for one year after the expiration of such term; but this restriction shall not be applicable to members of the first legislative assembly; and no person holding a commission or appointment under the United States shall be a member of the legislative assembly, or shall hold any office under the government of said territory.

9. The 16th section of the act authorizes the qualified voters to elect a delegate to the house of representatives of the United States,

who shall have and exercise all the rights and privileges as have been heretofore exercised and enjoyed by the delegates from the other territories of the United States to the said house of representatives. Vide *Courts of the United States*.

ORIGINAL, contracts, practice, evidence. An authentic instrument of something, and which is to serve as a model or example to be copied or imitated. It also means first, or not deriving any authority from any other source; as, original jurisdiction, original writ, original bill, and the like.

2. Originals are single or duplicate. Single, when there is but one; duplicate, when there are two. In the case of printed documents, all the impressions are *originals*, or in the nature of *duplicate originals*, and any copy will be primary evidence. *Watson's Case*, 2 Stark. R. 130; *sed vide* 14 Serg. & Rawle, 200; 2 Bouv. Inst. n. 2001.

3. When an original document is not evidence at common law, and a copy of such original is made evidence by an act of the legislature, the original is not, therefore, made admissible evidence by implication. 2 Camp. R. 121, n.

ORIGINAL ENTRY. The first entry made by a merchant, tradesman, or other person in his account books, charging another with merchandise, materials, work or labor, or cash, on a contract made between them.

2. This subject will be divided into three sections. 1. The form of the original entry. 2. The proof of such entry. 3. The effect.

3.—§ 1. To make a valid original entry it must possess the following requisites, namely: 1. It must be made in a proper book. 2. It must be made in proper time. 3. It must be intelligible and according to law. 4. It must be made by a person having authority to make it.

4.—1. In general the books in which the first entries are made, belonging to a merchant, tradesman, or mechanic, in which are charged goods sold and delivered, or work and labor done, are received in evidence. There are many books which are not evidence, a few of which will be here enumerated. A book made up by transcribing entries made on a slate by a journeyman, the transcript being made on the same evening, or sometimes not until nearly two weeks after the work was done, was considered as not being a book of original entries. 1 Rawle, R. 435; 2 Watts, R. 451; 4 Watts, R. 258; 1 Browne's R.

147; 6 Whart. R. 189; 5 Watts, 482; 4 Rawle, 408; 2 Miles, 268. A book purporting to be a book of original entries, containing an entry of the sale of goods when they were ordered but before they were delivered, is not a book of original entries. 4 Rawle, 404. And unconnected scraps of paper containing, as alleged, original entries of sales by an agent, on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries. 13 S. & R. 126. See 2 Whart. R. 33; 4 M'Cord, R. 76; 20 Wend. 72; 2 Miles, R. 268; 1 Yeates, R. 198; 4 Yeates, R. 341.

5.—2. The entry must be made in the course of business, and with the intention of making a charge for goods sold or work done; they ought not to be made after the lapse of one day. 8 Watts, 545; 1 Nott, & M'Cord, 130; 4 Nott & M'Cord, 77; 4 S. & R. 5; 2 Dall. 217; 9 S. & R. 285. A book in which the charges are made when the goods are ordered is not admissible. 4 Rawle, 404; 3 Dev. 449.

6.—3. The entry must be made in an intelligible manner, and not in figures or hieroglyphics which are understood by the seller only. 4 Rawle, 404. A charge made in the gross as "190 days' work," 1 Nott & M'Cord, 130, or "for medicine and attendance," or "thirteen dollars for medicine and attendance on one of the general's daughters in curing the hooping cough," 2 Const. Rep. 476, were rejected. An entry of goods without carrying out any prices, proves, at most, only a sale, and the jury cannot, without other evidence, fix any price. 1 South. 370. The charges should be specific and denote the particular work or service charged, as it arises daily, and the quantity, number, weight, or other distinct designation of the materials, or articles sold or furnished, and attach the price and value to each item. 2 Const. Rep. 745; 2 Bail. R. 449; 1 Nott & M'Cord, 130.

7.—4. The entry must of course have been made by a person having authority to make it, 4 Rawle, 404, and with a view to charge the party. 8 Watts, 545.

8.—§ 2. The proof of the entry must be made by the person who made it. If made by the seller, he is competent to prove it from the necessity of the case, although he has an interest in the matter in dispute. 5 Conn. 496; 12 John. R. 461; 1 Dall. 239. When made by a clerk, it must be proved by him. But, in either case, when

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the person who made the entry is out of the reach of the process of the court, as in the case of death, or absence out of the state, the handwriting may be proved by a person acquainted with the handwriting of the person who made the entry. 2 Watts & Serg. 137. But the plaintiff is not competent to prove the handwriting of a deceased clerk who made the entries. 1 Browne's R. App. liii.

9.—§ 3. The books and original entries, when proved by the supplementary oath of the party, is *prima facie* evidence of the sale and delivery of goods, or of work and labor done. 1 Yeates, 347; Swift's Ev. 84; 3 Verm. 463; 1 M'Cord, 481; 1 Aik. 355; 2 Root, 59; Cooke's R. 38. But they are not evidence of money lent, or cash paid. Id.; 1 Day, 104; 1 Aik. 73, 74; Kirby, 289. Nor of the time a vessel laid at the plaintiff's wharf; 1 Browne's Rep. 257; nor of the delivery of goods to be sold on commission. 2 Wharton, 33.

ORIGINAL JURISDICTION, *practice*. That which is given to courts to take cognizance of cases which may be instituted in those courts in the first instance. The constitution of the United States gives the supreme court of the United States original jurisdiction in cases which affect ambassadors, other public ministers and consuls, and to those in which a state is a party. Art. 3, s. 2; 1 Kent, Com. 314.

ORIGINAL WRIT, *practice, English law*. A mandatory letter issued in the king's name, sealed with his great seal, and directed to the sheriff of the county wherein the injury was committed or supposed to have been done, requiring him to command the wrongdoer or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. This writ is deemed necessary to give the courts of law jurisdiction.

2. In modern practice, however, it is often dispensed with, by recourse, as usual, to fiction, and a proceeding by *bill* is substituted. In this country, our courts derive their jurisdiction from the constitution and require no original writ to confer it. Improperly speaking, the first writ which is issued in a case, is sometimes called an original writ, but it is not so in the English sense of the word. Vide 3 Bl. Com. 273. Walk. Intr. to Amer. Law, 514.

ORIGINALIA, *Eng. law*. The transcripts and other documents sent to the office of the treasurer-remembrancer in the

exchequer, are called by this name to distinguish them from *recorda*, which contain the judgments of the barons.

ORNAMENT. An embellishment. In questions arising as to which of two things is to be considered as principal or accessory, it is the rule, that an ornament shall be considered as an accessory. *Vide Accessory; Principal.*

ORPHAN. A minor or infant who has lost both of his or her parents. Sometimes the term is applied to such a person who has lost only one of his or her parents. 3 Mer. 48; 2 Sim. & Stu. 93; Aso & Man. Inst. B. 1, t. 2, c. 1. See Hazzard's Register of Pennsylvania, vol. 14, pages 188, 189, for a correspondence between the Hon. Joseph Hopkinson and ex-president J. Q. Adams as to the meaning of the word *Orphan*, and Hob. 247.

ORPHANAGE, Engl. law. By the custom of London, when a freeman of that city dies, his estate is divided into three parts, as follows: one third part to the widow; another, to the children advanced by him in his lifetime, which is called the *orphanage*; and the other third part may be by him disposed of by will. Now, however, a freeman may dispose of his estate as he pleases; but in cases of intestacy, the statute of distribution expressly excepts and reserves the custom of London. Lov. on Wills, 102, 104; Bac. Ab. Custom of London, C. *Vide Legitime.*

ORPHANS' COURT. The name of a court in some of the states, having jurisdiction of the estates and persons of orphans.

ORPHANOTROPHI, civil law. Persons who have the charge of administering the affairs of houses destined for the use of orphans. *Clef des Lois Rom. mot Administrateurs.*

OSTENSIBLE PARTNER. One whose name appears in a firm as a partner, and who is really such.

OTHER WRONGS, pleading, evidence. In actions of trespass, the declaration concludes by charging generally, that the defendant did other wrongs to the plaintiff to his great damage. When the injury is a continuation or consequence of the trespass declared on, the plaintiff may give evidence of such injury under this averment of other wrongs. Rep. Temp. Holt, 699; 2 Salk. 642; 6 Mod. 127; Bull. N. P. 89; 2 Stark. N. P. C. 318.

OUNCE. The name of a weight. An ounce avoirdupois weight is the sixteenth

part of a pound; an ounce troy weight is the twelfth part of a pound. *Vide Weights.*

OUSTER, torts. An ouster is the actual turning out, or keeping excluded, the party entitled to possession of any real property corporeal.

2. An ouster can properly be only from real property corporeal, and cannot be committed of anything movable; 1 Car. & P. 123; S. C. 11 Eng. Com. Law R. 339; 2 Bouv. Inst. n. 2348; 1 Chit. Pr. 148, note r; nor is a mere temporary trespass considered as an ouster. Any continuing act of exclusion from the enjoyment, constitutes an ouster, even by one tenant in common of his co-tenant. Co. Litt. 199 b, 200 a. *Vide* 3 Bl. Com. 167; Arch. Civ. Pl. 6, 14; 1 Chit. Pr. 374, where the remedies for an ouster are pointed out. *Vide Judgment of Respondent Ouster.*

OUSTER LE MAIN. In law-French, this signifies, to take out of the hand. In the old English law, it signified a livery of lands out of the hands of the lord, after the tenant came of age. If the lord refused to deliver such lands, the tenant was entitled to a writ to recover the same from the lord; this recovery out of the hands of the lord was called *ouster le main*.

OUTFIT. An allowance made by the government of the United States to a minister plenipotentiary, or chargé des affaires, on going from the United States to any foreign country.

2. The outfit can in no case exceed one year's full salary of such minister or chargé des affaires. No outfit is allowed to a consul. Act of Cong. May 1, 1810, s. 1. *Vide Minister.*

OUTHOUSES. Buildings adjoining to or belonging to dwelling-houses.

2. It is not easy to say what comes within and what is excluded from the meaning of out-house. It has been decided that a *school-room*, separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house, the two buildings, together with some other, and the court which enclosed them, being rented by the same person, was properly described as an out-house. Russ. & R. C. C. 295; see, for other cases, 3 Inst. 67; Burn's Just., Burning, II; 1 Leach, 49; 2 East's P. C. 1020, 1021. *Vide House.*

OUTRIDERS, Engl. law. Bailiffs errant, employed by the sheriffs and their

deputies, to ride to the furthest places of their counties or hundreds to summon such as they thought good, to attend their county or hundred court.

OUTLAW, *Engl. law.* One who is put out of the protection or aid of the law. 22 Vin. Ab. 316; 1 Phil. Ev. Index, h. t.; Bac. Ab. Outlawry; 2 Sell. Pr. 277; Doct. Pl. 331; 3 Bl. Com. 283, 4.

OUTLAWRY, *Engl. law.* The act of being put out of the protection of the law by process regularly sued out against a person who is in contempt in refusing to become amenable to the court having jurisdiction. The proceedings themselves are also called the outlawry.

2. Outlawry may take place in criminal or in civil cases. 3 Bl. Com. 283; Co. Litt. 128; 4 Bouv. Inst. n. 4196.

3. In the United States, outlawry in civil cases is unknown, and if there are any cases of outlawry in criminal cases they are very rare. Dane's Ab. ch. 198, a, 34. Vide Bac. Ab. Abatement, B; Id. h. t.; Gilb. Hist. C. P. 196, 197; 2 Virg. Cas. 244; 2 Dal. 92.

OUTRAGE. A grave injury; a serious wrong. This is a generic word which is applied to everything which is injurious, in a great degree, to the honor or rights of another.

TO OVERDRAW. To draw bills or checks upon an individual, bank or other corporation, for a greater amount of funds than the party who draws is entitled to.

2. When a person has overdrawn his account without any intention to do so, and afterwards gives a check on a bank, the holder is required to present it, and on refusal of payment to give notice to the maker, in order to hold him bound for it; but when the maker had overdrawn the bank knowingly, and had no funds there between the time the check was given and its presentment, the notice is not requisite. 2 N. & McC. 433.

OVERDUE. A bill, note, bond or other contract, for the payment of money at a particular day, when not paid upon the day, is overdue.

2. The indorsement of a note or bill overdue, is equivalent to drawing a new bill payable at sight. 2 Conn. 419; 18 Pick. 260; 9 Alab. R. 153.

3. A note when passed or assigned when overdue, is subject to all the equities between the original contracting parties. 6 Conn. 5; 10 Conn. 30, 55; 3 Har. (N. J.) Rep. 222.

OVERPLUS. What is left beyond a

certain amount; the residue, the remainder of a thing. The same as *Surplus*. (q. v.)

2. The overplus may be certain or uncertain. It is certain, for example, when an estate is worth three thousand dollars, and the owner asserts it to be so in his will, and devises of the proceeds one thousand dollars to A, one thousand dollars to B, and the overplus to C, and in consequence of the deterioration of the estate, or from some other cause, it sells for less than three thousand dollars, each of the legatees A, B and C shall take one third: the overplus is uncertain where, for example, a testator does not know the value of his estate, and gives various legacies and the *overplus* to another legatee, the latter will be entitled only to what may be left. 18 Ves. 466. See *Residue; Surplus*.

TO OVERRULE. To annul, to make void. This word is frequently used to signify that a case has been decided directly opposite to a former case; when this takes place, the first decided case is said to be overruled as a precedent, and cannot any longer be considered as of binding authority.

2. Mr. Greenleaf has made a very valuable collection of overruled cases, of great service to the practitioner.

3. The term overrule also signifies that a majority of the judges have decided against the opinion of the minority, in which case the latter are said to be overruled.

OVERSEERS OF THE POOR. Persons appointed or elected to take care of the poor with moneys furnished to them by the public authority.

2. The duties of these officers are regulated by local statutes. In general the overseers are bound to perform those duties, and the neglect of them will subject them to an indictment. Vide 1 Bl. Com. 360; 16 Vin. Ab. 150; 1 Mass. 459; 3 Mass. 436; 1 Penning. R. 6, 136; Com. Dig. Justices of the Peace, B. 63, 64, 65.

OVERSMAN, *Scotch law.* A person commonly named in a submission, to whom power is given to determine, in case the arbiters cannot agree in the sentence; sometimes the nomination of the oversman is left to the arbiters. In either case the oversman has no power to decide, unless the arbiters differ in opinion. Ersk. Pr. L. Scot. 4, 3, 16. The office of an oversman very much resembles that of an umpire.

OVERT. Open. An overt act in treason is proof of the intention of the traitor, because it opens his designs; without an

overt act treason cannot be committed. 2 Chit. Cr. Law, 40. An overt act, then, is one which manifests the intention of the traitor, to commit treason. Archb. Cr. Pl. 379; 4 Bl. Com. 79.

2. The mere contemplation or intention to commit a crime, although a sin in the sight of heaven, is not an act amenable to human laws. The mere speculative wantonness of a licentious imagination, however dangerous, or even sanguinary in its object, can in no case amount to a crime. But the moment that any overt act is manifest, the offender becomes amenable to the laws. Vide *Attempt; Conspiracy*; and Cro. Car. 577.

OWELTY. The difference which is paid or secured by one coparcener to another, for the purpose of equalizing a partition. Hugh. Ab. Partition and Partner, § 2, n. 8; Litt. s. 251; Co. Litt. 169 a; 1 Watts, R. 265; 1 Whart. 292; 3 Penna, 115; Cruise, Dig. tit. 19, § 82; Co. Litt. 10 a; 1 Vern. 133; Plow. 134; 16 Vin. Ab. 223, pl. 3; Bro. Partition, § 5.

OWING. Something unpaid. A debt, for example, is owing while it is unpaid, and whether it be due or not.

2. In affidavits to hold to bail it is usual to state that the debt on which the action is founded is due, owing and unpaid. 1 Penn. Law Jo. 210.

OWLER, *Eng. law*. One guilty of the offence of owling.

OWLING, *Eng. law*. The offence of transporting wool or sheep out of the kingdom.

2. The name is said to owe its origin to the fact that this offence was carried on in the night, when the owl was abroad.

OWNER, *property*. The owner is he who has dominion of a thing real or personal, corporeal or incorporeal, which he has a right to enjoy and to do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.

2. The right of the owner is more extended than that of him who has only the use of the thing. The owner of an estate may, therefore, change the face of it; he may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper, for minerals, stone, plaster, and similar things. He may commit what would be considered waste if done by another.

3. The owner continues to have the

same right although he perform no acts of ownership, or be disabled from performing them, and although another perform such acts, without the knowledge or against the will of the owner. But the owner may lose his right in a thing, if he permit it to remain in the possession of a third person, for a sufficient time to enable the latter to acquire a title to it by prescription, or lapse of time. See Civil Code of Louis. B. 2, t. 2, c. 1; Encyclopédie de M. D'Alembert, Propriétaire.

4. When there are several joint owners of a thing, as for example, of a ship, the majority of them have the right to make contracts in respect of such thing, in the usual course of business or repair, and the like, and the minority will be bound by such contracts. Holt, 586; 1 Bell's Com. 519, 5th ed. See 5 Whart. R. 366.

OWNERSHIP, *title to property*. The right by which a thing belongs to some one in particular, to the exclusion of all other persons. Louis. Code, art. 480.

OXGANG OF LAND, *old Eng. law*. An uncertain quantity of land, but, according to some opinions, it contains fifteen acres. Co. Litt. 69 a.

OYER, *pleading*. Oyer is a French word, signifying to hear; in pleading it is a prayer or petition to the court, that the party may hear read to him the deed, &c., stated in the pleadings of the opposite party, and which deed is by indentment of law in court, when it is pleaded with a profert.

2. The origin of this form of pleading, we are told, is that the generality of defendants, in ancient times, were themselves incapable of reading. 3 Bl. Com. 299.

3. Oyer is in some cases demandable of right, and in others it is not. It may be demanded of any specialty or other written instrument, as bonds of all sorts, deeds poll, indentures, letters testamentary, and of administration, and the like, of which a *profert in curiam* is necessarily made by the adverse party. But if the party be not bound to plead the specialty or instrument with a profert, and he pleads it with one, it is but surplusage, and the court will not compel him to give oyer of it. 1 Salk. 497. Oyer is not now demandable of the writ, and if it be demanded, the plaintiff may proceed as if no such demand were made. Dougl. 227; 3 B. & P. 398; 1 B. & P. 646, n. b. Nor is oyer demandable of a record, yet if a judgment or other record be pleaded in its own court, the party

pleading it must give a notice in writing of the term and number roll whereon such judgment or matter of record is entered or filed, in default of which the plea is not to be received. Tidd's Pr. 529.

4. To deny oyer when it ought to be granted is error; and in such case the party making the claim, should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right of oyer, or strike out the rest of the pleading, following the oyer, and demur; 1 Saund. 9 b, n. 1; Bac. Abr. Pleas, 1; upon which the judgment of the court is either that the defendant have oyer, or that he answer without it. Id. ibid.; 2 Lev. 142; 6 Mod. 28. On the latter judgment, the defendant may bring a writ of error, for to deny oyer when it ought to be granted, is error, but not *e converso*. Id. ibid.; 1 Blackf. R. 126.

See, in general, 1 Saund. 9, n. 1; 289, n. 2; 2. Saund. 9, n. 12, 13; 46, n. 7; 366, n. 1; 405, n. 1; 410, n. 2; Tidd's Pr. 8 ed. 635 to 638, and index, tit. Oyer; 1 Chit. Pl. 369 to 375; Lawes on Civ. Pl. 96 to 101; 16 Vin. Ab. 157; Bac. Abr. Pleas, &c., I 12, n. 2; Arch. Civ. Pl. 185; 1 Sell. Pr. 260; Doct. Pl 344; Com. Dig. Pleader, P; Abatement, I 22; 1 Blackf. R. 241. 3 Bouv. Inst. n. 2890.

OYER AND TERMINER. The name of a court authorized to *hear and determine* all treasons, felonies and misdemeanors; and, generally, invested with other power in relation to the punishment of offenders.

OYEZ, practice. Hear; do you hear. In order to attract attention immediately before he makes proclamation, the cryer of the court cries *Oyez, Oyez*, which is generally corruptly pronounced *O yes*.

P.

PACE. A measure of length containing two feet and a half; the geometrical pace is five feet long. The common pace is the length of a step; the geometrical is the length of two steps, or the whole space passed over by the same foot from one step to another.

PACIFICATION. The act of making peace between two countries which have been at war; the restoration of public tranquillity.

TO PACK. To deceive by false appearance; to counterfeit; to delude; as packing a jury. (q. v.) Bac. Ab. Juries, M; 12 Conn. R. 262.

PACT, civil law. An agreement made by two or more persons on the same subject, in order to form some engagement, or to dissolve or modify one already made; *conventio est duorum in idem placitum consensus de re solvenda, id est faciendâ vel præstandâ*. Dig. 2, 14; Clef des Lois Rom. h. t.; Ayl. Pand. 558; Merl. Rép. Pacte, h. t.

PACTIONS, International law. When contracts between nations are to be performed by a single act, and their execution is at an end at once, they are not called treaties, but agreements, conventions or *pactions*. 1 Bouv. Inst. n. 100.

PACTUM CONSTITUTÆ PECUNIÆ, civil law. An agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay; or it may be defined, simply an agreement by which a person promises a creditor to pay him.

2. When a person by this pact promises his own creditor to pay him, there arises a new obligation which does not destroy the former by which he was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the creditor is strengthened. Poth. Ob. Pt. 2, c. 6, s. 9.

3. There is a striking conformity between the *pactum constitutæ pecuniæ*, as above defined, and our *indebitatus assumptit*. The *pactum constitutæ pecuniæ* was a promise to pay a subsisting debt whether natural or civil; made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumptit* was brought upon a promise for the payment of a debt, it was not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise, the right to the action of debt was not extinguished nor varied.

4 Rep. 91 to 95; see 1 H. Bl. 550 to 555; Doug. 6, 7; 3 Wood. 168, 169, n. c; 1 Vin. Abr. 270; Bro. Abr. Action sur le case, pl. 7, 69, 72; Fitzh. N. B. 94, A, n. a, 145 G; 1 New Rep. 295; Bl. Rep. 850; 1 Chit. Pl. 89; Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 4, n. 388, 396.

PACTUM DE NON PETANDO, civil law. An agreement made between a creditor and his debtor that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation. This is not unlike the *covenant not to sue*, (q. v.) of the common law. Wolff, Dr. de la Nat. § 755.

PACTUM DE QUOTA LITIS. An agreement by which a creditor of a sum difficult to recover, promises a portion, for example, one-third, to the person who will undertake to recover it. In general, attorneys will abstain from making such a contract, yet it is not unlawful.

PAGODA, comm. law. A denomination of money in Bengal. In the computation of ad valorem duties, it is valued at one dollar and ninety-four cents. Act of March 2, 1799, s. 61, 1 Story's L. U. S. 626. Vide *Foreign Coins*.

PAIS, or PAYS. A French word signifying country. In law, matter in *pais* is matter of fact in opposition to matter of record: a trial *per pais*, is a trial by the country, that is, by a jury.

PALFRIDUS, A palfrey; a horse to travel on. 1 Tho. Co. Litt. 471; F. N. B. 93.

PANDECTS, civil law. The name of an abridgment or compilation of the civil law, made by order of the emperor Justinian, and to which he gave the force of law. It is also known by the name of *Digest*. (q. v.)

PANEL, practice. A schedule or roll containing the names of jurors, summoned by virtue of a writ of *venire facias*, and annexed to the writ. It is returned into the court whence the *venire* issued. Co. Litt. 158, b.

PANNEL, Scotch law. A person accused of a crime; one indicted.

PAPER-BOOK, practice. A book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of a case.

2. Courts of error and other courts, on arguments, require that the judges shall each be furnished with such a paper-book. In the court of king's bench, in England,

the transcript containing the whole of the proceedings, filed or delivered between the parties, when the issue joined, in an issue in fact, is called the *paper-book*. Steph. on Pl. 95; 3 Bl. Com. 317; 3 Chit. Pr. 521; 2 Str. 1131, 1266; 1 Chit. R. 277; 2 Wils. R. 243; Tidd, Pr. 727.

PAPER DAYS, Eng. law. Days on which special arguments are to take place. Tuesdays and Fridays in term time are paper days appointed by the court. Lee's Dict. of Pr. h. t.; Arch. Pr. 101.

PAPER MONEY. By paper money is understood the engagements to pay money which are issued by governments and banks, and which pass as money. Pardes. Dr. Com. n. 9. Bank notes are generally considered as cash, and will answer all the purposes of currency; but paper money is not a legal tender if objected to. See *Bank note, Specie, Tender*.

PAR, comm. law. Equal. It is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; *above* par, or *below* par, when they sell for more or less.

PARAGE. Equality of name or blood, but more especially of land in the partition of an inheritance among co-heirs, hence comes disparage and disparagement. Co. Litt. 166.

PARAGIUM. A Latin term which signifies equality. It is derived from the adjective *par*, equal, and made a substantive by the addition of *agium*. 1 The. Co. Litt. 681.

2. In the ecclesiastical law, by *paragium* is understood the portion which a woman gets on her marriage. Ayl. Par. 336.

PARAMOUNT. That which is superior.

2. It is usually applied to the highest lord of the fee, of lands, tenements, or hereditaments. F. N. B. 135. Where A lets lands to B, and he underlets them to C, in this case A is the paramount, and B is the mesne landlord. Vide *Mesne*, and 2 Bl. Com. 91; 1 Tho. Co. Litt. 484, n. 79; Id. 485, n. 81.

PARAPHERNALIA. The name given to all such things as a woman has a right to retain as her own property, after her husband's death; they consist generally of her clothing, jewels, and ornaments suitable to her condition, which she used personally during his life.

2. These, when not extravagant, she

has a right to retain even against creditors; and, although in his lifetime the husband might have given them away, he cannot bequeath such ornaments and jewels by his will. 2 Bl. Com. 430; 2 Supp. to Ves. jr. 376; 5 Com. Dig. 230; 2 Com. Dig. 212; 11 Vin. Ab. 176; 4 Bouv. Inst. n. 3996-7.

PARATITLA, civil law. An abbreviated explanation of some titles or books of the Code or Digest.

PARATUM HABEO. A return made by the sheriff to a *capias ad respondendum*, which signified that he had the defendant ready to bring into court. This was a fiction where the defendant was at large. Afterwards he was required by statute to take bail from the defendant, and he returned *cepi corpus* and bail bond. But still he might be ruled to bring in the body. 7 Penn. St. Rep. 535.

PARAVAIL. Tenant paravail is the lowest tenant of the fee, or he who is the immediate tenant to one who holds of another. He is called tenant paravail, because it is presumed he has the avails or profits of the land. F. N. B. 135; 2 Inst. 296.

PARCEL, estates. A part of the estate. 1 Com. Dig. Abatement, H 51, p. 133; 5 Com. Dig. Grant, E 10, p. 545. To parcel is to divide an estate. Bac. Ab. Conditions, O.

PARCENARY. The state or condition of holding title to lands jointly by parceners, before the common inheritance has been divided. Litt. sec. 56. Vide 2 Bl. Com. 187; *Coparcenary*; *Estate in coparcenary*.

PARCENERS, Engl. law. The daughters of a man or woman seised of lands and tenements in fee simple or fee tail, on whom, after the death of such ancestor, such lands and tenements descend, and they enter. Litt. s. 243; Co. Litt. 164; 2 Bouv. Inst. n. 1871-2. Vide *Coparceners*.

PARCO FRACTO, Engl. law. The name of a writ against one who violently breaks a pound, and takes from thence beasts which, for some trespass done, or some other just cause, were lawfully impounded.

PARDON, crim. law, pleading. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. 7 Pet. S. C. Rep. 160.

2. Every pardon granted to the guilty

is in derogation of the law; if the pardon be equitable, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But as human actions are necessarily imperfect, the pardoning power must be vested somewhere in order to prevent injustice, when it is ascertained that an error has been committed.

3. The subject will be considered with regard, 1. To the kinds of pardons. 2. By whom they are to be granted. 3. For what offences. 4. How to be taken advantage of. 5. Their effect.

4.—§ 1. Pardons are general or special.

1. The former are express, when an act of the legislature is passed expressly directing that offences of a certain class shall be pardoned, as in the case of an act of amnesty. See *Amnesty*. A general pardon is implied by the repeal of a penal statute, because, unless otherwise provided by law, an offence against such statute while it was in force cannot be punished, and the offender goes free. 2 Overt. 423. 2. Special pardons are those which are granted by the pardoning power for particular cases.

5. Pardons are also divided into absolute and conditional. The former are those which free the criminal without any condition whatever; the latter are those to which a condition is annexed, which must be performed before the pardon can have any effect. Bac. Ab. Pardon, E; 2 Caines, R. 57; 1 Bailey, 283; 2 Bailey, 516. But see 4 Call, R. 35.

6.—§ 2. The constitution of the United States gives to the president in general terms, "the power to grant reprieves and pardons for offences against the United States." The same power is given generally to the governors of the several states to grant pardons for crimes committed against their respective states, but in some of them the consent of the legislature or one of its branches is required.

7.—§ 3. Except in the case of impeachment, for which a pardon cannot be granted, the pardoning power may grant a pardon of all offences against the government, and for any sentence or judgment. But such a pardon does not operate to discharge the interest which third persons may have acquired in the judgment; as, where a penalty was incurred in violation of the embargo laws, and the custom house officers became entitled to one-half of the penalty, the pardon did not discharge that. 4 Wash. C. C

R. 64. See 2 Bay, 565; 2 Whart. 440; 7 J. J. Marsh. 131.

8.—§ 4. When the pardon is general, either by an act of amnesty, or by the repeal of a penal law, it is not necessary to plead it, because the court is bound, ex officio, to take notice of it. And the criminal cannot even waive such pardon, because by his admittance, no one can give the court power to punish him, when it judicially appears there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted, and for this reason it must be specially pleaded. 7 Pet. R. 150, 162.

9.—§ 5. The effect of a pardon is to protect from punishment the criminal for the offence pardoned, but for no other. 1 Porter, 475. It seems that the pardon of an assault and battery, which afterwards becomes murder by the death of the person beaten, would not operate as a pardon of the murder. 12 Pick. 496. In general, the effect of a full pardon is to restore the convict to all his rights. But to this there are some exceptions: 1st. When the criminal has been guilty of perjury, a pardon will not qualify him to be a witness at any time afterwards. 2d. When one was convicted of an offence by which he became civilly dead, a pardon did not affect or annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate in consequence of his civil death. 10 Johns. R. 232, 483.

10.—§ 6. All contracts, made for the buying or procuring a pardon for a convict, are void. And such contracts will be declared null by a court of equity, on the ground that they are opposed to public policy. 4 Bouv. Inst. n. 3857.

Vide, generally, Bac. Ab. h. t.; Com. Dig. h. t.; Nels. Ab. h. t.; Vin. Ab. h. t.; 13 Petersd. Ab. h. t.; Dane's Ab. h. t.; 3 Inst. 233 to 240; Hawk. b. 2, c. 37; 1 Chit. Cr. L. 762 to 778; 2 Russ. on Cr. 595; Arch. Cr. Pl. 92; Stark. Cr. Pl. 368, 380.

PARENTAGE. Kindred. Vide 2 Bouv. Inst. n. 1955; *Branch; Line.*

PARENTS. The lawful father and mother of the party spoken of. 1 Murph. R. 336; 11 S. & R. 93.

2. The term parent differs from that of ancestor, the latter embracing not only the father and mother, but every person in an

ascending line. It differs also from predecessor, which is applied to corporators. Wood's Inst. 68; 7 Ves. 522; 1 Murph. 336; 6 Binn. 255. See *Father; Mother.*

3. By the civil law, grandfathers and grandmothers, and other ascendants, were, in certain cases, considered parents. Dict. de Jurisp. Parente. Vide 1 Ashm. R. 55; 2 Kent, Com. 159; 5 East, R. 223; Bouv. Inst. Index, h. t.

PARES. A man's equals; his peers. (q. v.) 3 Bl. Com. 349.

PARES CURIAE, *feudal law.* Those vassals who were bound to attend the lord's court were so called. Ersk. Inst. B. 2, tit. 3, s. 17.

PARI DELICTO, *crim. law.* In a similar offence or crime; equal in guilt. A person who is *in pari delicto* with another, differs from a *particeps criminis* in this, that the former always includes the latter but the latter does not always include the former. 8 East, 381, 2.

PARI MATERIA. Of the same matter; on the same subject; as, laws *pari materia* must be construed with reference to each other. Bac. Ab. Stat. I. 3.

PARI PASSU. By the same gradation.

PARISH. A district of country of different extents. In the ecclesiastical law it signified the territory committed to the charge of a parson, vicar, or other minister. Ayl. Parerg. 404; 2 Bl. Com. 112. In Louisiana, the state is divided into parishes.

PARIUM JUDICIUM. The trial by jury, or by a man's peers, or equals, is so called.

PARK, *Eng. law.* An enclosed chase, (q. v.) extending only over a man's own grounds. The term *park* signifies an enclosure. 2 Bl. Com. 38.

PARLIAMENT. This word, derived from the French *parlement*, in the English law, is used to designate the legislative branch of the government of Great Britain, composed of the house of lords, and the house of commons.

2. It is an error to regard the king of Great Britain as forming a part of parliament. The connexion between the king and the lords spiritual, the lords temporal, and the commons, which, when assembled in parliament, form the three states of the realm, is the same as that which subsists between the king and those states—the people at large—out of parliament; Colton's Records, 710; the king not being, in either

case, a member, branch, or coestate, but standing solely in the relation of sovereign or head. Rot. Par. vol. iii. 623 a.; 2 Mann. & Gr. 457 n.

PAROL. More properly *parole*. A French word, which means literally, word or speech. It is used to distinguish contracts which are made verbally or in writing not under seal, which are called parol contracts, from those which are under seal, which bear the name of deeds or specialties. (q. v.) 1 Chit. Contr. 1; 7 Term. R. 350, 351, n.; 3 Johns. Cas. 60; 1 Chit. Pl. 88. It is proper to remark that when a contract is made under seal, and afterwards it is modified verbally, it becomes wholly a parol contract. 2 Watts, 451; 9 Pick. 298; 13 Wend. 71.

2. Pleadings are frequently denominated the *parol*. In some instances the term parol is used to denote the entire pleadings in a cause; as, when in an action brought against an infant heir, on an obligation of his ancestors, he prays that the parol may demur, i. e., the pleadings may be stayed, till he shall attain full age. 3 Bl. Com. 300; 4 East, 485; 1 Hoffm. R. 178. See a form of a plea in abatement, praying that the parol may demur, in 1 Wentw. Pl. 43; and 2 Chit. Pl. 520. But a devisee cannot pray the parol to demur. 4 East, 485.

3. Parol evidence is evidence verbally delivered by a witness. As to the cases when such evidence will be received or rejected, vide Stark. Ev. pt. 4, p. 995 to 1055; 1 Phil. Ev. 466, c. 10, s. 1; Sugd. Vend. 97.

PAROL LEASES. An agreement made verbally, not in writing, between the parties, by which one of them leases to the other a certain estate.

2. By the English statute of frauds of 29 Car. II., c. 3, s. 1, 2, and 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing, and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered, unless in writing." The principles of this statute have been adopted,

with some modifications, in nearly all the states of the Union. 4 Kent, Com. 95; 1 Hill. Ab. 130.

PAROLE, international law. The agreement of persons who have been taken by an enemy that they will not again take up arms against those who captured them, either for a limited time, or during the continuance of the war. Vattel, liv. 3, c. 8, § 151.

PARRICIDE, civil law. One who murders his father; it is applied, by extension, to one who murders his mother, his brother, his sister, or his children. The crime committed by such person is also called parricide. Merl. Rép. mot Parricide; Dig. 48, 9, 1, l. 3, l. 4.

2. This offence is defined almost in the same words in the penal code of China. Penal Laws of China, B. 1, s. 2, § 4.

3. The criminal was punished by being scourged, and afterwards sewed in a sort of sack, with a dog, a cock, a viper, and an ape, and then thrown into the sea, or into a river; or if there were no water, he was thrown in this manner to wild beasts. Dig. 48, 9, 9; C. 9, 17, 1, l. 4, 18, 6; Bro. Civ. Law, 423; Wood's Civ. Law, B. 3, c. 10, s. 9.

4. By the laws of France parricide is the crime of him who murders his father or mother, whether they be the legitimate, natural or adopted parents of the individual, or the murder of any other legitimate ascendant. Code Pénal, art. 297. This crime is there punished by the criminal's being taken to the place of execution without any other garment than his shirt, barefooted, and with his head covered with a black veil. He is then exposed on the scaffold while an officer of the court reads his sentence to the spectators; his right hand is then cut off, and he is immediately put to death. Id. art. 13.

5. The common law does not define this crime, and makes no difference between its punishment, and the punishment of murder. 1 Hale's P. C. 380; Prin. Penal Law, c. 18, § 8, p. 243; Dalloz, Dict. mot Homicide, § 3.

PARSON, eccles. law. One who has full possession of all the rights of a parochial church.

2. He is so called because by his *person* the church, which is an invisible body, is represented: in England he is himself a body corporate in order to protect and defend the church (which he personates) by a

perpetual succession. Co. Litt. 300; 1 Tho. Co. Lit. 101.

3. Fortunately, in the United States, where religion is generally well supported, we have no national church, and, therefore, no parsons known as such to the law.

PART. A share; a purpart. (q. v.) This word is also used in contradistinction to counterpart; covenants were formerly made in a script and rescript, or *part* and *counterpart*.

PART OWNERS. This term in its most extensive sense means tenant in common or joint tenant. In a more limited meaning, it is applied to the separate rights of several owners of a ship, where the parties are not partners.

2. In general, when the majority of the part owners are desirous of employing such a ship upon a particular voyage or adventure, they have a right to do so, upon giving security in the admiralty, by stipulation to the minority, if required, to bring her back and restore the ship, or, in case of her loss, to pay them the value of their respective shares. 4 Bouv. Inst. n. 3780; Abbott on Ship. 70; 3 Kent, Com. 151, 4th ed.; Story on Partn. § 489.

PARTIAL LOSS, mer. law. Any damage short of, or not amounting to a total loss; for if it be not the latter it must be the former. Partial losses are sometimes denominated *average* losses, because they are often in the nature of those losses which are the subject of average contributions. 1 Bouv. Inst. n. 1217.

PARTICEPS CRIMINIS, crim. law. Partners in crime, whether in the same degree or in *pari delicto*, (q. v.) or in different degree: for one may be a principal and the other an accessory. Russ. on Cr. 21; 8 East, 381, 2; 2 Supp. to Ves. jun. 122, 398; 5 Com. Dig. 346.

PARTICEPS FRAUDIS. Participators in fraud.

2. It is a general rule of law, *in pari delicto, potior est conditio defendentis*, and the courts will help neither party; but this rule operates only in cases where the refusal of the courts to aid either party, frustrates the objects of the transactions, and takes away the temptation to engage in contracts *contra bonos mores*, or violating the policy of the laws. If it be necessary, in order to discountenance such transactions, to enforce such contract at law, or to relieve against it in equity, it will be done, though both parties be *in pari delicto*. The party

is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it, when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose, and encourage the parties engaged in such transactions. 4 Rand. R. 372; 1 Black. R. 363; 2 Freem. 101.

PARTICULAR AVERAGE. This term, particular average, has been condemned as not being exact. See *Average*. It denotes, in general, every kind of expense or damage, short of total loss, which regards a particular concern, and which is to be borne by the proprietor of that concern alone. Between the insurer and insured, the term includes losses of this description, as far as the underwriter is liable. Particular average must not be understood as a total loss of a part; for these two kinds of losses are perfectly distinct from each other. A total loss of a part may be recovered, where a particular average would not be recoverable. See Stev. on Av. 77.

PARTICULAR AVERMENT, pleading. Vide *Averment*.

PARTICULAR CUSTOM. A particular custom is one which only affects the inhabitants of some particular district. To be good, a particular custom must possess these requisites: 1. It must have been used so long that the memory of man runneth not to the contrary. 2. It must have been continued. 3. It must have been peaceable. 4. It must be reasonable. 5. It must be certain. 6. It must be consistent with itself. 7. It must be consistent with other customs. 1 Bl. Com. 74, 79.

PARTICULAR ESTATE. An estate which is carved out of a larger and which precedes a remainder; as, an estate for years to A, remainder to B for life; or an estate for life to A, remainder to B in tail: this precedent estate is called the particular estate. 2 Bl. Com. 165; 4 Kent, Com. 226; 16 Vin. Abr. 216; 4 Com. Dig. 32; 5 Com. Dig. 346.

PARTICULAR LIEN, contracts. A right which a person has to retain property in respect of money or labor expended on such particular property. For example, when a tailor has made garments out of cloth delivered to him for the purpose, he is not bound to part with the clothes until his employer has paid him for his services; nor a ship carpenter with a ship which he has repaired; nor can an engraver be compelled

to deliver the seal which he has engraved for another, until his compensation has been paid. 2 Roll. Ab. 92; 8 M. & S. 167; 14 Pick. 332; 3 Bouv. Inst. n. 2514. Vide *Lien*.

PARTICULARS, practice. The items of which the accounts of one of the parties is composed, and which are frequently furnished to the opposite party in a *bill of particulars*. (q. v.)

PARTIES, contracts. Those persons who engage themselves to do, or not to do the matters and things contained in an agreement.

2. All persons generally can be parties to contracts, unless they labor under some disability.

3. Consent being essential to all valid contracts, it follows that persons who want, first, understanding; or secondly, freedom to exercise their will, cannot be parties to contracts. Thirdly, persons who in consequence of their situation are incapable to enter into some particular contract. These will be separately considered.

4.—§ 1. Those persons who want understanding, are idiots and lunatics; drunkards and infants.

5.—1. The contracts of idiots and lunatics, are not binding; as they are unable from mental infirmity, to form any accurate judgment of their actions, and consequently, cannot give a serious and sufficient consideration to any engagement. And although it was formerly a rule that the party could not stultify himself; 39 H. VI. 42; Newl. on Contr. 19; 1 Fonb. Eq. 46, 7; yet this rule has been so relaxed, that the defendant may now set up this defence. 3 Camp. 128; 2 Atk. 412; 1 Fonb. Eq. n. d.; and see Highm. on Lun. 111, 112; Long on Sales, 14; 3 Day's Rep. 90; Chit. on Contr. 29, 257, 8; 2 Str. 1104.

6.—2. A person in a state of complete intoxication has no agreeing mind; Bull. N. P. 172; 3 Campb. 33; Sugd. Vend. 154; 1 Stark. Rep. 126; and his contracts are therefore void, particularly if he has been made intoxicated by the other party. 1 Hen. & Munf. 69; 1 South. Rep. 361; 2 Hayw. 394; see Louis. Code, art. 1781; 1 Clarke's R. 408.

7.—3. In general the contract of an infant, however fair and conducive to his interest it may be, is not binding on him, unless the supply of necessities to him be the object of the agreement; Newl. Contr. 2; 1 Eq. Cas. Ab. 286; 1 Atk. 489; 3 Atk. 613; or unless he confirm the agree-

ment after he shall be of full age. Bac. Abr. Infancy, I 3. But he may take advantage of contracts made with him, although the consideration were merely the infant's promise, as in an action on mutual promises to marry. Bull. N. P. 155; 2 Str. 907; 1 Marsh. (Ken.) Rep. 76; 2 M. & S. 205. See Stark. Ev. pt. iv. page 724; 1 Nott & McCord, 197; 6 Cranch, 226; Com. Dig. Infant; Bac. Abr. Infancy and Age; 9 Vin. Ab. 393, 4; Fonbl. Eq. b. 1, c. 2, § 4, note b; 3 Burr. 1794; 1 Mod. 25; Stra. 937; Louis. Code, article 1778.

8.—§ 2. Persons who have understanding, but who, in law, have not freedom to exercise their will, are married women; and persons under duress.

9.—1. A married woman has, in general, no power or capacity to contract during the coverture. Com. Dig. Baron & Feme, W; Pleader, 2 A 1. She has in legal contemplation no separate existence, her husband and herself being in law but one person. Litt. section 28; see Chitty on Cont. 39, 40. But a contract made with a married woman, and for her benefit, where she is the meritorious cause of action, as in the instance of an express promise to the wife, in consideration of her personal labor, as that she would cure a wound; Cro. Jac. 77; 2 Sid. 128; 2 Wils. 424; or of a bond or promissory note, payable on the face thereof to her, or to herself and husband, may be enforced by the husband and wife, though made during the coverture. 2 M. & S. 396, n. b.; 2 Bl. Rep. 1236; 1 H. Black. 108. A married woman has no original power or authority by virtue of the marital tie, to bind her husband by any of her contracts. The liability of a husband on his wife's engagements rests on the idea that they were formed by his authority; and if his assent do not appear by express evidence or by proof of circumstances from which it may reasonably be inferred, he is not liable. 1 Mod. 125; 3 B. & C. 631; see Chitty on Cont. 39 to 50.

10.—2. Contracts may be avoided on account of duress. See that word, and also Poth. Obl. P. 1, c. 1, s. 1, art. 3, § 2.

11.—§ 3. Trustees, executors, administrators, guardians, and all other persons who make a contract for and on behalf of others, cannot become parties to such contract on their own account; nor are they allowed in any case to purchase the trust estate for themselves. 1 Vern. 465; 2 Atk. 59; 10 Ves. 3; 9 Ves. 234; 12 Ves. 372,

3 Mer. Rép. 200; 6 Ves. 627; 8 Bro. P. C. 42; 10 Ves. 381; 5 Ves. 707; 13 Ves. 156; 1 Pet. C. C. R. 373; 3 Binn. 54; 2 Whart. 53; 7 Watts, 387; 13 S. & R. 210; 5 Watts, 304; 2 Bro. C. C. 400; White's L. C. in Eq. *104-117; 9 Paige, 238, 241, 650, 663; 1 Sandf. R. 251, 256; 3 Sandf. R. 61; 2 John. Ch. R. 252; 4 How. S. C. 503; 2 Whart. 53, 63; 15 Pick. 24, 31. As to the transactions between attorneys and others in relation to client's property, see 2 Ves. jr. 201; 1 Madd. Ch. 114; 15 Ves. 42; 1 Ves. 379; 2 Ves. 259. The contracts of alien enemies may in general be avoided, except when made under the license of the government, either express or implied. 1 Kent, Com. 104. See 15 John. 6; Dougl. 641.

As to the persons who make contracts in equity, see Newl. Cont. c. 1, pp. 1 to 33.

PARTIES TO ACTIONS. Those persons who institute actions for the recovery of their rights, and those persons against whom they are instituted, are the parties to the actions; the former are called plaintiffs, and the latter, defendants. The term parties is understood to include all persons who are directly interested in the subject-matter in issue, who have right to make defence, control the proceedings, or appeal from the judgment. Persons not having these rights are regarded as strangers to the cause. 20 How. St. Tr. 538, n.; Greenl. Ev. § 523.

2. It is of the utmost importance in bringing actions to have proper parties, for however just and meritorious the claim may be, if a mistake has been made in making wrong persons, either plaintiffs or defendants, or including too many or too few persons as parties, the plaintiff may in general be defeated.

3. Actions are naturally divided into those which arise upon contracts, and those which do not, but accrue to the plaintiff in consequence of some wrong or injury committed by the defendant. This article will therefore be divided into two parts, under which will be briefly considered, first, the parties to actions arising upon contracts; and, secondly, the parties to actions arising upon injuries or wrongs, unconnected with contracts, committed by the defendant.

4.—Part I. *Of parties to actions arising on contracts.* These are the plaintiffs and the defendants.

5.—Sect. 1. *Of the plaintiffs.* These will be considered as follows :

§ 1. *Between the original contracting parties.* An action on a contract, whether express or implied, or whether it be by parol, or under seal, or of record, must be brought in the name of the party in whom the legal interest is vested. 1 East, R. 497; and see Yelv. 25, n. 1; 13 Mass. Rep. 105; 1 Pet. C. C. R. 109; 1 Lev. 235; 3 Bos. & Pull. 147; 1 H. Bl. 84; 5 Serg. & Rawle, 27; Hamm. on Par. 32; 2 Bailey's R. 55; 16 S. & R. 237; 10 Mass. 287; 15 Mass. 286; 10 Mass. 230; 2 Root, R. 119.

6.—§ 2. *Of the number of plaintiffs who must join.* When a contract is made with several, if their legal interests were joint, they must all, if living, join in the action for the breach of the contract. 1 Saund. 153, note 1; 8 Serg. & Rawle, 308; 10 Serg. & Rawle, 257; 10 East, 418; 8 T. R. 140; Arch. Civ. Pl. 58; Yelv. 177, note 1. But dormant partners need not join their copartners. 8 S. & R. 85; 7 Verm. 123; 2 Verm. 65; 6 Pick. 352; 4 Wend. 628; 8 Wend. 666; 3 Cowen, 84; 2 Harr. & Gill, 159. When a contract is made and a bond is given to a firm by a particular name, as A B and Son, the suit must be brought by the actual partners, the two sons of A B, the latter having been dead several years at the time of making the contract. 2 Campb. 548. When a person who has no interest in the contract is joined with those who have, it is fatal. 19 John. 213; 2 Penn. 817; 2 Greenl. 117.

7.—§ 3. *When the interest of the contract has been assigned.* Some contracts are assignable at law; when these are assigned, the assignee may maintain an action in his own name. Of this kind are promissory notes, bills of exchange, bail-bonds, replevin-bonds; Hamm. on Part. 108; and covenants running with the land pass with the tenure, though not made with assigns. 5 Co. 24; Cro. Eliz. 552; 3 Mod. 338; 1 Sid. 157; Hamm. Part. 116; Bac. Abr. Covenant, E 5. When a contract not assignable at law has been assigned, and a recovery on such contract is sought, the action must be in the name of the assignor for the use of the assignee.

8.—§ 4. *When one or more of several obligees, &c., is dead.* When one or more of several obligees, covenantees, partners or others, having a joint interest in the contract, not running with the land, dies, the action must be brought in the name of the

survivor, and that fact averred in the declaration. 1 Dall. 65, 248; 1 East, R. 497; 2 John. Cas. 374; 4 Dalt. 354; Arch. Civ. Pl. 54, 5; Addis. on Contr. 285; 1 Chan. Rep. 31; Yelv. 177.

9.—§ 5. *In the case of executors and administrators.* When a personal contract, or a covenant not running with the land, has been made with one person only, and he is dead, the action for the breach of it must be brought in the name of the executor or administrator in whom the legal interest in the contract is vested; 2 H. Bl. 310; 3 T. R. 393; and all the executors or administrators must join. 2 Saund. 213; Went. 95; 1 Lev. 161; 2 Nott & McCord, 70; Hamm. on Part. 272.

10.—§ 6. *In the case of bankruptcy or insolvency.* In the case of the bankruptcy or insolvency of a person who is beneficially interested in the performance of a contract made before the act of bankruptcy or before the assignment under the insolvent laws, the action should be brought in the name of his assignees. 1 Chit. Pl. 14; 2 Dall. 276; 3 Yeates, 520; 7 S. & R. 182; 5 S. & R. 394; 9 S. & R. 434. See 3 Salk. 61; 3 T. R. 779; Id. 433; Hamm. on Part. 167; Com. Dig. Abatement, E 17.

11.—§ 7. *In case of marriage.* This part of the subject will be considered with reference to those cases. 1st. When the husband and wife must join. 2d. When the husband must sue alone. 3d. When the wife must sue alone. 4th. When they may join or not at their election. 5th. Who is to sue in the case of the death of the husband or wife. 6th. When a woman marries, *lis pendens*.

12.—1. To recover the chose in action of the wife, the husband must, in general, join, when the cause of action would survive. 3 T. R. 348; 1 M. & S. 180; Com. Dig. Baron & Feme, V; Bac. Ab. Baron & Feme, K; 1 Yeates' R. 551; 1 P. A. Browne's R. 263; 1 Chit. Pl. 17.

13.—2. In general the wife cannot join in any action upon a contract made during coverture, as for work and labor, money lent, or goods sold by her during that time. 2 Bl. Rep. 1239; and see 1 Salk. 114; 2 Wils. 424; 9 East, 472; 1 Str. 612; 1 M. & S. 180; 4 T. R. 516; 3 Lev. 103; Carth. 462; Ld. Raym. 368; Cro. Eliz. 61; Com. Dig. Baron & Feme, W.

14.—3. When the husband is *civiliter mortuus*, see 4 T. Rep. 361; 2 Bos. & Pull. 165; 4 Esp. R. 27; 1 Selw. N. P. 286;

Cro. Eliz. 519; 9 East, R. 472; Bac. Ab. Baron & Feme, M.; or, as has been decided in England, when he is an alien and has left the country, or has never been in it, the wife may, on her own separate contracts, sue alone. 2 Esp. R. 544; 1 Bos. & Pull. 357; 2 Bos. & Pull. 226; 1 N. R. 80; 11 East, R. 301; 3 Camp. R. 123; 5 T. R. 679. But the rights of such husband being only suspended, the disability may be removed, in one case, by a pardon, and, in the other, by the husband's return, and then he must be joined. Broom on Part. s. 114.

15.—4. When a party being indebted to a wife *dum sola*, after the marriage gives a bond to the husband and wife in consideration of such debt, they may join, or the husband may sue alone on such contract. 1 M. & S. 180; 4 T. R. 616; 1 Chit. Pl. 20.

16.—5. Upon the death of the wife, if the husband survive, he may sue for anything he became entitled to during the coverture; as for rent accrued to the wife during the coverture. 1 Rolle's Ab. 352, pl. 5; Com. Dig. Baron & Feme, Z; Co. Litt. 351, a, n. 1. But the husband cannot sue in his own right for the choses in action of the wife, belonging to her before coverture. Hamm. on Part. 210 to 215.

17. When the wife survives the husband, she may sue on all contracts entered into with her before coverture, which remain unsatisfied; and she may recover all arrears of rent of her real estate, which became due during the coverture, or their joint demise. 2 Taunt. 181; 1 Roll's Ab. 350 d.

18.—6. When a suit is instituted by a single woman, or by her and others, and she afterwards marries, *lis pendens*, the suit abates. 1 Chit. Pl. 437; 14 Mass. R. 295; Brayt. R. 21.

19.—§ 8. *When the plaintiff is a foreign government*, it must have been recognized by the government of this country to entitle it to bring an action. 3 Wheat. R. 324; Story, Eq. Pl. § 55. See 4 Cranch, 272; 9 Ves. 347; 10 Ves. 354; 11 Ves. 283; Harr. Dig. 2276.

20.—Sect. 2. *Of the defendants.* These will be considered in the following order:

§ 1. *Between the original parties.* The action upon an express contract, must in general be brought against the party who made it. 8 East, R. 12. On implied contracts against the person subject to the legal liability. Hamm. Part. 48; 2 Hen.

Bl. 563. Vide 6 Mass. R. 253; 8 Mass. Rep. 198; 11 Mass. R. 335; 6 Binn. R. 234; 1 Chit. Pl. 24.

21.—§ 2. *Of the number of defendants.* For the breach of a joint contract made by several parties, they should all be made defendants; 1 Saund. 158, note 1; Id. 291 b, n. 4; even though one be a bankrupt or insolvent. 2 M. & S. 28. Even an infant must be joined, unless the contract as to him be entirely void. 3 Taunt. 307; 5 John. R. 160. Vide 5 John. R. 280; 11 John. R. 101; 5 Mass. R. 270; 1 Pick. 500. When a joint contractor is dead, the suit should be brought against the survivor. 1 Saund. 291, note 2. The misjoinder of defendants in an action *ex contractu*, by joining one who is not a contractor, is fatal. 8 Conn. 194; Pet. C. C. 16; 2 J. J. Marsh. 38; 1 Breese, 128; 2 Rand. 446; 10 Pick. 281.

22.—§ 3. *In case of a change of credit, and of covenants running with the land, &c.* In general in the case of a mere personal contract, the action for the breach of it, cannot be brought against the person to whom the contracting party has assigned his interest, and the original party can alone be sued; for example, if two partners dissolve their partnership, and one of them covenant with the other that he will pay all the debts, a creditor may nevertheless sue both. Upon a covenant running with land, which must concern real property, or the estate therein; 3 Wils. 29; 2 H. Bl. 133; 10 East, R. 130; the assignee of the lessee is liable to an action for a breach of the covenant after the assignment of the estate to him, and while the estate remains in him, although he have not taken possession. Bac. Ab. Covenant, E 34; 3 Wils. 25; 2 Saund. 304, n. 12; Woodf. L. & T. 113; 7 T. R. 312; Bull. N. P. 159; 3 Salk. 4; 1 Dall. R. 210; 1 Fonbl. Eq. 359, note y; Hamm. N. P. 136.

23.—§ 4. *When one of several obligors, &c. is dead.* When the parties were bound by a joint contract, and one of them dies, his executor or administrator is at law discharged from liability, and the survivor alone can be sued. Bac. Ab. Obligation, D 4; Vin. Ab. Obligation, P 20; Carth. 105; 2 Burr. 1196. And when the deceased was a mere surety, his executors are not liable even in equity. Vide 1 Binn. R. 123.

24.—§ 5. *In the case of executors and administrators.* When the contracting

party is dead, his executor or administrator, or, in case of a joint contract, the executor or administrator of the survivor, is the party to be made defendant. Ham. on Part. 156. On a joint contract, the executors of the deceased contractor, the other surviving, are discharged at law, and no action can be supported against them; 6 Serg. & R. 262; 2 Whart. R. 344; 2 Browne, Rep. 31; and, if the deceased joint contractor was a mere surety, his representatives are not liable either at law or in equity. 2 Serg. & R. 262; 2 Whart. 344; P. A. Browne's R. 31. All the executors must be sued jointly; when administration is taken on the debtor's estate, all his administrators must be joined, and if one be a married woman, her husband must also be a party. Cro. Jac. 519.

25.—§ 6. *In the case of bankruptcy or insolvency.* A discharged bankrupt cannot be sued. A discharge under the insolvent laws does not protect the property of the insolvent, and he may in general be sued on his contracts, though he is not liable to be arrested for a debt which was due and not contingent at the date of his discharge. Dougl. 98; 8 East, R. 311; 1 Saund. 241, n. 5; Ingrah. on Insol. 377.

26.—§ 7. *In case of marriage.* This head will be divided by considering, 1. When the husband and wife must be joined. 2. When the husband must be sued alone. 3. When the wife must be sued alone. 4. When the husband and wife may be joined or not at the election of the plaintiff. 5. Who is to be sued in case of the death of the husband or wife. 6. Of actions commenced against the wife *dum sola*, which are pending at her marriage.

27.—1. When a feme sole who has entered into a contract marries, the husband and wife must in general be jointly sued. 7 T. R. 348; All. 72; 1 Keb. 281; 2 T. R. 480; 3 Mod. 186; 1 Taunt. 217; 7 Taunt. 432; 1 Moore, 126; and see 8 Johns. R. 2d ed. 115; 15 Johns. R. 403, 483; 17 Johns. Rep. 167; 7 Mass. R. 291; Com. Dig. Pleader, 2 A 2; 1 Bingh. R. 50. But if the husband be away, or live separate from his wife, she may, on a contract of which she is the meritorious cause, bring an action in the name of her husband, on indemnifying the latter for costs. 4 B. & A. 419; 2 C. & M. 888; Addis. on Contr. 342. And, on such a contract, she may sue as a feme sole when her husband is civiliter mortuus. Addis.

on Contr. 342; 1 Salk. 116; 1 Lord Raym. 147; 2 M. & W. 65; Moore, 851.

28.—2. When the wife cannot be considered either in person or property as creating the cause of action, as in the case of a mere personal contract made during the coverture, the husband must be sued alone. Com. Dig. Pleader, 2 A 2; 8 T. R. 545; 2 B. & P. 105; Palm. 312; 1 Taunt. 217; 4 Price, 48; 16 Johns. R. 281.

29.—3. The wife can in general be sued alone, in the same cases where she can sue alone, the cases being reversed.

30.—4. When the husband, in consequence of some new consideration, undertakes to pay a debt of the wife *dum sola*, he may be sued alone, or the husband and wife may be made joint defendants. All. 73; 7 T. R. 349; vide other cases in Com. Dig. Baron & Feme, Y; 1 Rollo's Ab. 348, pl. 45, 50; Bac. Ab. Baron & Feme, L.

31.—5. Upon the death of the wife, her executor, when she has appointed one under a power, or her administrator, is alone responsible for a debt or duty she contracted *dum sola*. The husband, as such, is not liable. Com. Dig. Baron & Feme, 2 C; 3 Mod. 186; Rep. Temp. Talb. 173; 3 P. Wms. 410. When the wife survives, she may be sued for her contracts made before coverture. 7 T. R. 350; 1 Camp. R. 189.

32.—6. When a single woman, being sued, marries *his pendens*, the plaintiff may proceed to judgment, as if she were a feme sole. 2 Rollo's R. 53; 2 Str. 811.

33. Part 2. *Of parties to actions in form ex delicto*. These are plaintiffs and defendants.

34.—Sect. 1. *Of plaintiffs*. These will be separately considered as follows:

35.—§ 1. *With reference to the interest of the plaintiff*. The action for a tort must, in general, be brought in the name of the party whose legal right has been affected. 8 T. R. 330; vide 7 T. R. 47; 1 East, R. 244; 2 Saund. 47 d; Hamm. on Part. 35, 6; 6 Johns. R. 195; 10 Mass. R. 125; 10 Serg. & Rawle, 357.

36.—§ 2. *With reference to the number of plaintiffs*. It is a general rule that when an injury is done to the property of two or more joint owners, they must join in the action; and even when the property is several, yet when the wrong has caused a joint damage, the parties must join in the action. 1 Saund. 291, g. When suits are brought by tenants in common against

strangers for the recovery of the land, inasmuch as they have several titles, they cannot, agreeably to the rules of the common law, join, but must bring separate actions; and this seems to be the rule in Missouri. 1 Misso. R. 746. This rule has been changed in some of the states. In Connecticut, when the plaintiff claims on the title of all the tenants, he recovers for their benefit, and his possession will be theirs. 1 Swift's Dig. 103. In Massachusetts, Mass. Rev. St. 611, and Rhode Island, R. I. Laws, 208, all the tenants or any two may join, or any one may sue alone. In Tennessee they usually join. 2 Yerg. R. 228.

37. When personal reputation is the object affected, two or more cannot join as plaintiffs in the action, although the mode of expression in which the slander was couched comprehended them all; as when a man addressing himself to three, said, you have murdered Peter. Dyer, 191, pl. 112; Cro. Car. 510; Goulds. pl. 6, p. 78. The reason of this is obvious, no one has any interest in the character of the others, the damages are, therefore, several to each.

38.—§ 3. In general, rights or causes of action arising *ex delicto* are not assignable.

39.—§ 4. *When one of several parties who had an interest is dead*. In such case the action must be instituted by the survivor. 1 Show. 188; S. C. Carth. 170.

40.—§ 5. *When the party injured is dead*. The executors or administrators cannot in general recover damages for a tort, when the action must be *ex delicto*, and the plea to it is not guilty. Vide the article *Actio personalis moritur cum persona*, where the subject is more fully examined.

41.—§ 6. *In case of insolvency*. The statutes generally authorize the trustee or assignee of an insolvent to institute a suit in his own name for the recovery of the rights and property of the insolvent. 6 Binn. 189; 8 Serg. & Rawle, 124. But for torts to the person of the insolvent, as for slander, the trustee or assignee cannot sue. W. Jones' Rep. 215.

42.—§ 7. *When the tort has been committed against a woman dum sola who afterwards married*. A distinction is made between those injuries committed *before* and those which take place *during* coverture. For injuries to the person, personal or real property of the wife, committed before

coverture, when the cause of action would survive to the wife, she must join in the action. 3 T. R. 627; Rolle's Ab. 347; Com. Dig. Baron & Feme, V. For an injury to the person of the wife during coverture, by battery, or to her character, by slander, or for any other such injury, the wife must be joined with her husband in the suit; when the injury is such that the husband receives a separate damage or loss, as if in consequence of the battery, he has been deprived of her society or been put to expense, he may bring a separate action in his own name; and for slander of the wife, when words are not actionable of themselves, and the husband has received some special damages, the husband must sue alone. 1 Lev. 140; 1 Salk. 119; 3 Mod. 120.

43.—Sect. 2. *Of the defendants.* § 1. *Between the original parties.* All natural persons are liable to be sued for their tortious acts, unconnected with or in disaffirmance of a contract; an infant is, therefore, equally liable with an adult for slander, assaults and batteries, and the like; but the plaintiff cannot bring an action *ex delicto*, which arose out of a contract, and by that means charge an infant for a breach of a contract. The form is of no consequence; the only question is whether the action arose out of a contract or otherwise. A plaintiff who hired a horse to an infant, and the infant by hard, improper and injudicious driving, killed the horse, cannot maintain an action *ex delicto* to recover damages for a breach of this contract. 3 Rawle's R. 351; 6 Watts' R. 9; 8 T. R. 335; Hamm. N. P. 267. But see contra, 6 Cranch, 226; 15 Mass. 359; 4 McCord, 387. Vide *Infant*.

44.—§ 2. *As to the number of defendants.* There are torts which, when committed by several, may authorize a joint action against all the parties; but when in legal contemplation several cannot concur in the act complained of, separate actions must be brought against each; the cases of several persons joining in the publication of a libel, a malicious prosecution, or an assault and battery, are cases of the first kind; verbal slander is of the second. 6 John. R. 32. In general, when the parties have committed a tort which might be committed by several, they may be jointly sued, or the plaintiff may sue one or more of them, and not sue the others, at his election. Bac. Ab. Action Qui Tam, D; Roll. Ab. 707; 8 East, R. 62.

45.—§ 3. *When the interest has been assigned.* A liability for a tort cannot well be assigned; but an estate may be assigned on which was erected a nuisance, and the assignee will be liable for continuing it, after having possession of the estate. Com. Dig. Case, Nuisance, B; Bac. Ab. Actions, B; 2 Salk. 460; 1 B. & P. 409.

46.—§ 4. *When the wrongdoer is dead.* In this case the remedy for wrongs *ex delicto*, and unconnected with contract, cannot in general be maintained. Vide *Actio personalis moritur cum persona*.

47.—§ 5. *In case of insolvency.* Insolvency does not discharge the right of action of the plaintiff in any case; it merely liberates the defendant from arrest when he has received the benefit of, and been discharged under, the insolvent laws; an insolvent may therefore be sued for his torts committed before his discharge.

48.—§ 6. *In case of marriage.* Marriage does not affect or change the liabilities of the husband, and he is alone to be sued for his torts committed either before or during the coverture. But it is otherwise with the wife; after her marriage she has no personal property to pay the damages which may be recovered, and she cannot even appoint an attorney to defend her. For her torts committed by her before the marriage, the action must be against the husband and wife jointly. Bac. Ab. Baron and Feme, L; 5 Binn. 43. They must also be sued jointly for the torts of the wife during the coverture, as for slander, assault and battery, &c. Bac. Ab. Baron and Feme, L.

See, generally, as to parties to actions, 3 United States Dig. Pleading, I, and Promissory Note, XVI.; Bouv. Inst. Index, h. t.

PARTIES TO A SUIT IN EQUITY. The person who seeks a remedy in chancery by suit, commonly called a plaintiff, and the person against whom the remedy is sought, usually denominated the defendant, are the parties to a suit in equity.

2. It is of the utmost importance, that there should be proper parties; and therefore no rules connected with the science of equity pleading, are so necessary to be attentively considered and observed, as those which relate to the persons who are to be made parties to a suit, for when a mistake in this respect is discovered at the hearing of the cause, it may sometimes be attended with defeat, and will, at least, be followed

by delay and expense. 3 John. Ch. R. 555; 1 Hopk. Ch. R. 566; 10 Wheat. R. 152.

3. A brief sketch will be here given by considering, 1. Who may be plaintiffs. 2. Who may be made defendants. 3. The number of the parties.

4.—§ 1. *Of the plaintiff.* Under this head will be considered who may sue in equity: and

5.—1. The government, or as the style is in England, the crown, may sue in a court of equity, not only in suits strictly on behalf of the government, for its own peculiar rights and interest, but also on behalf of the rights and interest of those, who partake of its prerogatives, or claim its peculiar protection. Mitf. Eq. Plead. by Jeremy, 4, 21-24; Coop. Eq. 21, 101. Such suits are usually brought by the attorney general.

6.—2. As a general rule all persons, whether natural or artificial, as corporations, may sue in equity; the exceptions are persons who are not *sui juris*, as a person not of full age, a feme covert, an idiot, or lunatic.

7. The incapacities to sue are either absolute, or partial.

8. The absolute, disable the party to sue during their continuance; the partial, disable the party to sue by himself alone, without the aid of another. In the United States, the principal absolute incapacity, is alienage. The alien, to be disabled to sue in equity, must be an alien enemy, for an alien friend may sue in chancery. Mitf. Equity, Pl. 129; Coop. Equity Pl. 27. But still the subject matter of the suit may disable an alien to sue. Coop. Eq. Pl. 25; Co. Lit. 129 b. An alien sovereign or an alien corporation may maintain a suit in equity in this country. 2 Bligh's Rep. 1, N. S.; 1 Dow. Rep. 179, N. S.; 1 Sim. R. 94; 2 Gall. R. 105; 8 Wheat. Rep. 464; 4 John. Ch. Rep. 370. In case of a foreign sovereign, he must have been recognized by the government of this country, before he can sue. Story's Eq. Pl. § 55; 8 Wheat. Rep. 324; Coop. Eq. Pl. 119.

9. Partial incapacity to sue exists in the case of infants, of married women, of idiots and lunatics, or other persons who are incapable, or are by law specially disabled, to sue in their own names; as for example, in Pennsylvania, and some other states, habitual drunkards, who are under guardianship.

10.—1. An infant cannot, by himself,

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exhibit a bill, not only on account of his want of discretion, but because of his inability to bind himself for costs. Mitf. Eq. Pl. 25. And when an infant sues, he must sue by his next friend. Coop. Eq. 27; 1 Sm. Chan. Pl. 54. But as the next friend may sometimes bring a bill from improper motives, the court will, upon a proper application, direct the master to make inquiry on this subject, and if there be reason to believe it be not brought for the benefit of the infant, the proceedings will be stayed. 3 P. Wms. 140; Mitf. Eq. Pl. 27; Coop. Eq. Pl. 28.

11.—2. A feme covert must, generally, join with her husband; but when he has abjured the realm, been transported for felony, or when he is civilly dead, she may sue as a feme sole. And when she has a separate claim, she may even sue her husband, with the assistance of a next friend of her own selection. Story's Eq. Pl. § 61; Story's Eq. Jur. § 1368; Fonbl. Eq. b. 1, c. 2, § 6, note p. And the husband may himself sue the wife.

12.—3. Idiots and lunatics are generally under the guardianship of persons who are authorized to bring a suit in the idiot's name, by their guardian or committee.

13.—§ 2. *Of the defendant.* 1. In general, those persons who may sue in equity, may be sued. Persons *sui juris*, may defend themselves, but those under an absolute or partial inability, can make defence only in a particular manner. A bill may be exhibited against all bodies politic or corporate, against all persons not laboring under any disability, and all persons subject to such incapacity, as infants, married women, and lunatics, or habitual drunkards.

14.—2. The government or the state, like the king in England, cannot be sued. Story, Eq. Pl. § 69.

15.—3. Bodies politic or corporate, like persons *sui juris*, defend a suit by themselves.

16.—4. Infants institute a suit, as has been seen, by next friend, but they must defend a suit by guardian appointed by the court, who is usually the nearest relation, not concerned in interest, in the matter in question. Mitf. Eq. Pl. 103; Coop. Eq. Pl. 20, 109; 9 Ves. 357; 10 Ves. 159; 11 Ves. 563; 1 Madd. R. 290. Vide *Guardian*, n. 6.

17.—5. Idiots and lunatics defend by their committees, who, in ordinary circumstances, are appointed guardians *ad litem*.

for that purpose, as a matter of course. Mitf. Eq. Pl. 103; Coop. Eq. Pl. 30, 32; Story's Eq. Pl. § 70; Shelf. on Lun. 425; and vide 2 John. Ch. R. 242, where Chancellor Kent held, that the idiot need not be made a party as defendant to a bill for the payment of his debts, but his committee only. When the idiot or lunatic has no committee, or the latter has an interest adverse to that of the lunatic or idiot, a guardian *ad litem* will be appointed. Mitf. Eq. Pl. 103; Story's Eq. Pl. § 70.

18.—6. In general, a married woman, when she is sued, must be joined with her husband, and their answer must also be joint. But there are exceptions to this rule in both its requirements.

19.—1. A married woman may be made a defendant, and answer as a feme sole, in some instances, as when her husband is plaintiff in the suit, and sues her as defendant, and from the like necessity, when the husband is an exile or has abjured the realm, or has been transported under a criminal sentence, or is an alien enemy. She may be sued and answer as a feme sole. Mitf. Eq. Pl. 104, 105; Coop. Eq. Pl. 30.

20.—2. When her husband is joined, or ought to be joined, she cannot make a separate defence, without a special order of court. The following are instances where such orders will be made. When a married woman claims as defendant in opposition to her husband, or lives separate from him, or disapproves of the defence he wishes her to make, she may obtain an order of court for liberty to answer, and defend the suit separately. And when the husband is abroad, the plaintiff may obtain an order that she shall answer separately; and if a woman obstinately refuses to join a defence with her husband, the latter may obtain an order to compel her to make a separate answer. Mitf. Eq. Pl. 104; Coop. Eq. Pl. 30; Story's Eq. Pl. § 71.

21.—§ 3. *As to the number of parties.* It is a general rule that every person who is at all interested in the subject-matter of the suit, must be made a party. It is the constant aim of a court of equity, to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested in the subject, ought to be parties to the suit, plain-

tiffs or defendants, however numerous they may be, so that a complete decree may be made binding on those parties. Mitford's Eq. Pl. 144; 1 John. Ch. R. 349; 9 John. R. 442; 2 Paige's C. R. 278; 2 Bibb, 184; 3 Cowen's R. 537; 4 Cowen's R. 682; 9 Cowen's R. 321; 2 Eq. Cas. Ab. 179; 3 Swans. R. 139. When a great number of individuals are interested, as in the instance of creditors, seeking an account of the estate of their deceased debtor for payment of their demands, a few suing on behalf of the rest may substantiate the suit, and the other creditors may come in under the decree. 2 Ves. 312, 313. In such case, the bill should expressly show that it is filed as well on the behalf of other members as those who are really made the complainants; and the parties must not assume a corporate name, for if they assume the style of a corporation, the bill cannot be sustained. 6 Ves. jr. 773; Coop. Eq. Pl. 40; 1 John. Ch. R. 349; 13 Ves. jr. 397; 16 Ves. jr. 321; 2 Ves. sen. 312; S. & S. 18; Id. 184. In some cases, however, when all the persons interested are not made parties, yet, if there be such privity between the plaintiffs and defendants, that a complete decree may be made, the want of parties is not a cause of demurrer. Mitf. Eq. Pl. 145. Vide Calvert on Parties to Suits in Equity; Edwards on Parties to Bills in Chancery; Bouv. Inst. Index, h. t.

PARTITION, conveyancing. A deed of partition is one by which lands held in joint tenancy, coparcenary, or in common, are divided into distinct portions, and allotted to the several parties, who take them in severalty.

2. In the old deeds of partition, it was merely agreed that one should enjoy a particular part, and the other, another part, in severalty; but it is now the practice for the parties mutually to convey and assure to each other the different estates which they are to take in severalty, under the partition. Cruise, Dig. t. 32, c. 6, s. 15.

PARTITION, estates. The division which is made between several persons, of lands, tenements, or hereditaments, or of goods and chattels which belong to them as co-heirs or co-proprietors. The term is more technically applied to the division of real estate made between coparceners, tenants in common or joint tenants.

2. The act of partition ascertains and fixes what each of the co-proprietors is entitled to have in severalty.

3. Partition is either voluntary, or involuntary, by compulsion. Voluntary partition is made by the owners of the estate, and by a conveyance or release of that part to each other which is to be held by him in severalty.

4. Compulsory partition is made by virtue of special laws providing that remedy. "It is presumed," says Chancellor Kent, 4 Com. 360, "that the English statutes of 31 and 32 Henry VIII. have been generally reenacted and adopted in this country, and, probably, with increased facilities for partition." In some states the courts of law have jurisdiction; the courts of equity have for a long time exercised jurisdiction in awarding partition. 1 Johns. Ch. R. 113; 1 Johns. Ch. R. 302; 4 Randolph's R. 493; State Eq. Rep. S. C. 106. In Massachusetts, the statute authorizes a partition to be effected by petition without writ. 15 Mass. R. 155; 2 Mass. Rep. 462. In Pennsylvania, intestates' estates may be divided upon petition to the orphans' court. By the civil code of Louisiana, art. 1214, et seq., partition of a succession may be made. Vide, generally, Cruise's Dig. tit. 32, ch. 6, s. 15; Com. Dig. Pleader, 3 F; Id. Parcener, C; Id. vol. viii. Append. h. t.; 16 Vin. Ab. 217; 1 Supp. to Ves. jr. 168, 171; Civ. Code of Louis. B. 3, t. 1, c. 8.

5. Courts of equity exercise jurisdiction in cases of partition on various grounds, in cases of such complication of titles, when no adequate remedy can be had at law; 17 Ves. 551; 2 Freem. 26; but even in such cases the remedy in equity is more complete, for equity directs conveyances to be made, by which the title is more secure. "Partition at law, and in equity," says Lord Redesdale, "are very different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it, which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyance, the partition cannot be effectually had." 2 Sch. & Lef. 371. See 1 Hill. Ab. c. 55, where may be found an abstract of the laws of the several states on this subject.

PARTNERS, contracts. Persons who have united together and formed a partnership.

2. Every person *sui juris* is competent to contract the relation of a partner. An infant may by law be a partner. 5 B & A.

159; but a feme covert, not being capable of contracting, cannot enter into partnership; and although married women are not unfrequently entitled to shares in banking houses, and other mercantile concerns, under positive covenants, yet when this happens, their husbands are entitled to such shares, and become partners in their steads. Whether a feme sole trader in Pennsylvania could enter into such contract, seems not settled. See 2 Serg. & Rawle, 189; see also, 2 Nott & McC. R. 242; 2 Bay, 162, 333; Code Civ. par Sirey, art. 220.

3. Partners are considered as ostensible, dormant, or nominal partners. 1. An actual ostensible partner is a party who not only participates in the profits and contributes to the losses, but who appears and exhibits himself to the world as a person connected with the partnership, and as forming a component member of a firm. He is clearly answerable for the debts and engagements of the partnership; his right to a share of the profits, or the permitted exhibition of his name as partner, would be sufficient to render him responsible. 6 Serg. & Rawle, 259, 337; Barnard. 343; 2 Blackst. R. 998; 17 Ves. 404; 18 Ves. 301; 1 Rose, 297; 16 Johns. R. 40; 8 Hayw. R. 78.

4.—2. A dormant partner is one who is a participant in the profits of the trade, but his name being suppressed and concealed from the firm, his interest is consequently not apparent. He is liable as a partner, because he receives and takes from the creditors a part of that fund which is the proper security to them for the satisfaction of debts, and upon which they rely for payment. 16 Johns. R. 40. Another reason assigned for subjecting a dormant partner to responsibility is, that if he were exempted he would receive usurious interest for his capital, without its being attended with any risk. 1 Dougl. 371; 4 East, R. 143; 10 Johns. R. 226; 4 B. & A. 663; 3 Man. Gr. & Scott, 641, 650. But in order to render one liable as a partner, he must receive the profits as such, and not merely his wages to be paid out of the profits. Vide *Profits*.

5.—3. A nominal partner is one who has not any actual interest in the trade or its profits, but, by allowing his name to be used, he holds himself out to the world as having an apparent interest. He is liable as a partner, because of the false appearance he holds forth to the world in repre-

senting himself to be jointly concerned in interest with those with whom he is apparently associated. 2 H. Bl. 235; 1 Esp. N. P. O. 29; 6 Serg. & R. 338; Watts. Partn. 26.

6. A partner in a private commercial partnership cannot introduce a stranger into the firm as a partner without the consent of all the copartners. If he should attempt to do so, this may make such stranger a partner with the partner who has associated with such third person; this will be a partnership, distinct from the first, and limited to the share of that partner who has so joined himself with another. 2 Rose, 255; Domat, de la Société, tit. 8, s. 2, n. 5.

7. As between the members of a firm and the persons having claims upon it, each individual member is answerable *in solido* for the amount of the whole of the debts contracted by the partnership, without reference either to the extent of his own separate beneficial interest in the concern, or to any private arrangement or agreement that may exist between himself and his copartners, stipulating for a restricted responsibility. 1 Ves. & Bea. 157; 9 East, 527; 5 Burr. 2611; 2 Bl. R. 947; 1 East, R. 20; 1 Ves. sen. 497; 2 Desaus. R. 148; 4 Serg. & Rawle, 356; 6 Serg. & Rawle, 333; Kirby, 53, 77, 147. In Louisiana, ordinary partners are not bound *in solido* for the debts of the partnership; Civ. Code of Lo. art. 2848; each partner is bound for his share of the partnership debts, calculating such share in proportion to the number of the partners, without any attention to the proportion of the stock or profits each is entitled to. Id. art. 2844.

8. Partners are bound by what is done by one in the course of the business of the partnership. Their liability under contracts is commensurate and coextensive with their rights. Although the general rule of law is, that no one is liable upon any contract except such as are privy to it; yet this is not contravened by the liability of partners, as they are imagined virtually present at and sanctioning the proceedings they singly enter into in the course of trade; or as each is vested with a power enabling him to act at once as principal and as the authorized agent of his copartners. Watts. Partn. 167; Gow. Partn. 53. It is doubtful, however, whether one can close the business by a general assignment of the partnership property for the benefit of creditors. Pierpont and Lord v. Graham. Cir. Court, April

1820, MS. Whart. Dig. 453, 1st ed.; 4 Wash. C. C. R. 232; see 1 Brock. R. 456; 3 Paige's R. 517; 5 Paige's R. 30; 1 Desaus. R. 537; 4 Day's R. 425; 5 Cranch, 300; 1 Hoffm. R. 68, 511; Stor. Partn. § 101; 2 Washb. R. 390.

9. One partner can, in simple contracts, bind his copartners in transactions relative to the partnership. 7 T. R. 207; 4 Dall. 286; 1 Dall. 269. But a security given by one partner, in the partnership name, known to be for his individual debt, does not bind the firm. 2 Caines' R. 246; 4 Johns. R. 251; 4 Johns. R. 262, in note; 2 Johns. R. 300; 16 Johns. R. 34; 4 Serg. & Rawle, 397. Nor can one partner bind his copartners by deed; and this both for technical reasons and the general policy of the law. Watts. Partn. 218; Gow on Partn. 83; 3 Murph. 321; 4 Sm. & Marsh. 261; 7 N. H. Rep. 549; 1 Pike, 206; 2 Harr. 147; 2 B. Monr. 267; 5 B. Monr. 47; 4 Miss. 417; 1 McMullen, 811; 3 Johns. Cas. 180; Taylor's R. 113; 2 Caines' R. 254; 2 Caines' Err. 1; 2 Johns. R. 213; 19 Johns. R. 513; 1 Dall. 119. But see 6 Watts & Serg. 165, where it is said this rule admits of some qualifications. The rule does not however apply to cases where the object is to discharge a debt as due to it; as to give a general release by deed. 3 John. 68; 7 N. H. Rep. 550; 1 Wend. 326; 20 Wend. 251; 22 Wend. 324. It seems to be an admitted principle, that one partner has no power to submit to arbitration any matters whatsoever, concerning or arising out of the partnership business. Story, Partn. § 114; Com. Dig. Arbitrament, D 2; 3 Bing. R. 101; 1 C. M. & R. 681; 1 Pet. R. 222; 19 John. R. 187; 3 Kent, Com. 49, 4th ed. But in Pennsylvania, 12 S. & R. 243, and Kentucky, 8 Monr. R. 433, one partner may by an unsealed instrument refer any partnership matter to arbitration, though he has no implied authority to consent to an order for a judgment in an action against himself and his copartner. 3 Mann. G. & Scott, 742. Nor has one partner the power to confess a judgment, or authorize the confession of a judgment, against the firm, when no writ has been issued against both. 1 Wend. 311; 9 Wend. 437; 1 Blackf. 252; 1 Scamm. 428, 442. Such a judgment, however is binding on the one who confessed it. 2 Bl. R. 1133; 1 Dall. 119; 1 W. & S. 340, 519; 7 W. & S. 142; 2 Caines, 254; 20 Wend. 609; and see 7 Watts, 331; 1 W.

& S. 519, 525; 2 Miles, 486; 1 Hoff. Ch. R. 525.

10. With regard to the right of the majority of the partners, when there is a dissent among them, it may be laid down, 1. That when there are stipulations on this subject, they must govern. Turn. & Russ. 496, 517. 2. In the absence of all agreement on the subject, each partner has an equal voice, though their interests be different, and a majority have a right to conduct the business. 3 John. Ch. R. 400; 3 Chit. Comm. Law, 236; Colly. Partn. B. 2, c. 2, s. 1; Id. B. 3, c. 1, s. 262; Story, Partn. § 123. 3. When there are only two partners, and they dissent, neither can bind the partnership, when the person with whom they deal has notice of such disagreement. 1 Stark. R. 164. See 1 Camp. R. 403; 10 East, R. 264; 7 Price, Rep. 193; 6 Ves. 777; 16 Vin. Ab. 244. But this right of the majority is confined to transactions in the usual scope of the business, and not to a change of the articles of the partnership, for in such case all the partners must consent. 4 John. Ch. R. 573.

11. The stock used in a joint undertaking by way of partnership in trade, is always considered in common and not as joint property, and consequently there is no survivorship therein; *jus accrescendi inter mercatores, pro beneficio commercii, locum non habet*. On the death of one partner, therefore, his representatives become tenants in common with the survivor, of all the partnership effects in possession. But with respect to *choses in action*, survivorship so far exists at law, as that the remedy or right to reduce them into possession vests exclusively in the survivor; although when they are recovered, the representatives of the deceased partner have, in equity, the same right of sharing and participating in them which their testator or intestate would have possessed had he been living. 1 Ld. Raym. 340. See 2 Dall. 65, 66, in note; 1 Dall. 248; 4 Dall. 354; 2 Serg. & Rawle, 494.

12. When real estate is owned by a partnership, it is held by the partners subject in all respects to the ordinary incidents of land held in common. 1 Sumn. R. 174; 7 Conn. 11; 5 Hill, (N. Y.) Rep. 118; 4 Metc. 537. But in equity the partners may by agreement, express or implied, affect real estate with a trust as a partnership property, and, by that means, render it in equity subject to the rules applicable to

partnership property as between the partners themselves and all claiming under them. 2 Edw. R. 28; 2 Rand. R. 183; 7 S. & R. 438, 441; 7 Conn. 11; 5 Metc. 582; 6 Yerg. 20.

See, generally, as to partners, 5 Com. Dig. Merchant, D; Bac. Abr. Merchant, C; Wats. on Partn. *passim*; Gow on Partn. *passim*; Supp. to Ves. jr. vol. 1, p. 36, 279, 281, 312, 389, 449, 503; Id. vol. 2, p. 40, 314, 315, 317, 362, 364, 377, 384, 456; 1 Salk. 291, †392; 1 Swanst. R. 506, 9; 10 East R. 265; 4 Ves. 396; 1 Hare & Wall. Sel. Dec. 292, 304; Civ. Code of Lo. B. 3, t. 11; Code Civ. L. 3, t. 9; Code de Proc. Civ. L. 1, t. 3; Chit. Contr. 66 to 82; Poth. Contrat de Société; Bouv. Inst. Index, h. t. Vide *Articles of Partnership*; *Death of a partner*; *Dissolution*; *Firm*; *Partnership*.

PARTNERSHIP, contracts. An agreement between two or more persons, for joining together their money, goods, labor and skill, or either or all of them, for the purpose of advancing fair trade, and of dividing the profits and losses arising from it, proportionably or otherwise, between them. 2 Bouv. Inst. n. 1435; Watson on Partn. 1; Gow on Partn. 2; see Civ. Code of Lo. art. 2772; Code Civ. art. 1832; Forbes. Inst. of Scotch Law, part 2, B. 3, s. 3, p. 184; edit. Edin. 1722, 12mo.; Domat, Civ. Law, vol. 1, p. 85; 9 John. R. 438; Puffend. B. 5, c. 8; 2 H. Bl. 246; 1 H. Bl. 37; Ersk. Inst. B. 3, t. 3, § 18; Tapia, Elementos de Jurisp. Mercantil, p. 86; 5 Duv. Dr. Civ. Fr. tit. 9, c. 1, n. 17; 4 Pard. Dr. Com. n. 966; 2 Bell's Com. 611, 5th ed.; Aso & Mann. Inst. B. 2, tit. 15. Sometimes partnership signifies a moral being composed of the reunion of all the partners. 4 Pard. n. 966. As a partnership has a separate existence as a person, it becomes liable to fulfil all its engagements, and the partners are individually bound and responsible only on its default, as sureties. 2 Bell's Comm. B. 6, c. 1, n. 4, p. 619, 5th ed.

2. Partnerships will be considered, 1st. In respect to their character and extent, as they regard property. 2d. With relation to the number and character of parties. 3d. As they are divided by the French code. 4th. As to their creation. 5th. As to their object. 6th. As to their duration. 7th. As to their dissolution. 8th. As to partnerships in Louisiana.

3.—§ 1. In respect to their character

and extent, as they regard property, partnerships may be divided into three classes, namely: universal partnerships; general partnerships; and limited or special partnerships. 1. A universal partnership is one where the parties agree to bring into the firm all their property, real, personal and mixed, and to employ all their skill, labor, and services, in the trade or business, for their common benefit. This kind of partnership is perhaps unknown in the United States. 5 Mason, R. 176.

4.—2. General partnerships are properly such, where the parties carry on all their trade and business for their joint benefit and profit; and it is not material whether the capital stock be limited or not, or the contributions of the partners be equal or unequal. Cowp. 814. The same appellation is given to a partnership where the parties are engaged in one branch of trade only.

5.—3. Special partnerships are those formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them. When they extend to a single transaction or adventure only, such as the purchase and sale of a particular parcel of goods, they are more commonly called limited partnerships. The appellation is however given to both classes of cases indiscriminately. Story, Partn. § 75.

6.—§ 2. When considered in relation to the number and character of the parties, partnerships are divided into private partnerships and public companies. 1. Private partnerships are those which consist of two or more partners for some private undertaking, trade, or business.

7.—2. Public companies are those where a greater number of persons are concerned, and the stock is divided into a considerable number of shares, the object embracing generally public as well as private interests. This term is, however, perhaps loosely applied, as these companies have for the most part the character of private associations. They are either incorporated or not. The incorporated are to be governed by the rules established in their respective charters. See *Corporation*. The unincorporated are in general subject to all the regulations of a common private partnership.

8.—§ 3. In the French law, partnerships are divided into three kinds, namely:

1. Partnerships under a collective name, that is, where the name of the firm contains the names of all or some of the partners.

9.—2. Partnerships en commandite or *in commendam*; these are limited partnerships, where one or more persons are general partners, and are jointly and severally responsible with all their estates, and one or more other persons who furnish a part or the whole of the capital, who are liable only to the extent of the capital they have furnished. The business is carried on in the name of the general partners. This species of partnership, with some modifications, has been adopted in several of the states of the American union. 3 Kent, Com. 34, 4th ed.; 2 Bouv. Inst. n. 1473, et seq.

10.—3. Anonymous partnerships are those in which all the partners are engaged in the business, there is no social name or firm, but a name designating the object of the association. The business is managed by syndics or directors. Vide Poth. de Société, h. t.; 5 Duv. Dr. Civ. Fr. h. t.; Pardes. Dr. Com. h. t.; Code de Com. h. t.; Merl. Répert. h. t. In Louisiana a similar division has been made. Civ. Code of Lo. h. t.

11.—§ 4. Partnerships are created by mere act of the parties; and in this they differ from corporations which require the sanction of public authority, either express or implied. Ang. & Ames on Corp. 23. The consent of the parties may be testified, either in express terms, as by articles of partnership, or positive agreement; or the assent may be tacit, and to be implied solely from the act of the parties. An implied or presumptive assent has equal operation with one that is express and determined. And it may be laid down as a general and undeniable proposition, that persons having a mutual interest in the profits and loss of any business, or particular branch of business, carried on by them, or persons appearing ostensibly to the world as joint traders, are to be recognized and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to such an exhibition. 1 Dall. 269.

12. A community of property does not of itself create a partnership, however that property may be acquired, whether by purchase, donation, accession, inheritance or prescription. Civ. Code of Louis. art. 2777. Hence joint tenants or tenants in common

of lands, goods, or chattels, under devises or bequests in last wills or testaments, and deeds or donations *inter vivos*, and inheritances or successions, are not partners. Story, Partn. § 3.

13. Joint owners of ships are not, in consequence of such ownership, to be considered as partners. Abbot on Ship. 68; 3 Kent, Com. 25, 4th ed.; 15 Wend. 187; and see Poth. De Société, n. 2; 4 Pard. Dr. Com. n. 969; 17 Dur. Dr. Fr. n. 320; 5 Duv. Dr. Civ. Fr. n. 83.

14. The free and personal choice of the contracting parties is so essentially necessary to the constituting of a partnership, that even executors and representatives of deceased partners do not, in their representative capacity, succeed to the state and condition of partners; 2 Ves. sen. 34; Wats. on Partn. 6; although a community of interest necessarily exists between them and the surviving partners, until the affairs of the partnership are wound up. 11 Ves. 3. When there is a positive agreement at the commencement of the partnership, that the personal representative or heir of a partner shall succeed him in the partnership, the obligation will be considered valid. Coll. on part. B. 1, ch. 1, § 1; Story, Partn. § 5.

15.—§ 5. The object of the partnership must be legal. All partnerships, therefore, which are formed for any purpose forbidden by law or good morals, are null and void. But all the partners in such a partnership are jointly liable to third persons who may contract with them without a knowledge of the illegal or immoral object of the partnership. Civ. Code of Lo. art. 2775; 5 B. & A. 341; 2 B. & P. 371; 3 T. R. 454; Poth. Oblig. by Evans, vol. 2, page 3; Gow on Partn. 8; Wats. Partn. 131. Partnerships are not confined to mere commercial trade or business; but generally extend to manufactures and to all other lawful occupations and employments, or to professional or other business. They may extend to all the business of the parties; to a single branch of such business; to a single adventure; or to a single thing. But there cannot lawfully be a partnership in a mere personal office, especially when it is of a public nature, requiring the personal confidence in the skill and integrity of the officer. Story, Partn. § 81; Colly. Partn. 31.

16.—§ 6. Partnerships may be formed to last for life, or for a specific period of time; they may be conditional or indefinite

in their duration, or for a single adventure or dealing; this depends altogether on the will of the parties. The period of duration is either expressed or implied, but the law will not presume that it shall last beyond life. 1 Swanst. R. 521; 1 J. Wils. R. 181. When a particular term is fixed, it is presumed to endure until the period has elapsed; when no term is fixed, it is presumed to endure for the life of the parties, unless previously dissolved by the acts of one of them, by mutual consent, or by operation of law. Story, Partn. § 84. When no time is limited for the duration of a general trading partnership, it is a partnership at will, and may be dissolved at any time at the pleasure of any one or more of the partners.

17.—§ 7. A partnership may be dissolved in several ways: when the partnership is formed for a single dealing or transaction, it follows that it is at an end so soon as the dealing or transaction in which the partners jointly engaged is completed. Gow on Partn. 268; Inst. Lib. 3, tit. 26, s. 6.

18. Where a general partnership is formed, either for a definite or an indefinite period of time, the causes which may operate a destruction of it, are various. In the case of a partnership limited as to its duration, it may, in the intermediate time, before the restricted period of its termination arrives, be dissolved either by the death, the confirmed insanity, the bankruptcy of all or one of the partners, or it may endure the stipulated period, and expire with the effluxion of time; but where the partnership is unlimited as to its existence, although in the instances of death or bankruptcy, it is determined, yet if they do not intervene, any partner may withdraw himself from it whenever he thinks proper. Code, lib. 4, t. 37, 1, 5.

19. Besides the causes above stated for a dissolution, a partnership, limited or unlimited as to its duration, may be dissolved by the decree of a court of equity, where the conduct of some or all of the partners has been such as not to carry on the trade or undertaking on the terms stipulated; Gow on Partn. 269; or by the voluntary or compulsory sale or transfer of the partnership interest of any one of the partners. 17 John. R. 525.

20. In New York, it has been held that there is no such thing as an indissoluble partnership, and that, therefore, any part-

ner may withdraw at any time, and by that act the partnership will be dissolved; the other party having his action against the withdrawing partner upon his covenant to continue the partnership. 19 Johns. R. 538. This doctrine is not in accordance with the English law. Indeed it is even doubtful in New York. Story, Eq. Jur. § 668; Story, Partn. § 275; 3 Kent, Com. 61, 4th ed.; 1 Hoffm. Ch. R. 534. See Gow on Partn. 303, 305, and 4 Wash. C. C. R. 232.

21. It may also be dissolved by the extinction of the thing or object of the partnership; or by the agreement of the parties. See Civ. Code of Louis. art. 2847; Code Civ. B. 3, tit. 9, c. 4, art. 1865 to 1872; 2 Bell's Com. 631 to 644, 5th ed. See *Dissolution*.

22. The effect of the dissolution of the partnership is to disable any one of the partners from contracting new obligations or engagements on account of the firm. 1 Pet. R. 351; 3 McCord, 378; 4 Munf. 215; 2 John. 300; 5 Mason, 56; Harper, R. 470; 4 John. 224; 1 McCord, 338; 6 Cowen, 701. But notwithstanding the dissolution there remain, with each of the partners, certain powers, rights, duties, authorities, and relations between them, which are indispensable to the complete arrangement and final settlement of the affairs of the firm. The partnership must, therefore, subsist for many purposes, notwithstanding the dissolution. Among these are, 1st. The completion of all the unperformed engagements of the partnership. 2d. The conversion of all the property, means and assets of the partnership, existing at the time of the dissolution, for the benefit of those who were partners, according to their respective shares. 3d. The application of the partnership funds, to the liquidation of the partnership debts. Story, Partn. § 324.

23.—§ 3. By the laws of Louisiana, partnerships are divided, as to their object, into commercial partnerships and ordinary partnerships. Commercial partnerships are such as are formed, 1. For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture. 2. For buying and selling any personal property whatsoever, as factors or brokers. 3. For carrying personal property for hire, in ships or other vessels. Civ. Code of Lo. art. 2796.

24. Ordinary partnerships are such as are not commercial; they are divided into

universal or particular partnerships. Id. art. 2797.

25. Universal partnership is a contract by which the parties agree to make a common stock of all the property they respectively possess; they may extend it to all the property real and personal, or restrict it to personal only; they may, as in other partnerships, agree that the property itself shall be common stock, or that the fruits only shall be such; but property which may accrue to one of the parties, after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void. Code Civ. of Lo. art. 2800.

26. Particular partnerships are such as are formed for any business not of a commercial nature. Id. art. 2806. The business of this partnership must be conducted in the name of all the persons concerned, unless a firm is adopted by the articles of partnership reduced to writing, and recorded as is prescribed with respect to partnerships *in commendam*. Id. art. 2808.

27. There is also a species of partnership which may be incorporated with either of the other kinds, called partnership *in commendam*, or limited partnership. Id. art. 2799. Partnership *in commendam* is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. Id. art. 2810.

28. Every species of partnership may receive such partners. It is therefore a modification of which the several kinds of partnerships are susceptible, rather than a separate division of partnerships. Vide Bouv. Inst. Index, h. t.; *Firm*.

PARTOWNERS. Persons who hold real or personal property by the same title, either as tenants in common, joint tenants, or coparceners. They are sometimes called *quasi partners*, and differ from partners in this, that they are either joint owners, or tenants in common, each having an independent, although an undivided interest in the property; neither can transfer or dispose of the whole property, nor act for the

others in relation to it, but merely for his own share, and to the extent of his own several right and interest.

2. In joint tenancy of goods or chattels, it is true, the joint tenants are seized *per my et per tout*, but still each one has an independent, and to a certain extent a distinct right during his lifetime, which he can dispose of and sever the tenancy.

3. Tenants in common hold undivided portions of the property by several titles, or in several rights, although by one title. Their possession, however, they hold in common and undivided. Whereas, in partnerships, the partners are joint owners of the property, and each has a right to sell or dispose of the whole, unless otherwise provided for in the articles of partnership. Colly. Partn. 86; Wats. Partn. 66; Story, Partn. § 91.

4. At common law, each of the owners of a chattel has an equal title and right to possess and use it; and in the case of common chattels the law has generally left this right to the free discretion of the several owners; but in regard to ships, the common law has adopted and followed out the doctrine of the courts of admiralty. It authorizes the majority in value and interest to employ the ship upon any probable design. This is done, not without guarding the rights of the minority. When the majority desire to employ a ship upon any particular voyage or adventure, they have a right to do so, upon giving security by stipulation to the minority, if required, to bring back and restore the ship to them, or in case of her loss, to pay them the value of their shares. Abbott, Shipp. 70; 3 Kent, Com. 151, 4th ed.; 2 Bro. Civ. Law, 131; Molloy, B. 2, c. 1, § 3; 2 Pet. Adm. R. 288; Story, Partn. 428; 11 Pet. R. 175. When the majority do not choose to employ the ship, the minority have the same right, upon giving similar security. 11 Pet. R. 175; 1 Hagg. Adm. R. 306; Jacobs. Sea Laws, 442.

5. When part owners are equally divided as to the employment upon any particular voyage, the courts of admiralty have manifested a disposition to support the right of the court to order a sale of the ship. Story, Partn. § 439; Bee's Adm. R. 2; Gilpin, R. 10; 18 Am. Jur. 486.

PARTURITION. The act of giving birth to a child.

2. Sometimes questions arise how far means may be employed to promote parturition, which cause, or are likely to cause,

the death of the fœtus. These means, in cases of deformed pelvis, are abortion in the early months, by embryotomy, by symphysiotomy, and by the Cæsarian section. These means are justifiable to save the life of the mother, and sometimes some of them have saved the lives of both. Vide *Cæsarian operation*; *Delivery*; *Pregnancy*.

PARTUS. The child just before it is born, or immediately after its birth. Before birth the partus is considered as a portion of the mother. Dig. 25, 4, 1, 1. See *Birth*; *Fœtus*; *Proles*; *Prolicide*.

PARTY, practice, contracts. When applied to practice, by party is understood either the plaintiff or defendant. In contracts, a party is one or more persons who engage to perform or receive the performance of some agreement. Vide *Parties to contracts*; *Parties to actions*; *Parties to a suit in equity*.

PARTY-JURY. An ancient word used to signify a jury *de medieta lingua*, (q. v.) or one composed one-half of natives, and the other of foreigners. Lexic. Techn. h. t.

PARTY WALL. A wall erected on the line between two adjoining estates, belonging to different persons, for the use of both estates. 2 Bouv. Inst. n. 1615.

2. Party walls are generally regulated by acts of the local legislatures. The principles of these acts generally are, that the wall shall be built equally on the lands of the adjoining owners, at their joint expense, but when only one owner wishes to use such wall, it is built at his expense, and when the other wishes to make use of it, he pays one half of its value; each owner has a right to place his joists in it, and use it for the support of his roof. When the party wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbor, and having done so, he is not answerable for any consequential damages which may ensue. 17 John. R. 92; 12 Mass. 220; 2 N. H. Rep. 534. Vide 1 Dall. 846; 5 S. & R. 1.

3. When such wall exists between two buildings, belonging to different persons, and one of them takes it down with his buildings, he is required to erect another in its place in a reasonable time, and with the least inconvenience; the other owner must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall.

3 Kent, Com. 486. When the wall is taken down, it must be done with care; but it is not the duty of the person taking it down to shore up or prop the house of his neighbor, to prevent it from falling; if, however, the work be done with negligence, by which injury accrues to the neighboring house, an action will lie. 1 Moody & M. 362. Vide 4 C. & P. 161; 9 B. & C. 725; 12 Mass. R. 220; 4 Paige's R. 169; 1 C. & J. 20; 1 Pick. 434; 12 Mass. 220; 2 Roll. Ab. 564; 3 B. & Ad. 874; 2 Ad. & Ell. 493; Crabb on R. P. § 500. In the excellent treatise of M. Lepage, entitled "Lois des Bâtimens," part 1, c. 3, s. 2, art. 1, will be found a very minute examination of the subject of party walls, with many cases well calculated to illustrate our law. See also Poth. Contr. de Société, prem. app. n. 207; 2 Hill. Ab. 119; Toull. liv. 2, t. 2, c. 3.

PASS. In the slave states this word signifies a certificate given by the master or mistress to a slave, in which it is stated that he is permitted to leave his home with the authority of his master or mistress. The paper on which such certificate is written is also called a pass.

PASS, practice. To be given, or entered; to proceed; as, let the judgment pass for the plaintiff.

TO PASS. To accomplish, to complete, to decide.

2. The title to goods passes by the sale whenever the parties have agreed upon the sale and the price, and nothing remains to be done to complete the agreement. 1 Bouv. Inst. n. 939.

3. When a jury decide upon the rights of the parties, which are in issue, they are said to pass upon them.

PASS BOOK, com. law. A book used by merchants with their customers, in which an entry of goods sold and delivered to a customer is made.

2. It is kept by the buyer, and sent to the merchant whenever he wishes to purchase any article. It ought to be a counterpart of the merchant's books, as far as regards the customer's account.

3. Among English bankers, the term pass-book is given to a small book made up from time to time, from the banker's ledger, and forwarded to the customer; this is not considered as a statement of account between the parties, yet when the customer neglects for a long time to make any objection to the correctness of the entries he

will be bound by them. 2 Atk. 252; 2 Deac. & Ch. 584; 2 M. & W. 2.

PASSAGE. A way over water; a voyage made over the sea or great river; as, the Sea Gull had a quick passage: the money paid for the transportation of a person over the sea; as, my passage to Europe was one hundred and fifty dollars.

PASSAGE MONEY, contracts. The sum claimable for the conveyance of a person with or without luggage on the water.

2. The difference between *freight* and *passage money* is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. The same rules which govern the claim for freight affect that for passage money. 3 Chit. Com. Law, 424; 1 Pet. Adm. Dec. 126; 3 John. 335.

PASSIVE, com. law. All the sums of which one is a debtor. It is used in contradistinction to active. (q. v.) By active debts are understood those which may be employed in furnishing assets to a merchant to pay those which he owes, which are called passive debts.

PASSPORT, SEA BRIEF, or SEA LETTER, maritime law. A paper containing a permission from the neutral state to the captain or master of a ship or vessel to proceed on the voyage proposed; it usually contains his name and residence; the name, property, description, tonnage and destination of the ship; the nature and quantity of the cargo; the place from whence it comes, and its destination; with such other matters as the practice of the place requires.

2. This document is indispensably necessary in time of war for the safety of every neutral vessel. Marsh. Ins. B. 1, c. 9, s. 6, p. 406, b.

3. In most countries of continental Europe passports are given to travellers; these are intended to protect them on their journey from all molestation, while they are obedient to the laws. Passports are also granted by the secretary of state to persons travelling abroad, certifying that they are citizens of the United States. 9 Pet. 692. Vide 1 Kent, Com. 162, 182; Merl. Répert. h. t.

PASSENGER, cont. One who has taken a place in a public conveyance, for the purpose of being transported from one place to another.

2. By act of Feb. 22, 1847, Minot's Statutes at Large of United States, p. 127,

it is provided as follows : That if the master of any vessel owned in whole or in part by a citizen of the United States of America, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use, and unoccupied by stores, or other goods, not being the personal luggage of such passengers, that is to say, on the lower deck or platform one passenger for every fourteen clear superficial feet of deck, if such vessel is not to pass within the tropics during such voyage ; but if such vessel is to pass within the tropics during such voyage, then one passenger for every twenty such clear superficial feet of deck, and on the orlop deck (if any) one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers to the United States of America, and shall leave such port or place with the same or any other number thereof, within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any circuit or district court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year : *Provided*, That this act shall not be construed to permit any ship or vessel to carry more than two passengers to five tons of such ship or vessel.

3.—§ 2. That if the passengers so taken on board of such vessel, and brought into or transported from the United States aforesaid, shall exceed the number limited by the last section to the number of twenty in the whole, such vessel shall be forfeited to the United States aforesaid, and be prosecuted and distributed as forfeitures are under the act to regulate duties on imports and tonnage.

4.—§ 3. That if any such vessel as aforesaid shall have more than two tiers of berths, or in case, in such vessel, the interval between the floor and the deck or platform beneath shall not be at least six inches,

and the berths well constructed, or in case the dimensions of such berths shall not be at least six feet in length, and at least eighteen inches in width, for each passenger as aforesaid, then the master of said vessel, and the owners thereof, severally, shall forfeit and pay the sum of five dollars for each and every passenger on board of said vessel on such voyage, to be recovered by the United States aforesaid, in any circuit or district court of the United States where such vessel may arrive, or from which she sails.

5.—§ 4. That, for the purposes of this act, it shall in all cases be computed that two children, each being under the age of eight years, shall be equal to one passenger, and that children under the age of one year shall not be included in the computation of the number of passengers.

6.—§ 5. That the amount of the several penalties imposed by this act shall be liens on the vessel or vessels violating its provisions ; and such vessel may be libelled and sold therefor in the district court of the United States aforesaid in which such vessel shall arrive.

9. By act of March 2, 1847, Minot's Statutes at Large of United States, p. 149, it is enacted, That so much of said act as authorizes shippers to estimate two children of eight years of age and under as one passenger, in the assignment of room, is hereby repealed.

10. The act of May 17, 1848, Minot's Statute at Large of United States, p. 220, further provides, That all vessels, whether of the United States or any other country, having sufficient capacity according to law for fifty or more passengers, (other than cabin passengers,) shall, when employed in transporting such passengers between the United States and Europe, have on the upper deck, for the use of such passengers, a house over the passage-way leading to the apartment allotted to such passengers below deck, firmly secured to the deck, or combings of the hatch, with two doors, the sills of which shall be at least one foot above the deck, so constructed that one door or window in such house may, at all times, be left open for ventilation ; and all vessels so employed, and having the capacity to carry one hundred and fifty such passengers, or more, shall have two such houses ; and the stairs or ladder leading down to the aforesaid apartment shall be furnished with a hand-rail of wood or strong rope : *Provided*,

nevertheless, Booby hatches may be substituted for such houses in vessels having three permanent decks.

11.—§ 2. That every such vessel so employed, and having the legal capacity for more than one hundred such passengers, shall have at least two ventilators to purify the apartment or apartments occupied by such passengers; one of which shall be inserted in the after part of the apartment or apartments, and the other shall be placed in the forward portion of the apartment or apartments, and one of them shall have an exhausting cap to carry off the foul air, and the other a receiving cap to carry down the fresh air; which said ventilators shall have a capacity proportioned to the size of the apartment or apartments to be purified; namely, if the apartment or apartments will lawfully authorize the reception of two hundred such passengers, the capacity of such ventilators shall each of them be equal to a tube of twelve inches diameter in the clear, and in proportion for larger or smaller apartments; and all said ventilators shall rise at least four feet six inches above the upper deck of any such vessel, and be of the most approved form and construction: *Provided*, That if it shall appear from the report to be made and approved, as provided in the seventh section of this act, that such vessel is equally well ventilated by any other means, such other means of ventilation shall be deemed, and held to be, a compliance with the provisions of this section.

12.—§ 3. That every vessel carrying more than fifty such passengers shall have for their use on deck, housed and conveniently arranged, at least one camboose or cooking range, the dimensions of which shall be equal to four feet long and one foot six inches wide for every two hundred passengers; and provisions shall be made in the manner aforesaid in this ratio for a greater or less number of passengers: *Provided*, *however*, And nothing herein contained shall take away the right to make such arrangements for cooking between decks, if that shall be deemed desirable.

13.—§ 4. That all vessels employed as aforesaid shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least fifteen pounds of good navy bread, ten pounds of rice, ten pounds of oatmeal, ten pounds of wheat flour, ten pounds of peas and beans, thirty-five pounds of potatoes,

one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork, free of bone, all to be of good quality, and a sufficient supply of fuel for cooking; but at places where either rice, oatmeal, wheat flour, or peas and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the other last-named articles may be increased and substituted therefor; and in case potatoes cannot be procured on reasonable terms, one pound of either of said articles may be substituted in lieu of five pounds of potatoes; and the captains of such vessels shall deliver to each passenger at least one-tenth part of the aforesaid provisions weekly, commencing on the day of sailing, and daily at least three quarts of water, and sufficient fuel for cooking; and if the passengers on board of any such vessel in which the provisions, fuel and water herein required shall not have been provided as aforesaid, shall at any time be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each and every passenger who shall have been put on short allowance the sum of three dollars for each and every day they may have been on such short allowance, to be recovered in the circuit or district court of the United States: *Provided*, *nevertheless*, And nothing herein contained shall prevent any passenger, with the consent of the captain, from furnishing for himself the articles of food herein specified; and, if put on board in good order, it shall fully satisfy the provisions of this act so far as regards food: *And provided further*, That any passenger may also, with the consent of the captain, furnish for himself an equivalent for the articles of food required in other and different articles; and if, without waste or neglect on the part of the passenger, or inevitable accident, they prove insufficient, and the captain shall furnish comfortable food to such passengers during the residue of the voyage, this, in regard to food, shall also be a compliance with the terms of this act.

14.—§ 5. That the captain of any such vessel so employed is hereby authorized to maintain good discipline, and such habits of cleanliness among such passengers, as will tend to the preservation and promotion of health; and to that end, he shall cause such regulations as he may adopt for this purpose to be posted up, before sailing, on board such vessel, in a place accessible to such passengers, and shall keep the same so

posted up during the voyage; and it is hereby made the duty of said captain to cause the apartment occupied by such passengers to be kept, at all times, in a clean, healthy state, and the owners of every such vessel so employed are required to construct the decks, and all parts of said apartment, so that it can be thoroughly cleansed; and they shall also provide a safe, convenient privy or water closet for the exclusive use of every one hundred such passengers. And when the weather is such that said passengers cannot be mustered on deck with their bedding, it shall be the duty of the captain of every such vessel to cause the deck occupied by such passengers to be cleaned [cleansed] with chloride of lime, or some other equally efficient disinfecting agent, and also at such other times as said captain may deem necessary.

15.—§ 6. That the master and owner or owners of any such vessel so employed, which shall not be provided with the house or houses over the passage-ways, as prescribed in the first section of this act; or with ventilators, as prescribed in the second section of this act; or with the cambooses or cooking ranges, with the houses over them, as prescribed in the third section of this act; shall severally forfeit and pay to the United States the sum of two hundred dollars for each and every violation of, or neglect to conform to, the provisions of each of said sections; and fifty dollars for each and every neglect or violation of any of the provisions of the fifth section of this act; to be recovered by suit in any circuit or district court of the United States, within the jurisdiction of which the said vessel may arrive, or from which it may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or owners, or captain of such vessel, may be found.

16.—§ 7. That the collector of the customs, at any port in the United States at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart, shall appoint and direct one of the inspectors of the customs for such port to examine such vessel, and report in writing to such collector whether the provisions of the first, second, third and fifth sections of this act have been complied with in respect to such vessel; and if such report shall state such compliance, and be approved by such collector, it shall be deemed and held as conclusive evidence thereof.

17.—§ 8. That the first section of the act entitled "An act to regulate the carrying of passengers in merchant vessels," approved February twenty-second, eighteen hundred and forty-seven, be so amended that, when the height or distance between the decks of the vessels referred to in the said section shall be less than six feet, and not less than five feet, there shall be allowed to each passenger sixteen clear superficial feet on the deck, instead of fourteen, as prescribed in said section; and if the height or distance between the decks shall be less than five feet, there shall be allowed to each passenger twenty-two clear superficial feet on the deck; and if the master of any such vessel shall take on board his vessel, in any port of the United States, a greater number of passengers than is allowed by this section, with the intent specified in said first section of the act of eighteen hundred and forty-seven, or if the master of any such vessel shall take on board at a foreign port, and bring within the jurisdiction of the United States, a greater number of passengers than is allowed by this section, said master shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished in the manner provided for the punishment of persons convicted of a violation of the act aforesaid; and in computing the number of passengers on board such vessels, all children under the age of one year, at the time of embarkation, shall be excluded from such computation.

18.—§ 9. That this act shall take effect, in respect to such vessels sailing from ports in the United States, in thirty days from the time of its approval; and in respect to every such vessel sailing from ports in Europe, in sixty days after such approval; and it is hereby made the duty of the secretary of state to give notice, in the ports of Europe, of this act, in such manner as he may deem proper.

19.—§ 10. That so much of the first section of the act entitled "An act regulating passenger ships and vessels," approved March second, eighteen hundred and nineteen, or any other act that limits the number of passengers to two for every five tons, is hereby repealed.

20. By act of March 3, 1849, Minot's Statutes at Large of United States, p. 399, it is enacted, That all vessels bound from any port in the United States to any port or place in the Pacific Ocean, or on its tributaries, or from any such port or place to any

port in the United States on the Atlantic, or its tributaries, shall be subject to the provisions of all the laws now in force relating to the carriage of passengers in merchant vessels, sailing to and from foreign countries, and the regulation thereof; except the fourth section of the "Act to provide for the ventilation of passenger vessels, and for other purposes," approved May seventeenth, eighteen hundred and forty-eight, relating to provisions, water, and fuel; but the owners and masters of all such vessels shall in all cases furnish to each passenger the daily supply of water therein mentioned, and they shall furnish for themselves, a sufficient supply of good and wholesome food; and in case they shall fail so to do, or shall provide unwholesome or unsuitable provisions, they shall be subject to the penalty provided in said fourth section in case the passengers are put on short allowance of water or provisions.

21.—§ 2. That the act entitled "An act to regulate the carriage of passengers in merchant vessels," approved February twenty-second, eighteen hundred and forty-seven, shall be so amended as that a vessel passing into or through the *tropics* shall be allowed to carry the same number of passengers as vessels that do not enter the tropics.

22. By act of January 31, 1848, *Minot's Statutes at Large of United States*, p. 210, it is enacted, That, from and after the passage of this act, all and every vessel and vessels which shall or may be employed by the American Colonization Society, or by the Maryland State Colonization Society, to transport, and which shall actually transport, from any port or ports in the United States to any colony or colonies on the west coast of Africa, colored emigrants to reside there, shall be, and the same are hereby, excepted out of and exempted from the operation of the act entitled "An act to regulate the carriage of passengers in merchant vessels," passed twenty-second February, eighteen hundred and forty-seven; and of the act entitled "An act to amend an act entitled 'An act to regulate the carriage of passengers in merchant vessels, and to determine the time when said act shall take effect,'" passed second March, eighteen hundred and forty-seven.

23. No deduction is to be made, in estimating the number of passengers in a vessel, for children or persons not paying. *Gilp. R. 334*. For his rights and duties, vide *Common Carriers*.

PASTURES, *pasturas*. The land on which beasts are fed; and by a grant of pastures the land itself passes. 1 *Thom. Co. Litt.* 202.

PATENT, *construction*. That which is open or manifest.

2. This word is usually applied to ambiguities which are said to be latent or patent.

3. A patent ambiguity is one which is produced by the uncertainty, contradictoriness or deficiency of the language of an instrument, so that no discovery of facts or proof of declaration can restore the doubtful or smothered sense, without adding ideas which the actual words will not of themselves sustain. *Bac. Max. 99*; *T. Raym. R. 411*; *Roberts on Fr. 15*.

4. A latent ambiguity may be explained by parol evidence, but the rule is different with regard to a patent ambiguity, which cannot be explained by parol proof. The following instance has been proposed by the court as a patent ambiguity: "If A B, by deed, give goods to one of the sons of J S, who has several sons, he shall not aver which was intended; for by judgment of law upon this deed, the gift is void for uncertainty, which cannot be supplied by averment." 8 *Co. 155 a*. And no difference exists between a deed and a will upon this subject. 2 *Atk. 239*.

5. This rule, which allows an explanation of latent ambiguities, and which forbids the use of parol evidence to explain a patent ambiguity, is difficult of application. It is attended, in some instances, with very minute nicety of discrimination, and becomes a little unsteady in its application. When a bequest is made "to Jones, son of Jones," or "to Mrs. B," it is not easy to show that the ambiguity which this imperfect designation creates, is not ambiguity arising upon the face of the will, and as such, an ambiguity *patent*, yet parol evidence is admitted to ascertain the persons intended by those ambiguous terms.

6. The principle upon which parol testimony is admitted in these cases, is probably, in the first of them, a presumption of possible ignorance in the testator of the christian name of the legatee; and in the second, a similar presumption of his being in the habit of calling the person by the name of Mrs. B. Presumptions, which being raised upon the face of the will, may be confirmed and explained by extrinsic evidence. *Rob. on Fr. 15, 27*; 2 *Vern.*

624, 5; 1 Vern. by Raithby, 31, note 2; 1 Rep. Leg. 147; 3 Stark. Ev. 1000; 3 Bro. C. C. 311; 2 Atk. 239; 3 Atk. 257; 3 Ves. Jr. 547. Vide articles *Ambiguity*; *Latent*.

PATENT, contracts. A patent for an invention is a grant made by the government of the United States to the inventor of any new or useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer; securing to him for a limited time, therein expressed, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery, on certain conditions, among which is the one of at once giving up his secret and making public his discovery or invention, and the manner of making and using the same, so that at the expiration of his privilege, it may become public property. The instrument securing this grant is also called a patent. The subject will be considered by taking a succinct view of, 1. The legislation of the United States on the subject. 2. The patentee. 3. The subject to be patented. 4. The caveat and preliminary proceedings. 5. The proceedings to obtain a patent. 6. The patent. 7. The duty or tax on patents. 8. Courts having jurisdiction in patent cases. 9. Actions for violations of patents.

§ 1. *Legislation of the United States.*

2. The constitution of the United States authorizes congress to pass laws "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right of their respective writings and discoveries." Art. 1, s. 8, n. 8. By virtue of this authority congress can grant patents to inventors, and it rests in the sound discretion of the legislature to say when, and for what length of time, and under what circumstances the patent for an invention shall be granted. Congress may, therefore, grant a patent which shall operate retrospectively by securing to the inventor the use of his invention, though it was in public use and enjoyed by the community at the time this act was passed. 3 Sumn. 535; 2 Story, R. 164. The first act passed under this power

is that which established the patent office on the 10th of April, 1790, 1 Story, L. U. S. 80. There were several supplements and modifications to this first law, namely, the acts passed February 7, 1793, Idem, 300; June 7, 1794, Idem, 363; April 17, 1800, Idem, 753; July 3, 1832, 4 Sharsw. cont. of Story, L. U. S. 2300; July 13, 1832, Idem, 2313.

3. These acts were repealed by the act of July 4, 1836, 4 Sharsw. cont. Story, L. U. S. 2504, which enacts:

§ 21. That all acts and parts of acts heretofore passed on this subject, be, and the same are hereby repealed: Provided, however, That all actions and processes in law or equity sued out prior to the passage of this act, may be prosecuted to final judgment and execution, in the same manner as though this act had not been passed, excepting and saving the application to any such action, of the provisions of the fourteenth and fifteenth sections of this act, so far as they may be applicable thereto. And provided, also, That all applications and petitions for patents, pending at the time of the passage of this act, in cases where the duty has been paid, shall be proceeded with and acted on in the same manner as though filed after the passage thereof.

4. The existing laws on the subject of patents are the act of July 4, 1836, already mentioned; the acts of March 3, 1837; Idem, 2546; March 3, 1839; 9 Laws U. S. 1019; August 29, 1842; ch. 263, Pamph. Laws, 171; May 27, 1848. Minot's Stat. at Large, U. S. 231.

§ 2. *Of the patentee.*

5. Any person or persons having discovered or invented the thing to be patented, whether he be a citizen of the United States or an alien, is entitled to a patent on fulfilling the requirements of the law. Act of July 4, 1836, s. 6.

6. By the 10th section of the same act it is provided, That where any person hath made, or shall have made, any new invention, discovery or improvement, on account of which a patent might by virtue of this act be granted, and such person shall die before any patent shall be granted therefor, the right of applying for and obtaining such patent shall devolve on the executor or administrator of such person, in trust for the heirs at law of the deceased, in case he shall have died intestate; but if otherwise, then in trust for his devisees, in as full and ample manner, and under the same conditions,

limitations, and restrictions, as the same was held, or might have been claimed or enjoyed by such in his or her lifetime; and when application for a patent shall be made by such legal representatives, the oath or affirmation provided in the sixth section of this act, shall be so varied as to be applicable to them.

7. And by the act of March 3, 1837, section 6, it is enacted, That any patent hereafter to be issued, may be made and issued to the assignee or assignees of the inventor or discoverer, the assignment thereof being first entered of record, and the application therefor being duly made, and the specifications duly sworn to by the inventor. And in all cases hereafter, the applicant for a patent shall be held to furnish duplicate drawings, whenever the case admits of drawings, one of which to be deposited in the office, and the other to be annexed to the patent, and considered a part of the specification.

§ 3. *The subject to be patented*

8. Patents are granted, 1. For inventions and discoveries. 2. For importations. 1. *Patents for inventions and discoveries.*

By the act of July 4, 1836, sect. 6, it is enacted, that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the commissioner of patents, expressing such desire, and the commissioner on due proceedings had, may grant a patent therefor.

9. The thing to be patented must be an *invention or discovery*; it must be *new and useful*.

10.—1. The invention or discovery must be something which the inventor has himself found out; some peculiar device or manner of producing any given effect. A patent cannot, therefore, be taken out for the elementary principles of motion, which philosophy and science have discovered, but only for the manner of applying them. 1 Gallis. 478; 2 Gallis. 51.

11. A patent may be taken out for an improvement on a machine which is known

and used; 3 Wheat. 454; but a mere change of former proportions, will not entitle a party to a patent. 1 Gallis. 438; 2 Gallis. 51.

12. It is provided by the act of July 4, 1836, s. 13, that whenever the original patentee shall be desirous of adding the description and specification of any new improvement of the original invention or discovery which shall have been invented or discovered by him subsequent to the date of his patent, he may, like proceedings being had in all respects as in the case of original applications, and on the payment of fifteen dollars, as hereinbefore provided, have the same annexed to the original description and specification; and the commissioner shall certify, on the margin of such annexed description and specification, the time of its being annexed and recorded; and the same shall thereafter have the same effect in law, to all intents and purposes as though it had been embraced in the original description and specification.

13. And by the act of March 3, 1837, s. 8, that, whenever application shall be made to the commissioner for any addition of a newly discovered improvement to be made on an existing patent, or whenever a patent shall be returned for correction and re-issue, the specification of claim annexed to every such patent shall be subject to revision and restriction, in the same manner as are original applications for patents; the commissioner shall not add any such improvement to the patent in the one case, nor grant the re-issue in the other case, until the applicant shall have entered a disclaimer, or altered his specification of claim in accordance with the decision of the commissioner; and in all such cases the applicant, if dissatisfied with such decision, shall have the same remedy and be entitled to the benefit of the same privileges and proceedings as are provided by law in the case of original applications for patents.

14.—2. The thing patented must be a *new and useful* invention, discovery or improvement.

15. Among inventors, he who is first in time, has a prior right to the patent for the invention. Pet. C. C. R. 394.

16. But by the act of March 3, 1839, sect. 7, it is provided, that every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be

held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use, prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent.

17. By the term useful invention is meant an invention which may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to morals, to the health, or good order of society. 1 Mason, C. C. R. 302; 4 Wash. C. C. R. 9. The term is also opposed to that which is frivolous or mischievous. 1 Mason, C. C. R. 182; Renouard, 177; Perpigna, Man. des Inv. c. 2, s. 1, page 50. See 3 Car. & P. 502; 1 Pet. C. C. R. 480; 1 U. S. Law Journ. 563; 1 Paine, 203; 2 Kent, Com. 368, n.; Phill. on Pat. c. 7, s. 14.

18. The act of August 29, 1842, sect. 3, provides that any citizen or citizens, or alien or aliens, having resided one year in the United States, and taken the oath of his or their intention to become a citizen or citizens, who by his, her, or their own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture, whether of metal, or other material or materials, or any new and original design for the printing of woolen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or bas relief or composition in alto or basso relievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire or obtain an exclusive property or right therein to make, use, and sell and vend the same, or copies of the same, to others, by them, made, used,

and sold, may make application in writing to the commissioner of patents, expressing such desire, and the commissioner, on due proceedings had, may grant a patent therefor, as in the case now of application for a patent: Provided, That the fee in such cases which by the now existing laws would be required of the particular applicant shall be one-half the sum, and that the duration of said patent shall be seven years, and that all the regulations and provisions which now apply to the obtaining or protection of patents not inconsistent with the provisions of this act, shall apply to applications under this section.

2. *Patents for importations.*

19. It is enacted by the act of March 3, 1839, s. 6, that no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and thirty-six, to which this is additional, by reason of the same having been patented in a foreign country, more than six months prior to his application: Provided, That the same shall not have been introduced into public and common use, in the United States, prior to the application for such patent: And provided, also, That in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters-patent.

20. And by the act of July 4, 1836, s. 8, it is provided, that nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having previously taken out letters-patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specification and drawing.

§ 4. *Of the caveat and other preliminary proceedings.*

21. The act of July 4, 1836, s. 12, provides that any citizen of the United States, or alien who shall have been resident in the United States one year next preceding, and shall have made oath of his intention to become a citizen thereof, who shall have invented any new art, machine, or improvement thereof, and shall desire further time to mature the same, may, on paying to the credit of the treasury, in manner as provided in the ninth section of this act, the sum of twenty dollars, file in the patent office a caveat, setting forth the design and purpose

thereof, and its principal and distinguishing characteristics, and praying protection of his right, till he shall have matured his invention; which sum of twenty dollars, in case the person filing such caveat shall afterwards take out a patent for the invention therein mentioned, shall be considered a part of the sum herein required for the same. And such caveat shall be filed in the confidential archives of the office, and preserved in secrecy. And if application shall be made by any other person within one year from the time of filing such caveat, for a patent of any invention with which it may in any respect interfere, it shall be the duty of the commissioner to deposit the description, specifications, drawings, and model, in the confidential archives of the office, and to give notice, by mail, to the person filing the caveat, of such application, who shall, within three months after receiving the notice, if he would avail himself of the benefit of his caveat, file his description, specifications, drawings, and model; and if, in the opinion of the commissioner, the specifications of claim interfere with each other, like proceedings may be had in all respects as are in this act provided in the case of interfering applications: Provided, however, That no opinion or decision of any board of examiners, under the provisions of this act, shall preclude any person interested in favor of or against the validity of any patent which has been or may hereafter be granted, from the right to contest the same in any judicial court in any action in which its validity may come in question.

22. And the same act, s. 8, directs, that whenever the applicant shall request it, the patent shall take date from the time of the filing of the specification and drawings, not however, exceeding six months prior to the actual issuing of the patent; and on like request, and the payment of the duty herein required, by any applicant, his specification and drawings shall be filed in the secret archives of the office, until he shall furnish the model and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications.

§ 5. *Of the proceedings to obtain a patent.*

23. This section will be divided by considering the proceedings when there is no opposition, and when there are conflicting claims.

1. *Proceedings without opposition.*

24. The sixth section of the act of July

4, 1836, directs, that before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery. He shall, furthermore, accompany the whole with a drawing, or drawings, and written references, where the nature of the case admits of drawings, or with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter; which descriptions and drawings, signed by the inventor and attested by two witnesses, shall be filed in the patent office; and he shall, moreover, furnish a model of his invention, in all cases which admit of a representation by model, of a convenient size to exhibit advantageously its several parts. The applicant shall also make oath or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement, for which he solicits a patent, and that he does not know or believe that the same was ever known or used; and also of what country he is a citizen; which oath or affirmation may be made before any person authorized by law to administer oaths.

25. The fourth section of the act of August 29, 1842, provides that the oath required for applicants for patents, may be taken, when the applicant is not, for the time being, residing in the United States, before any minister plenipotentiary, chargé d'affaires, consul, or commercial agent, holding a commission under the government of the United States, or before any notary public of the country in which such applicant may be.

26. And the act of March 3, 1837, sect.

13, provides that in all cases in which an oath is required by this act, or by the act to which this is additional, if the person of whom it is required shall be conscientiously scrupulous of taking an oath, affirmation may be substituted therefor.

27. The seventh section of the act of July 4, 1836, further enacts, that on the filing of any such application, description, and specification, and the payment of the duty hereinafter provided, the commissioner shall make or cause to be made, an examination of the alleged new invention or discovery; and if, on any such examination, it shall not appear to the commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application, if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor. But whenever on such examination it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented or discovered, or patented, or described in any printed publication in this or any foreign country, as aforesaid, or that the description is defective and insufficient, he shall notify the applicant thereof, giving him, briefly, such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification to embrace only that part of the invention or discovery which is new. In every such case, if the applicant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back twenty dollars part of the duty required by this act, on filing a notice in writing of such election in the patent office, a copy of which, certified by the commissioner, shall be a sufficient warrant to the treasurer for paying back to said applicant the said sum of twenty dollars. But if the said applicant in such case shall persist in his claim for a patent, with or without any alteration of his specification, he shall be required to make oath or affirmation anew in manner as aforesaid. And if the specification and claim shall not have been so

modified as in the opinion of the commissioner, shall entitle the applicant to a patent, he may, on appeal, and upon request in writing, have the decision of a board of examiners, to be composed of three disinterested persons, who shall be appointed for that purpose by the secretary of state, one of whom at least, to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertains; who shall be under oath or affirmation for the faithful and impartial performance of the duty imposed upon them by said appointment. Said board shall be furnished with a certificate in writing, of the opinion and decision of the commissioner, stating the particular grounds of his objection, and the part or parts of the invention which he considers as not entitled to be patented. And the same board shall give reasonable notice to the applicant, as well as to the commissioner, of the time and place of their meeting, that they may have an opportunity of furnishing them with such facts and evidence as they may deem necessary to a just decision; and it shall be the duty of the commissioner to furnish to the board of examiners such information as he may possess relative to the matter under their consideration. And on an examination and consideration of the matter by such board, it shall be in their power, or of a majority of them, to reverse the decision of the commissioner, either in whole or in part; and their opinion being certified to the commissioner, he shall be governed thereby, in the further proceedings to be had on such application: Provided, however, That before a board shall be instituted in any such case, the applicant shall pay to the credit of the treasury, as provided in the ninth section of this act, (see 47,) the sum of twenty-five dollars, and each of said persons so appointed shall be entitled to receive for his services in each case, a sum not exceeding ten dollars, to be determined and paid by the commissioner out of any moneys in his hands, which shall be in full compensation to the persons who may be so appointed, for their examination and certificate as aforesaid.

28. By the twelfth section of the act of March 3, 1839, the commissioner of patents is vested with power to make all such regulations in respect to the taking of evidence to be used in contested cases before him, as may be just and reasonable

And so much of the act of July 4, 1836, as provides for a board of examiners, is thereby repealed.

29. And by the same act, sect. 11, it is provided, that in all cases where an appeal is now allowed by law from the decision of the commissioner of patents to a board of examiners provided for in the seventh section of the act to which this is additional, the party, instead thereof, shall have a right to appeal to the chief justice of the district court of the United States for the district of Columbia, by giving notice thereof to the commissioner, and filing in the patent office, within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing, and also paying into the patent office, to the credit of the patent fund, the sum of twenty-five dollars. And it shall be the duty of said chief justice, on petition, to hear and determine all such appeals, and to revise such decisions in a summary manner, on the evidence produced before the commissioner, at such early and convenient time as he may appoint, first notifying the commissioner of the time and place of hearing, whose duty it shall be to give notice thereof to all parties who appear to be interested therein, in such manner as said judge shall prescribe. The commissioner shall also lay before the said judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined. And at the request of any party interested, or at the desire of the judge, the commissioner and the examiners in the patent office, may be examined under oath, in explanation of the principles of the machine, or other thing for which a patent, in such case, is prayed for. And it shall be the duty of said judge after a hearing of any such case, to return all the papers to the commissioner, with a certificate of his proceedings and decision, which shall be entered of record in the patent office; and such decision, so certified, shall govern the further proceedings of the commissioner in such case: Provided, however, That no opinion or decision of the judge in any such case, shall preclude any person interested in favor or against the validity of any patent, which has been or may hereafter be granted, from the right to contest the same in any judicial court, in any action in which its validity may come in question.

2. *When there are conflicting claims.*

30. It is enacted by the 8th section of the act of July 4, 1836, that whenever an application shall be made for a patent, which, in the opinion of the commissioner, would interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and if either shall be dissatisfied with the decision of the commissioner on the question of priority, right or invention, on a hearing thereof, he may appeal from such decision, on the like terms and conditions as are provided in the preceding section of this act; and like proceedings shall be had, to determine which, or whether either of the applicants is entitled to receive a patent as prayed for.

31. And by the 16th section of the same act, that whenever there shall be two interfering patents, or whenever a patent on application shall have been refused on an adverse decision of a board of examiners, on the ground that the patent applied for would interfere with an unexpired patent previously granted, any person interested in any such patent, either by assignment or otherwise, in the one case, and any such applicant in the other, may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge and declare either the patents void in whole or in part, or inoperative and invalid in any particular part or portion of the United States, according to the interest which the parties to such suit may possess in the patent or the inventions patented; and may also adjudge that such applicant is entitled, according to the principles and provisions of this act, to have and receive a patent for his invention, as specified in his claim, or for any part thereof, as the fact of priority of right or invention shall in any such case be made to appear. And such adjudication, if it be in favor of the right of such applicant, shall authorize the commissioner to issue such patent, on his filing a copy of the adjudication, and otherwise complying with the requisitions of this act. Provided, however, that no such judgment or adjudication shall affect the rights of any persons except the parties to the action and those deriving title from or under them subsequent to the rendition of such judg-

ment. And the commissioner is vested by the 12th section of the act of March 3, 1839, with powers to make such rules and regulations in respect to the taking of evidence to be used in contested cases before him, as may be just and reasonable.

32. The act of March 3, 1839, section 10, provides, that the provisions of the sixteenth section of the before recited act shall extend to all cases where the patents are refused for any reason whatever, either by the commissioner of patents or by the chief justice of the district of Columbia, upon appeals from the decision of said commissioner, as well as where the same shall have been refused on account of, or by reason of interference with a previously existing patent; and in all cases where there is no opposing party, a copy of the bill shall be served upon the commissioner of patents, when the whole of the expenses of the proceeding shall be paid by the applicant, whether the final decision shall be in his favor or otherwise.

§ 6. *Of the patent.*

33. This section will be divided by considering, 1. The form of the patent. 2. The correction of the patent. 3. The special provisions of the acts of congress occasioned by the burning of the patent office. 4. The disclaimer. 5. The assignment of patents. 6. The extension of the patent. 7. The requisites to be observed after the granting of a patent to secure it.

1. *Form of the patent.*

34. The patent is to be issued in the form prescribed by the act of congress. The fifth section of the act of July 4, 1836, directs, that all patents issuing from said office shall be issued in the name of the United States, and under the seal of said office, and be signed by the secretary of state, and countersigned by the commissioner of the said office, and shall be recorded, together with the descriptions, specifications and drawings, in the said office, in books to be kept for that purpose. Every such patent shall contain a short description or title of the invention or discovery, correctly indicating its nature and design, and in its terms grant to the applicant or applicants, his or their heirs, administrators, executors or assigns, for a term not exceeding fourteen years, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery, referring to the specifications for the particulars thereof, a

copy of which shall be annexed to the patent, specifying what the patentee claims as his invention or discovery. It is usually dated at the time of issuing it, but by a provision of the last mentioned act, section 8, whenever the applicant shall request it, the patent shall take date from the time of filing the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent.

2. *Correction of patent.*

35. It is provided by the thirteenth section of the act of July 4, 1836, that whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention, more than he had or shall have a right to claim as new; if the error has, or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. And in the event of his death, or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assignees. And the patent, so reissued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all actions, hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form, before the issuing out of the original patent. And whenever the original patentee shall be desirous of adding the description and specification of any new improvement of the original invention or discovery which shall have been invented or discovered by him subsequent to the date of his patent, he may, like proceedings being had in all respects as in the case of original applications, and on the payment of fifteen dollars, as hereinbefore provided, have the same annexed to the original description and specification; and the commissioner shall certify, on the margin of such annexed description and specification,

the time of its being annexed and recorded; and the same shall thereafter have the same effect in law, to all intents and purposes, as though it had been embraced in the original description and specification.

36. And it is enacted by the act of March 3, 1837, section 5, that, whenever a patent shall be returned for correction and reissue under the thirteenth section of the act to which this is additional, and the patentee shall desire several patents to be issued for distinct and separate parts of the thing patented, he shall first pay, in manner and in addition to the sum provided by that act, the sum of thirty dollars for each additional patent so to be issued; Provided, however, that no patent made prior to the aforesaid fifteenth day of December, 1836, shall be corrected and reissued until a duplicate of the model and drawing of the thing as originally invented, verified by oath as shall be required by the commissioner, shall be deposited in the patent office:—Nor shall any addition of an improvement be made to any patent heretofore granted, nor any new patent to be issued for an improvement made in any machine, manufacture, or process, to the original inventor, assignee or possessor, of a patent therefor, nor any disclaimer be admitted to record, until a duplicate model and drawing of the thing originally intended, verified as aforesaid, shall have been deposited in the patent office, if the commissioner shall require the same; nor shall any patent be granted for an invention, improvement, or discovery, the model or drawing of which shall have been lost, until another model and drawing, if required by the commissioner, shall, in like manner, be deposited in the patent office:

37. And in all such cases, as well as in those which may arise under the third section of this act, the question of compensation for such models and drawings, shall be subject to the judgment and decision of the commissioners provided for in the fourth section, under the same limitations and restrictions as are therein prescribed.

3. *Special provisions occasioned by the burning of the patent office.*

38. The act of March 3, 1837, was passed to remedy the inconveniences arising from the burning of the patent office. It is enacted,

39.—Sect. 1. That any person who may be in possession of, or in any way interested in, any patent for an invention, discovery, or improvement, issued prior to the fifteenth

day of December, in the year of our Lord one thousand eight hundred and thirty-six, or in an assignment of any patent, or interest therein, executed, and recorded prior to the said fifteenth day of December, may, without charge, on presentation or transmission thereof to the commissioner of patents, have the same recorded anew in the patent office, together with the descriptions, specifications of claim and drawings annexed or belonging to the same; and it shall be the duty of the commissioner to cause the same, or any authenticated copy of the original record, specification, or drawing which he may obtain, to be transcribed and copied into books of record to be kept for that purpose; and wherever a drawing was not originally annexed to the patent and referred to in the specification and drawing produced as a delineation of the invention, being verified by oath in such manner as the commissioner shall require, may be transmitted and placed on file or copied as aforesaid, together with the certificate of the oath; or such drawings may be made in the office, under the direction of the commissioner, in conformity with the specification. And it shall be the duty of the commissioner to take such measures as may be advised and determined by the board of commissioners provided for by the fourth section of this act, to obtain the patents, specifications, and copies aforesaid, for the purpose of being so transcribed and recorded. And it shall be the duty of each of the several clerks of the judicial courts of the United States, to transmit, as soon as may be, to the commissioner of the patent office, a statement of all the authenticated copies of patents, descriptions, specifications, and drawings of inventions and discoveries made and executed prior to the aforesaid fifteenth day of December, which may be found on the files of his office; and also to make out and transmit to said commissioner for record as aforesaid, a certified copy of every such patent, description, specification, or drawing, which shall be specially required by such commissioner.

40.—Sect. 2. That copies of such record and drawings, certified by the commissioner, or, in his absence, by the chief clerk, shall be prima facie evidence of the particulars of the invention and of the patent granted therefor, in any judicial court of the United States, in all cases where copies of the original record or specification and drawings would be evidence, without proof of the loss of such originals; and no patent issued

prior to the aforesaid fifteenth day of December, shall, after the first day of June next, be received in evidence in any of the said courts in behalf of the patentee or other person who shall be in possession of the same, unless it shall have been so recorded anew, and a drawing of the invention, if separate from the patent, verified as aforesaid, deposited in the patent office; nor shall any written assignment of any such patent, executed and recorded prior to the said fifteenth day of December, be received in evidence in any of the said courts in behalf of the assignee or other person in possession thereof, until it shall have been so recorded anew.

41.—Sect. 3. That whenever it shall appear to the commissioner that any patent was destroyed by the burning of the patent office building on the aforesaid fifteenth day of December, or was otherwise lost prior thereto, it shall be his duty, on application therefor by the patentee or other person interested therein, to issue a new patent for the same invention or discovery bearing the date of the original patent, with his certificate thereon that it was made and issued pursuant to the provisions of the third section of this act, and shall enter the same of record: Provided, however, That before such patent shall be issued, the applicant therefor shall deposit in the patent office a duplicate, as near as may be, of the original model, drawings, and description, with specification of the invention or discovery, verified by oath, as shall be required by the commissioner; and such patent and copies of such drawings and descriptions, duly certified, shall be admissible as evidence in any judicial court of the United States, and shall protect the rights of the patentee, his administrators, heirs and assigns, to the extent only in which they would have been protected by the original patent and specification.

42. The act of August 29, 1842, sect. 2, extends the provisions of the last section to patents granted prior to the said fifteenth day of December, though they may have been lost subsequently; provided, however, the same shall not have been recorded anew under the provisions of said act.

4. *Of the disclaimer.*

43. The act of March 3, 1837, sect. 7, authorizes any patentee who shall have, through inadvertence, accident, or mistake, made his specification of claim too broad, claiming more than that of which he was

the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee, his administrators, executors, and assigns, whether of the whole or of a sectional interest therein, may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent; which disclaimer shall be in writing, attested by one or more witnesses, and recorded in the patent office, on payment by the person disclaiming, in manner as other patent duties are required by law to be paid, of the sum of ten dollars. And such disclaimer shall thereafter be taken and considered as part of the original specification, to the extent of the interest which shall be possessed in the patent or right secured thereby, by the disclaimant, and by those claiming by or under him subsequent to the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same.

5. *Assignment of patents.*

44. By virtue of the act of July 4, 1836, sect. 11, every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the patent office within three months from the execution thereof. This act required the payment of a fee of three dollars to be paid by the assignee, but this provision has been repealed by the act of March 3, 1839, s. 8, and such assignments, grants, and conveyances, shall, in future, be recorded without any charge whatever. But by the act of May 27, 1848, Minot's Stat. at Large, U. S. 231, it is enacted, That hereafter the commissioner of patents shall require a fee of one dollar for recording any assignment, grant or conveyance, of the whole or any part of the interest in letters-patent, or power of attorney, or license to make or use the things patented, when such instrument shall not exceed three hundred words; the sum of two dollars when it shall exceed three hundred, and shall not exceed one

thousand words and the sum of three dollars when it shall exceed one thousand words; which fees shall in all cases be paid in advance.

6. *The extension of the patent.*

45. The act of July 4, 1836, sect. 18, directs, That whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the commissioner of the patent office, setting forth the grounds thereof; and the commissioner shall, on the applicant's paying the sum of forty dollars to the treasury, as in the case of an original application for a patent, cause to be published, in one or more of the principal newspapers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent, a notice of such application and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted. And the secretary of state, the commissioner of the patent office, and the solicitor of the treasury, shall constitute a board to hear and decide upon the evidence produced before them both for and against the extension, and shall sit for that purpose at the time and place designated in the published notice thereof. The patentee shall furnish to said board a statement, in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew and extend the patent, by making a certificate thereon of such extension, for the term of seven years from and after the expiration of the first term; which certificate, with a certificate of said board of their judgment

and opinion as aforesaid, shall be entered on record in the patent office; and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein: *Provided*, however, That no extension of a patent shall be granted after the expiration of the term for which it was originally issued.

7. *Requisites to secure the patent.*

46. The act of August 29, 1842, section 6, requires, That all patentees and assignees of patents hereafter granted, are hereby required to stamp, engrave, or cause to be stamped or engraved, on each article vended, or offered for sale, the date of the patent; and if any person or persons, patentees or assignees, shall neglect to do so, he, she, or they, shall be liable to the same penalty, to be recovered and disposed of in the manner specified in the foregoing fifth section of this act. See 49.

§ 7. *Duty or tax on patents.*

47. The tax or duty on patents is not the same in all cases, foreigners being required to pay a greater sum than citizens, and the subjects of the king of Great Britain a greater sum than other foreigners. The ninth section of the act of July 4, 1836, requires, That before any application for a patent can be considered by the commissioner as aforesaid, the applicant shall pay into the treasury of the United States, or into the patent office, or into any of the deposit banks to the credit of the treasury, if he be a citizen of the United States, or an alien, and shall have been resident in the United States for one year next preceding, and shall have made oath of his intention to become a citizen thereof, the sum of thirty dollars; if a subject of the king of Great Britain, the sum of five hundred dollars; and all other persons the sum of three hundred dollars; for which payment duplicate receipts shall be taken, one of which to be filed in the office of the treasurer. And the moneys received into the treasury under this act, shall constitute a fund for the payment of the salaries of the officers and clerks herein provided for, and all other expenses of the patent office, and to be called the patent fund.

48. When an applicant withdraws his application before the issuing of the patent, he is entitled to receive back twenty dollars

of the sum he may have paid into the treasury. Act of July 4, 1836, sect. 7. And the act of March 3, 1837, section 12, enacts, That whenever the application of any foreigner for a patent shall be rejected and withdrawn for want of novelty in the invention, pursuant to the seventh section of the act to which this is additional, the certificate thereof of the commissioner shall be a sufficient warrant to the treasurer to pay back to such applicant two-thirds of the duty he shall have paid into the treasury on account of such application.

When money has been paid by mistake, as for fees accruing at the patent office, it must, by the direction of the act of August 29, 1842, section 1, be refunded.

§ 8. *Penalty for use of patentee's marks.*

49. The act of August 29, 1842, s. 5, declares, That if any person or persons shall paint or print, or mould, cast, carve, or engrave, or stamp, upon any thing made, used, or sold, by him, for the sole making or selling which he hath not or shall not have obtained letters-patent, the name or any imitation of the name of any other person who hath or shall have obtained letters-patent for the sole making and vending of such thing, without consent of such patentee or his assigns or legal representatives; or if any person, upon any such thing not having been purchased from the patentee, or some person who purchased it from or under such patentee, or not having the license or consent of such patentee, or his assigns or legal representatives, shall write paint, print, mould, carve, engrave, stamp, or otherwise make or affix the word "patent," or the words "letters-patent," or the word "patentee," or any word or words of like kind, meaning, or import, with the view or intent of imitating or counterfeiting the stamp, mark, or other device of the patentee, or shall affix the same or any word, stamp, or device, of like import, on any unpatented article, for the purpose of deceiving the public, he, she, or they, so offending, shall be liable for such offence, to a penalty of not less than one hundred dollars, with costs, to be recovered by action in any of the circuit courts of the United States, or in any of the district courts of the United States, having the powers and jurisdiction of a circuit court; one-half of which penalty, as recovered, shall be paid to the patent fund, and the other half to any person or persons who shall sue for the same.

§ 9. *Courts having jurisdiction in patent cases.*

50. It is enacted by the 17th section of the act of July 4, 1836, That all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States on such terms and conditions as said courts may deem reasonable: Provided, however, That from all judgments and decrees, from any such court rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of circuit courts, and in all other cases in which the court shall deem it reasonable to allow the same.

§ 10. *Actions for violation of patent rights.*

51. The act of July 4, 1836, section 14, provides, That whenever in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs; and such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentee, assignee, or as grantees of the exclusive right within and throughout a specified part of the United States.

52.—Sect. 15. That the defendant in any such action shall be permitted to plead the general issue, and to give this act and any special matter in evidence, of which notice

in writing may have been given to the plaintiff or his attorney, thirty days before trial, tending to prove that the description and specification filed by plaintiff does not contain the whole truth relative to his invention or discovery, or that it contains more than is necessary to produce the described effect; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery thereof by the patentee, or had been in public use, or on sale with the consent and allowance of the patentee before his application for a patent, or that he had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same; or that the patentee, if an alien at the time the patent was granted, had failed and neglected for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued; in either of which cases judgment shall be rendered for the defendant, with costs. And whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing and where the same had been used: Provided, however, that whenever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery or any part thereof having been before known or used in any foreign country, it not appearing that the same or any substantial part thereof had before been patented or described in any printed publication. And provided, also, that whenever the plaintiff shall fail to sustain his action on the ground that in his specification of claim is embraced more than that of which he was the first inventor, if it shall appear that the defendant had used or violated any part of the

invention justly and truly specified and claimed as new, it shall be in the power of the court to adjudge and award as to costs as may appear to be just and equitable.

53. This last section has been modified by the act of March 3, 1837, which enacts as follows:—Section 9, That anything in the fifteenth section of the act to which this is additional to the contrary notwithstanding, That, whenever by mistake, accident, or inadvertence, and without any wilful default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery as shall be truly and bona fide his own: Provided, it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid. And every such patentee, his executors, administrators and assigns, whether of the whole or of a sectional interest therein, shall be entitled to maintain a suit at law or in equity on such patent for any infringement of such part of the invention or discovery as shall be bona fide his own as aforesaid, notwithstanding the specification may embrace more than he shall have any legal right to claim. But, in every such case in which a judgment or verdict shall be rendered for the plaintiff he shall not be entitled to recover costs against the defendant, unless he shall have entered at the patent office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented which was so claimed without right: Provided, however, That no person bringing any such suit shall be entitled to the benefits of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the patent office a disclaimer as aforesaid.

See *Bac. Ab. Monopoly*; *Id. Prerogative*, F 4; *Phill. on Pat.*; *Fessend. on Pat.*; *Carp. on Pat.*; *Hand on Pat.*; *Webst. on Pat.*; *Coll. on Pat.*; *Gods. on Pat.*; *Holr. on Pat.*; *Smith on Pat.*; *Drewry's Patent Law Amendment Act*; *Davies' Collection of Cases on the Law of Patents*; *Rankin's Analysis of the Law of Patents*. Among the French writers see *Perpigna on Patents*

written in English; and the Manuel of the same author, in French; and the works of Renouard, Dalloz, Molard, and Regnault. See the various Digests, h. t. and particularly Peters' Digest, h. t.

PATENT, FRENCH. The following points in relation to the patent laws of France will be found useful to those who have invented valuable machinery, and who are desirous of availing themselves of the patent laws of that country:—

2.—§ 1. *To whom patents are granted.* All persons may obtain patents in this country, whether they are men or women, adults or infants, Frenchmen or foreigners, and in general all persons who fulfil the conditions required by the law in order to obtain patents.

3. It is not requisite that the applicant should be present, but the application must be made in his name.

4.—§ 2. *The different kinds of patents.* There are three principal kinds of patents. 1. Patents for inventions, (brevets d'invention.) 2. Patents for improvements, (brevets de perfectionnement.) 3. Patents for importations, (brevets d'importations.) But as patents may be taken for a combination of the above, there may be added, by such combination, four others, namely: 5. Patents for invention and improvements, (brevets d'invention et de perfectionnement.) 6. Patents for invention and importation, (brevets d'invention et d'importation.) 7. Patents for importation and improvement, (brevets d'importation et de perfectionnement.) 8. Patents for importation, invention and improvement (brevets d'invention, et perfectionnement et d'importation.)

5. The forms prescribed to obtain these several kinds of patents are exactly the same, the only difference consists in the declaration of the applicant, which must be in conformity with the kind of patent he desires to obtain.

6. The applicant himself has the right to fix the number of years for which he desires to have his patent, when he applies to have his request registered at the prefecture. He may have it for five, ten, or fifteen years. And this period he has a right to change until the patent has been signed. But with regard to patents for importations, the duration of the patent cannot extend beyond the period for which there is a patent in the country, from which the importation has been made

7. Patents, other than for importation, may be extended as to time. There are two species of prolongation; the first, within fifteen years; the second, beyond fifteen years.

8.—§ 3. *Cost of patents.* The tax, as it is called, which must be paid in order to obtain a patent, varies according to the duration of the patent. This tax may be paid in cash or by instalments. When paid in cash, it is as follows:

1. For five years, 300 francs, about 56 dollars and 40 cents.

2. For ten years, 800 francs, about 94 dollars.

3. For fifteen years, 1500 francs, about 282 dollars; besides some office expenses, amounting to from ten to fifteen dollars.

9.—§ 4. *Foreign patents.* The patentee in France cannot obtain a patent in a foreign country, without losing his rights in France; but this provision is easily eluded by another person taking out the patent in the foreign country, when patents for importations are granted. Perpigna, Manuel des Inventeurs, &c., c. 3, 5, p. 90.

PATENT LAWS OF GREAT BRITAIN AND IRELAND. The patent laws of Great Britain and Ireland will be briefly considered by taking a view of the persons to whom patents will be granted; the different kinds of patents; the time for which they are granted; and the expenses attending them.

2.—§ 1. *To whom patents are granted.* Both foreigners and subjects may obtain letters-patent; but inasmuch as the applicant must accompany his petition by a declaration made before a master in chancery, or a master extraordinary in chancery, that he has made such an invention; that he is the true and first inventor thereof; or that it is new in the kingdom, according to the special circumstances of the case, the applicant must be present in Great Britain.

3.—§ 2. *The different kinds of patents.* This will be considered by taking a view, first of the object of a patent, and secondly, the territory over which a patent extends.

4.—1. The thing patented must be, 1. A discovery or invention made by the applicant himself, in the United Kingdom. 2. The introduction or importation of an invention known abroad, and in this case, the introducer is the true and first inventor, within the realm. 3. Though not absolutely the true and first inventor, by reason of some one else having made the same invention and kept it secret, yet the invention must

have been made public by the applicant, and as the first publisher, the applicant will be entitled to letters-patent. Novelty and utility are essential conditions of the grant, but it is of no consequence whether the discovery was known or not, in a country foreign to the United Kingdom. Webst. on Pat. 11 and 70, note *w*.

A recent act of parliament, passed July 1, 1852, (15 & 16 Vict. cap. 83,) amended the English patent system in several important particulars. The cardinal features of the new system are: 1, protection from the day of the application; 2, one patent for the United Kingdom; 3, moderate cost and periodical payment; 4, printing and publishing of specifications; 5, one office of patents and specifications. Webster's New Patent Law, p. 41.

By the 18th sec. of said act, letters patent are sealed with the great seal of the United Kingdom, and extend to the whole of the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man; also, to the colonies or plantations, or such of them as the applicant may designate in his petition for the letters patent and the law officer of the crown shall insert, in his warrant for the sealing of the patent. The patent may bear date as of the day of the application, or of the sealing, or of any intermediate day.

The patent is granted for fourteen years, subject however to the condition that it shall be void at the expiration of three years and of seven years respectively from the date thereof, unless before the expiration of the said three years and seven years, stamps of the value of £50 and £100 respectively, be affixed to the letters patent. The cost of obtaining letters patent is, in the first instance, £20 if the patent is unopposed; if opposed, there are additional fees amounting to nearly £5.

By sec. 25, letters patent obtained in the United Kingdom for patented foreign inventions are not to continue in force after the expiration of the foreign patent.

PATENT, PRUSSIAN. This subject will be considered by taking a view of the persons who may obtain patents; the nature of the patent; and the duration of the right.

2.—§ 1. *Of the persons who may obtain patents.* Prussian citizens or subjects are alone entitled to a patent. Foreigners cannot obtain one.

3.—§ 2. *Nature of the patents.* Patents are granted in Prussia for an invention,

when the thing has been discovered or invented by the applicant. For an improvement, when considerable improvement has been made to a thing before known. And for importation, when the thing has been brought from a foreign country and put in use in the kingdom. Patents may extend over the whole country or only over a particular part.

4.—§ 3. *Duration of patents.* The patent may at the choice of the applicant, be for any period not less than six months nor more than fifteen years.

PATENT, ROMAN. The Roman patents will be considered by taking a view of the persons to whom they may be granted; the different kinds of patents; the cost of a patent; and the obligations of the patentee.

2.—§ 1. *To whom patents are granted.* Every person, whether a citizen of the estates of the pope or foreigner, man or woman, adult or infant, may obtain a patent for an invention, for an improvement, or for importation, by fulfilling the conditions prescribed in order to obtain a grant of such titles. Persons who have received a patent from the Roman government may, afterwards, without any compromise of their rights or privileges, receive a patent in a foreign country.

3.—§ 2. *The different kinds of patents.* In the Roman estates there are granted patents for invention, for improvements, and for importations.

4.—1st. Patents for inventions are granted for, 1. A new kind of important culture. 2. A new and useful art, before unknown. 3. A new and useful process of culture or of manufacture. 4. A new natural production. 5. A new application of a means already known.

5.—2d. Patents for improvements may be granted for any useful improvement made to inventions already known and used in the Roman states.

6.—3d. Patents for importations are granted in two cases, namely: 1. For the introduction of inventions already patented in a foreign country, and the privilege of which patent yet continues. 2. For the introduction of an invention known and freely used in a foreign country, but not yet used or known in the Roman states.

7.—§ 3. *Cost of a patent.* The cost of a patent is fixed at a certain sum per annum, without regard to the length of time for which it may have been granted. It varies in relation to patents for inventions and

importation. It is ten Roman crowns per annum for a patent for invention and improvement, and of fifteen crowns a year for a patent for importation.

8.—§ 4. *Obligation of the patentee.* He is required to bring into use his invention within one year after the grant of the patent, and not to suspend the supply for the space of one year during the time the privilege shall last.

9. He is required to pay one half of the tax or expense of his patent on receiving his patent, and the other half during the first month of the second portion of its duration.

PATENT-OFFICE. An office bearing this name was established by law, and by the act of congress of July 4, 1836, which repeals all acts theretofore passed in relation to patents, 4 Sharsw. cont. of Story's L. U. S. 2504, it is provided, § 1. That there shall be established and attached to the department of state, an office to be denominated the patent office; the chief officer of which shall be called the commissioner of patents, to be appointed by the president, by and with the advice and consent of the senate, whose duty it shall be, under the direction of the secretary of state, to superintend, execute, and perform, all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries, inventions, and improvements, as are herein provided for, or shall hereafter be, by law, directed to be done and performed, and shall have the charge and custody of all the books, records, papers, models, machines, and all other things belonging to said office. And said commissioner shall receive the same compensation as is allowed by law to the commissioner of the Indian department, and shall be entitled to send and receive letters and packages by mail, relating to the business of the office, free of postage.

2.—§ 2. That there shall be, in said office, an inferior officer, to be appointed by the said principal officer, with the approval of the secretary of state, to receive an annual salary of seventeen hundred dollars, and to be called the chief clerk of the patent-office; who in all cases during the necessary absence of the commissioner, or when the said principal office shall become vacant, shall have the charge and custody of the seal, and of the records, books, papers, machines, models, and all other things belonging to the said office, and shall per-

form the duties of commissioner during such vacancy. And the said commissioner may also, with like approval, appoint an examining clerk, at an annual salary of fifteen hundred dollars; two other clerks at twelve hundred dollars each, one of whom shall be a competent draughtsman; one other clerk at one thousand dollars; a machinist at twelve hundred and fifty dollars; and a messenger at seven hundred dollars. And said commissioner, clerks, and every other person appointed and employed in said office, shall be disqualified and interdicted from acquiring or taking, except by inheritance, during the period for which they shall hold their appointments, respectively, any right or interest, directly or indirectly, in any patent for an invention or discovery which has been, or may hereafter be, granted.

3.—§ 3. That the said principal officer, and every other person to be appointed in the said office, shall, before he enters upon the duties of his office or appointment, make oath or affirmation, truly and faithfully to execute the trust committed to him. And the said commissioner and the chief clerk shall also, before entering upon their duties, severally give bond with sureties to the treasurer of the United States, the former in the sum of ten thousand dollars, and the latter, in the sum of five thousand dollars, with condition to render a true and faithful account to him or his successor in office, quarterly of all moneys which shall be by them respectively received for duties on patents, and for copies of records, and drawings, and all other moneys received by virtue of said office.

4.—§ 4. That the said commissioner shall cause a seal to be made and provided for the said office, with such device as the president of the United States shall approve, and copies of any records, books, papers, or drawings, belonging to the said office, under the signature of the said commissioner, or when the office shall be vacant, under the signature of the chief clerk, with the said seal affixed, shall be competent evidence in all cases in which the original records, books, papers, or drawing, could be evidence. And any person making application therefor, may have certified copies of the records, drawings, and other papers deposited in said office, on paying, for the written copies, the sum of ten cents for every page of one hundred words; and for copies of drawing, the reasonable expense of making the same.

PATENTEE. He to whom a patent has been granted. The term is usually applied to one who has obtained letters-patent for a new invention.

2. His rights are, 1. To make, sell and enjoy the profits, during the existence of his rights, of the invention or discovery patented. 2. To recover damages for a violation of such rights. 3. To have an injunction to prevent any infringement of such rights.

3. His duties are to supply the public, upon reasonable terms, with the thing patented.

PATER. Father. A term used in making genealogical tables.

PATER FAMILIAS, civil law. One who was *sui juris*, and consequently was not either under parental power, nor under that of a master; a child in his cradle, therefore, could have been pater familias, if he had neither a master nor a father. Leq. Elem. § 127, 128.

PATERNA PATERNIS. This expression is used in the French law to signify that in a succession, the property coming from the father of the deceased, descends to his paternal relations.

PATERNAL. That which belongs to the father or comes from him; as, paternal power, paternal relation, paternal estate, paternal line. *Vide Line.*

PATERNAL POWER. *Patria potestas.* The authority lawfully exercised by parents over their children. It will be proper to consider, 1. Who are entitled to exercise this power. 2. Who are subject to it. 3. The extent of this power.

2.—1. As a general rule the father is entitled to exert the paternal power over his children. But for certain reasons, when the father acts improperly, and against the interest of those over whom nature and the law have given him authority, he loses his power over them. It being a rule that whenever the good of the child requires it, the courts will deliver the custody of the children to others than the father. And numerous instances may be found where, for good reasons, the custody will be given to the mother.

3. The father of a bastard child has no control over him; the mother has the right to the custody and control of such child. 2 Mass. 109; 12 Mass. 387.

4.—2. All persons are subject to this power until they arrive at the full age of twenty-one years. A father may, however,

to a certain extent, deprive himself of this unlimited paternal power, first, by delegating it to others, as when he binds his son an apprentice; and, secondly, when he abandons his children, and permits them to act for themselves. 2 Verm. Cas. 290; 2 Watts, 408; 4 S. & R. 207; 4 Mass. 675.

5.—3. The principle upon which the law is founded as to the extent of paternal power is, that it be exerted for the benefit of the child. The child is subject to the lawful commands of the father to attend to his business, because by being so subjected he acquires that discipline and the practice of attending to business, which will be useful to him in after life. He is liable to proper correction for the same reason. 1 Bouv. Inst. n. 326–33. See *Correction; Father; Mother; Parent.*

PATERNAL PROPERTY. That which descends or comes from the father and other ascendants, or collaterals of the paternal stock. Domat. Liv. Prél. tit. 3, s. 2, n. 11.

PATERNITY. The state or condition of a father.

2. The husband is *prima facie* presumed to be the father of his wife's children, born during coverture, or within a competent time afterwards; *pater is est quem nuptiæ demonstrant.* 7 N. S. 553. But this presumption may be rebutted by showing circumstances which render it impossible that the husband can be the father. 6 Binn. 283; 1 Browne's R. Appx. xlvii.; Hardin's R. 479; 8 East, R. 193; Stra. 51, 940; 4 T. R. 356; 2 M. & K. 349; 3 Paige's R. 139; 1 Sim. & Stu. 150; Turn. & Russ. 138; 1 Bouv. Inst. n. 302, et seq.

3. The declarations of both or one of the spouses, however, cannot affect the condition of a child born during the marriage. 7 N. S. 553; 3 Paige's R. 139. *Vide Bastard; Bastardy; Legitimacy; Maternity; Pregnancy.*

PATHOLOGY, med. jur. The science or doctrine of diseases. In cases of homicides, abortions, and the like, it is of great consequence to the legal practitioner to be acquainted, in some degree, with pathology. 2 Chit. Pr. 42, note.

PATRIA. The country; the men of the neighborhood competent to serve on a jury; a jury. This word is nearly synonymous with *pais*. (q. v.)

PATRIA POTESTAS, civil law. Paternal power; (q. v.) the authority which is law-

fully exercised by the father over his children.

PATRICIDE. One guilty of killing his father.

PATRIMONIAL. A thing which comes from the father, and by extension, from the mother or other ancestor.

PATRIMONIUM, civil law. That which is capable of being inherited.

2. Things capable of being possessed by a single person exclusively of all others, are, in the Roman or civil law, said to be in *patrimonio*; when incapable of being so possessed they are *extra patrimonium*.

3. In general, things may be inherited, but there are some which are said to be *extra patrimonium*, or which are not in commerce. These are such as are *common*, as the light of heaven, the air, the sea, and the like. Things *public*, as rivers, harbors, roads, creeks, ports, arms of the sea, the sea-shore, highways, bridges, and the like. *Things which belong to cities and municipal corporations*, as public squares, streets, market houses, and the like. See. 1 Bouv. Inst. n. 421 to 446.

PATRIMONY. Patrimony is sometimes understood to mean all kinds of property; but its more limited signification, includes only such estate as has descended in the same family; and in a still more confined sense, it is only that which has descended or been devised in a direct line from the father, and by extension, from the mother, or other ancestor.

2. By patrimony, *patrimonium*, is also understood the father's duty to take care of his children. Sw. pt. 8, § 18, n. 31, p. 235.

PATRINUS. A godfather.

PATRON, eccles. law. He who has the disposition and gift of an ecclesiastical benefice. In the Roman law it signified the former master of a freedman. Dig. 2, 4, 8, 1.

PATRONAGE. The right of appointing to office; as the patronage of the president of the United States, if abused, may endanger the liberties of the people.

2. In the ecclesiastical law, it signifies the right of presentation to a church or ecclesiastical benefice. 2 Bl. Com. 21.

PATRONUS, Roman civil law. This word is a modification of the Latin word *pater*, father; a denomination applied by Romulus to the first senators of Rome, and which they always afterwards bore. Romulus at first appointed a hundred of them.

Seven years afterwards, in consequence of the association of Tatius to the Romans, a hundred more were appointed, chosen from the Sabines. Tarquinius Priscus increased the number to three hundred. Those appointed by Romulus and Tatius were called *patres majorum gentium* and the others were called *patres minorum gentium*. These and their descendants constituted the nobility of Rome. The rest of the people were called plebeians, every one of whom was obliged to choose one of these fathers as his *patron*. The relation thus constituted involved important consequences. The plebeian, who was called (*cliens*) a client, was obliged to furnish the means of maintenance to his chosen patron; to furnish a portion for his patron's daughters; to ransom him and his sons, if captured by an enemy, and pay all sums recovered against him by judgment of the courts. The patron, on the other hand, was obliged to watch over the interests of his client, whether present or absent, to protect his person and property, and especially to defend him in all actions brought against him for any cause. Neither could accuse or bear testimony against the other, or give contrary votes, &c. The contract was of a sacred nature; the violation of it was a sort of treason, and punishable as such. According to Cicero, (*De Repub. II. 9.*) this relation formed an integral part of the governmental system, *Et habuit plebem in clientelas principum descriptum*, which he affirms was eminently useful. Blackstone traces the system of vassalage to this ancient relation of patron and client. It was, in fact, of the same nature as the feudal institutions of the middle ages, designed to maintain order in a rising state by a combination of the opposing interests of the aristocracy and of the common people, upon the principle of reciprocal bonds for mutual interests. Dumazeau, *Barreau Romain*, § III. Ultimately, by force of radical changes in the institution, the word *patronus* came to signify nothing more than an advocate. Id. IV.

PATRUELIS, civil law. A cousin german by the father's side; the son or daughter of a father's brother. Dig. 38, 10, 1.

PATRUUS, civil law. An uncle by the father's side, a father's brother. Dig. 38, 10, 10. *Patruus magnus*, is a grandfather's brother, grand-uncle. *Patruus major*, is a great-grandfather's brother. *Patruus maximus*, is a great-grandfather's father's brother.

PAUPER. One so poor that he must be supported at the public expense.

2. The statutes of the several states make ample provisions for the support of the poor. It is not within the plan of this work even to give an abstract of such extensive legislation. Vide 16 Vin. Ab. 259; Botts on the Poor Laws; Woodf. Landl. & Ten. 201.

PAVIAGE. Contribution or tax for paving the streets or highways.

PAWN. A pledge. Vide *Pledge*.

PAWN-BROKER. One who is lawfully authorized to lend money, and actually lends it, usually in small sums, upon pawn or pledge.

PAWNEE. He who receives a pawn or pledge.

2. The rights of the pawnee are to have the exclusive possession of the pawn; to use it, when it is for the advantage of the pawnor, but, in such case, when he makes a profit out of it, he must account for the same. 1 Car. Law Rep. 87; 2 Murph. 111.

3. The pawnee is bound to take reasonable care of the pledge, and to return it to the pawnor, when the obligation of the latter has been performed.

4. The pawnee has two remedies to enforce his claim; the first, to sell the pawn, after having given due notice; and, secondly, by action. See 1 Bouv. Inst. n. 1046, 1050.

PAWNOR. One who, being liable to an engagement, gives to the person to whom he is liable, a thing to be held as a security for the payment of his debt or the fulfilment of his liability.

2. The rights of the pawnor are to redeem the pledge, at any time before it is sold.

3. His obligations are to warrant the title of the pledge, and to redeem it at the time agreed upon. See 1 Bouv. Inst. n. 1045.

PAYEE. The person in whose favor a bill of exchange is made payable. Vide *Bills of Exchange*.

PAYMENT, contracts. That which is given to execute what has been promised; or it is the fulfilment of a promise. *Solvere dicimus cum quis fecit, quod facere promisit.* But though this is the general acceptation of the word, yet by payment is understood, every way by which the creditor is satisfied or ought to be, and the debtor liberated: for example, an accord and satisfaction will

operate as a payment. If I owe you a sum of money, for the security of which I give you a mortgage, and afterwards you consent to receive *in payment* a tract of land, from the moment the sale is complete, the first obligation, with all its accessories, is extinct, although you should be afterwards evicted of the property sold. 7 Toull. n. 46; 2 Mart. Lo. Rep. N. S. 144; S. C. 2 Harr. Cond. Lo. R. 621, 624.

2. This subject will be considered by taking a separate view of the person by whom the payment may be made; to whom it may be made; when and where it ought to be made; how it ought to be made; the effect of the payment.

3.—1. The payment may be made by the real debtor and other persons from whom the creditor has a right to demand it; an agent may make payment for his principal; and any mode of payment by the agent, accepted and received as such by the creditor, as an absolute payment, will have the effect to discharge the principal, whether known or unknown, and whether it be in the usual course of business or not. If, for example, a factor or other agent should be employed to purchase goods for his principal, or should be entrusted with money to be paid for him, and, instead of receiving the money, the creditor or seller should take the note of the factor or agent, payable at a future day, as an absolute payment, the principal would be discharged from the debt. 3 Chit. Com. Law, 204; 1 B. & Ald. 14; 6 B. & C. 160; 7 B. & C. 17. When such note has been received conditionally and not as an absolute payment, it would not have the effect of a payment by the principal; and whether so received or not is a fact to be decided by the jury. 1 Cowen, R. 259, 383; 9 John. R. 310; 6 Cowen, R. 181; 7 John. R. 311; 15 John. R. 276; 3 Wend. R. 83; 6 Wend. R. 475; 10 Wend. R. 271; 5 John. R. 68; 1 Liverm. Ag. 207.

4. Payment may also be made by a third person a stranger to the contract.

5. In the payment of mortgages, it is a rule that the personal estate shall be applied to discharge them when made by the testator or intestate himself, to secure the payment of a debt due by him, because the personal estate was benefited by the money borrowed; and it makes no difference whether the mortgaged lands have been devised, or come to the heir by descent. 2 Cruise, Dig. 147. The testator may, however, ex-

empt the personal estate from the payment, and substitute the real in its place. But when the mortgage was not given by the deceased, but he acquired the real estate subject to it, it never was his debt, and therefore his personal estate is not bound to pay the mortgage debt, but it must be paid by the real estate. 2 Cruise, Dig. 164-8; 3 John. Chan. R. 252; 2 P. Wms. 664, n. 1; 2 Bro. C. C. 57; 2 Bro. C. C. 101, 152; 5 Ves. jr. R. 534; 14 Ves. 417.

6.—2. It must be made by the creditor himself, or his assigns, if known, or some person authorized by him, either expressly, or by implication; as to his factor, Cowp. 251; to his broker, 1 Maul. & Selw. 576; 4 Id. 566; 4 Taunt. 242; 1 Stark. Ca. 233.

7. In the case of partners and other joint creditors, or joint executors or administrators, payment to one is generally a valid payment. When an infant is a creditor, payment must be made to his guardian. A payment may be good when made to a person who had no authority to receive it, if the creditor shall afterwards ratify it. Poth. Obl. n. 528.

8.—3. Time and place of payment: first, as to the time. When the contract is, that payment shall be made at a future time, it is clear that nothing can be demanded until after it has elapsed, or until any other condition to which the payment is subject, has been fulfilled; and in a case where the goods had been sold at six or nine months, the debtor had the option as to those two terms. 5 Taunt. 338. When no time of payment is mentioned in the agreement, the money is payable immediately. 1 Pet. 455; 4 Rand. 346.

9. Secondly, the payment must be made at the place agreed upon in the contract; but in the absence of such agreement, it must be made agreeably to the presumed intention of the parties, which, among other things, may be ascertained by the nature of the thing to be paid or delivered, or by the custom in such cases.

10.—4. How the payment ought to be made. To make a valid payment, so as to compel the receiver to take it, the whole amount due must be paid; Poth. Obl. n. 499, or n. 534, French edition; when a part is accepted, it is a payment *pro tanto*. The payment must be made in the thing agreed upon; but when it ought to be made in money, it must be made in the lawful coin of the country, or in bank notes which

are of the value they are represented to be. A payment made in bills of an insolvent bank, though both parties may be ignorant of its insolvency, it has been held, did not discharge the debt; 11 Verm. 576; 6 Hill, 340; but see 1 W. & S. 92; 8 Yerg. 175; and a payment in counterfeit bank notes is a nullity. 2 Hawks, 326; 3 Hawks, 568; 6 Hill, 840. In general, the payment of a part of a debt, after it becomes due, will not discharge the whole, although there may be an agreement by the debtor that it should have that effect, because there is no consideration for such agreement. But see 3 Kelly's R. 210, contra. A payment of a part, before it is due, will discharge the whole, when so agreed.

11.—5. The payment, when properly made, discharges the debtor from his obligation. Sometimes a payment extinguishes several obligations; this happens when the thing given to discharge an obligation, was the same which is the object of another obligation. Poth. Obl. 552.

12. A single payment may discharge several debts; as, for example, if Peter be indebted to Paul one thousand dollars, and Paul being indebted to James, Paul give an order to Peter to pay James this money; the payment made by Peter to James discharges both the obligations due by Peter to Paul, and by Paul to James. Poth. Ob. n. 553. This rule, that a payment made in order to acquit or discharge an obligation, extinguishes the other obligations which have the same object, takes place also when there are several debtors as regards the whole of them. If, for example, Peter trust Paul on the credit of James, a payment by Paul discharges both himself and James. Poth. Obl. n. 554.

13. But in case money or other things have been delivered to a person who was supposed to be entitled to them as a creditor, when he was not, this is not a payment, and the whole, if nothing was due, or if the debt was less than the amount paid, the surplus, may be recovered in action for money had and received.

Vide, generally, Bouv. Inst. Index, h. t.; 1 Com. Dig. 473; 8 Com. Dig. 607; 16 Vin. Ab. 296; 1 Vern. by Raith. 3, 150 n. Yelv. 11 a; 1 Salk. 22; 15 East, 12; 8 East, R. 111; 2 Ves. jr. 11; Phil. Ev. Index, h. t.; Stark. Ev. h. t.; Louia. Code, art. 2129; Ayl. Pand. 565; 1 Sell. Pr. 277; Dane's Ab. Index, h. t.; Toull. lib. 3, tit. 3, c. 5; Pardes. part 2, tit. 2, c. 1

Merl. Répert. h. t.; Chit. Contr. Index, h. t.; 3 Eng. C. L. Rep. 130. As to what transfer will amount to an assignment or a payment and extinguishment of a claim, see 6 John. Ch. R. 395; Id. 425; 2 Ves. jr. 261; 18 Ves. jr. 384; 1 N. H. Rep. 167; 1 N. H. Rep. 252; 2 N. H. Rep. 300; 3 John. Ch. R. 53.

PAYMENT, pleadings. The name of a plea by which the defendant alleges that he has paid the debt claimed in the declaration; this plea must conclude to the country. 4 Call, 371; Minor, 137. Vide *Solvit ad diem*; *Solvit post diem*.

PAYS. The country. Trial per pays, is a trial by the country; that is, by jury. Vide *Pais*.

PAX REGIS, Eng. law. The king's peace. In ancient times there were certain limits which were known by this name. The pax regis, or the verge of the court, as it was afterwards called, extended from the palace gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms and nine barleycorns. Crabb's C. L. 41.

PEACE. The tranquillity enjoyed by a political society, internally, by the good order which reigns among its members, and externally, by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security, as opposed to one of violence and warfare, but likewise a state of public order and decorum. Ham. N. P. 139; 12 Mod. 566. Vide, generally, Bac. Ab. Prerogative, D 4; Hale, Hist. P. C. 160; 3 Taunt. R. 14; 1 B. & A. 227; Peake, R. 89; 1 Esp. R. 294; Harr. Dig. Officer, V 4; 2 Benth. Ev. 319, note. Vide *Good behaviour*; *Surety of the peace*.

PECK. A measure of capacity, equal to two gallons. Vide *Measure*.

PECULATION, civil law. The unlawful appropriation by a depositary of public funds, of the property of the government entrusted to his care, to his own use or that of others. Domat, Suppl. au Droit Public, liv. 3, tit. 5.

PECULIAR, eccles. law. In England, a particular parish or church, which has, within itself, independent of the ordinary jurisdiction, power to grant probate of wills, and the like. 1 Eng. Ecol. R. 72, note; Shelf. on Mar. & Div. 538. Vide *Court of peculiars*.

PECULIUM, civil law. The savings which were made by a son or slave with the

consent of his father or master. Inst. 2, 9, 1; Dig. 15, 1, 5, 3; Poth. ad Pand. lib. 50, tit. 17, c. 2, art. 3.

2. A master is not entitled to the extraordinary earnings of his apprentice, which do not interfere with his services so as to affect his master's profits. An apprentice was therefore decreed to be entitled to salvage in opposition to his master's claim for it. 2 Cranch, 270.

PECUNIA, civil law, property. By this term was understood, 1. Money. 2. Every thing which constituted the private property of an individual, or which was a part of his fortune; a slave, a field, a house, and the like, were so considered.

2. It is in this sense the law of the Twelve Tables said; *Uti quisque pater familias legassit super pecuniâ tutelare rei suæ, ita jus esto*. In whatever manner a father of a family may have disposed of his property, or of the tutorship of his things, let this disposition be law. 1 Leçons Elem. du Dr. Civ. Rom. 238.

3. Flocks were the first riches of the ancients, and it is from *pecus* that the words *pecunia*, *peculium*, *peculatus*, are derived. Co. Litt. 207.

PECUNIARY. That which relates to money.

2. Pecuniary punishment, is one which imposes a fine on a convict; a pecuniary legacy is one which entitles the legatee to receive a sum of money, and not a specific chattel. In the ecclesiastical law, by pecuniary causes is understood such causes as arise either from the withholding ecclesiastical dues, or the doing or omitting such acts relating to the church, in consequence of which damage accrues to the plaintiff. In England these causes are cognizable in the ecclesiastical courts.

PEDIGREE, descents. A succession of degrees from the origin; it is the state of the family as far as regards the relationship of the different members, their births, marriages and deaths; this term is applied to persons or families, who trace their origin or descent.

2. On account of the difficulty of proving in the ordinary manner by living witnesses, facts which occurred in remote times, *hearsay evidence* (q. v.) has been admitted to prove a pedigree. 1 Phil. Ev. 186; 1 Stark. Ev. 55; 10 Serg. & Rawle, 383; 2 Supp. to Ves. jr. 110; 8 Com. Dig. 583; 1 Pet. 337; 5 Pet. 81; 13 Pet. 209; 1 Wheat. 6; 8 Wash. C. C. R. 243; 4

Wash. C. C. R. 186 ; 3 Bouv. Inst. n. 3067. *Vide Descent; Line.*

PEDIS POSSESSIO. A foothold, an actual possession. To constitute adverse possession there must be *pedis possessio*, or a substantial enclosure. 2 Bouv. Inst. n. 2193 ; 2 N. & M. 343.

PEDLARS. Persons who travel about the country with merchandise, for the purpose of selling it. They are obliged under the laws of perhaps all the states to take out licenses, and to conform to the regulations which those laws establish.

PEER. Equal. A man's peers are his equals. A man is to be tried by his peers.

2. In England and some other countries, this is a title of nobility ; as, peers of the realm. In the United States, this equality is not so much political as civil. A man who is not a citizen, is nevertheless to be tried by citizens.

PEERESS. A noblewoman, the wife of a peer.

PEINE FORTE ET DURE, Eng. law. A punishment formerly inflicted in England, on a person who, being arraigned of felony, refused to plead and put himself on his trial, and stubbornly stood mute. He was to be laid down and as much weight was to be put upon him as he could bear, and more, until he died. This barbarous punishment has been abolished. *Vide Mute.*

PELT WOOL. The wool pulled off the skin or pelt of a dead ram.

PENAL. That which may be punished ; that which inflicts a punishment.

PENAL STATUTES. Those which inflict a penalty for the violation of some of their provisions.

2. It is a rule of law that such statutes must be construed strictly. 1 Bl. Com. 88 ; Esp. on Pen. Actions, 1 ; Bosc. on Conv. ; Cro. Jac. 415 ; 1 Com. Dig. 444 ; 5 Com. Dig. 360 ; 1 Kent, Com. 467. They cannot, therefore, be extended by their spirit or equity to other offences than those clearly described and provided for. Paine, R. 82 ; 6 Cranch, 171.

PENALTY, contr. A clause in an agreement, by which the obligor agrees to pay a certain sum of money, if he shall fail to fulfil the contract contained in another clause of the same agreement.

2. A penal clause in an agreement supposes two obligations, one of which is the primitive or principal ; and the other, is conditional or accessory.

3. The penal obligation differs from an

alternative obligation, for this is but one in its essence ; while a penalty always includes two distinct engagements, and, when the first is fulfilled, the second is void. When a breach has taken place, the obligee has his option to require the fulfilment of the first obligation, or the payment of the penalty, in those cases which cannot be relieved in equity, when the penalty is considered as liquidated damages. Dalloz, Dict. mots Obligation avec clause pénale.

4. It is difficult, in many cases, to distinguish between a penalty and liquidated damages. In general, the courts have inclined to consider the sum reserved by such agreement to be a penalty, rather than as stipulated damages. (q. v.)

5. The sum will be considered as a penalty, and not as liquidated damages, in the following cases : 1. When the parties to the agreement have expressly declared the sum to be a penalty, and no other intent is to be collected from the instrument. 2 Bos. & P. 346 ; 1 H. Bl. 227 ; 1 Pick. 451 ; 4 Pick. 179 ; 7 Wheat. 14 ; 3 John. Cases, 297. 2. When from the form of the instrument, as in the case of a money bond, it is sufficiently clear a penalty was intended. 3. When it is doubtful whether the sum was intended as a penalty or not, and a certain damage or debt is made payable on the face of the instrument. 2 B. & P. 350 ; 3 C. & P. 240. 4. When the agreement was evidently made for the attainment of another object, to which the sum specified is wholly collateral. 11 Mass. 76 ; 15 Mass. 488 ; 1 Bro. C. C. 418, 419. 5. When the agreement contains several matters, of different degrees of importance, and yet the sum mentioned is payable for the breach of any, even the least. 6 Bing. 141 ; 5 Bing. N. C. 390 ; 7 Scott, 364. 6. When the contract is not under seal, and the damages may be ascertained and estimated ; and this though the parties have expressly declared the sum to be as liquidated damages. 2 B. & Ald. 704 ; 6 B. & C. 216 ; 4 Dall. 150 ; 5 Cowen, 144. See 2 Greenl. Ev. § 258. 1 Holt N. P. C. 43 ; 1 Bing. R. 302 ; S. C. 8 Moore, 244 ; 4 Burr. 2229.

6. The penalty remains unaffected, although the condition may have been partially performed ; as in a case where the penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars, which had been paid for ten years ; the penalty was still valid. 5 Verm. 355.

7. A distinction seems to be made in

courts of equity between penalties and forfeitures. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation. *Edin. on Inj.* 22; 16 *Ves.* 403; 8 *C.* 18 *Ves.* 58; 3 *Ves.* 692; 4 *Bouv. Inst. n.* 3915.

8. By penalty is understood, also, the punishment inflicted by law for its violation; the term is mostly applied to a pecuniary punishment. See 6 *Pet.* 404; 10 *Wheat.* 246; 1 *Gall. R.* 26; 2 *Gall. R.* 515; 1 *Mason, R.* 243; 3 *John. Cas.* 297; 1 *Pick. R.* 451; 15 *Mass.* 488; 7 *John.* 72; 4 *Mass.* 433; 8 *Mass.* 223; 8 *Com. Dig.* 846; 16 *Vin. Ab.* 301; 1 *Vern.* 83, n.; 1 *Saund.* 58, n.; 1 *Swans.* 318; 1 *Wash. C. C. R.* 1; 2 *Wash. C. C. R.* 323; *Paine, C. C. R.* 661; 7 *Wheat.* 13. See, generally, *Bouv. Inst. Index, h. t.*

PENANCE, *eccl. law.* An ecclesiastical punishment, inflicted by an ecclesiastical court, for some spiritual offence. *Ayl. Par.* 420.

PENCIL. An instrument made of plumbago, black lead, red chalk, or other suitable substance, for writing without ink.

2. It has been helden that a will written with a pencil, could not, on this account, be annulled. 1 *Phillim. R.* 1; 2 *Phillim.* 173.

PENDENTE LITE. Pending the continuance of an action, while litigation continues.

2. An administrator is appointed, pendente lite, when a will is contested. 2 *Bouv. Inst. n.* 1557. Vide *Administrator.*

PENDENTES, *civil law.* The fruits of the earth not yet separated from the ground; the fruits hanging by the roots. *Ersk. Inst. B. 2, Lit. 2, s. 4.*

PENETRATION, *crimes.* The act of inserting the penis into the female organs of generation. 9 *Car. & Payne*, 118; 8 *C.* 38 *E. C. L. R.* 63. See 8 *Car. & Payne*, 614; 34 *E. C. L. R.* 562; 5 *C. & P.* 321; 8 *C.* 24 *E. C. L. R.* 339; 9 *C. & P.* 31; *Id.* 752; 88 *E. C. L. R.* 320. But in order to commit the crime of rape, it is requisite that the penetration should be such as to rupture the hymen. 5 *C. & P.* 321.

2. This has been denied to be sufficient to constitute a rape without omission. (q. v.) See, on this subject, 12 *Co.* 37; *Hawk. bk.*

1, c. 41, s. 3; 1 *Hale, P. C.* 628; 1 *East, P. C.* 437, 8; *Russ. & Ry. C. C.* 519; 6 *C. & P.* 351; 5 *C. & P.* 297, 321; 8 *C.* 24 *E. C. L. R.* 339; 1 *Chit. Med. Jur.* 386 to 395; 1 *Virg. Cas.* 307; 4 *Mood. Cr. Cas.* 142, 337; 4 *Car. & P.* 249; 1 *Par. & Fonbl.* 433; 2 *Mood. & M. C. N. P.* 122; 1 *Russ. C. & M.* 560; 1 *East, P. C.* 437.

PENITENTIARY. A prison for the punishment of convicts.

2. There are two systems of penitentiaries in the United States, each of which is claimed to be the best by its partizans: the Pennsylvania system and the New York system. By the former, convicts are lodged in separate, well lighted, and well ventilated cells, where they are required to work, during stated hours. During the whole time of their confinement, they are never permitted to see or speak with each other. Their usual employments are shoemaking, weaving, winding yarn, picking wool, and such like business. The only punishments to which convicts are subject, are the privation of food for short periods, and confinement *without labor* in dark, but well aired cells; this discipline has been found sufficient to keep perfect order; the whip and all other corporal punishments are prohibited. The advantages of the plan are numerous. Men cannot long remain in solitude without labor; convicts, when deprived of it, ask it as a favor, and in order to retain it, use, generally, their best exertions to do their work well; being entirely secluded, they are of course unknown to their fellow prisoners, and can form no combination to escape while in prison, or associations to prey upon society when they are out; being treated with kindness, and afforded books for their instruction and amusement, they become satisfied that society does not make war upon them, and more disposed to return to it, which they are not prevented from doing by the exposure of their fellow prisoners, when in a strange place; the labor of the convicts tends greatly to defray the expenses of the prison. The disadvantages which were anticipated have been found to be groundless. Among these were, that the prisoners would be unhealthy; experience has proved the contrary; that they would become insane, this has also been found to be otherwise; that solitude is incompatible with the performance of business; that obedience to the discipline of the prison could not be enforced. These and

all other objections to this system are, by its friends, believed to be without force.

3. The New York system, adopted at Auburn, which was probably copied from the penitentiary at Ghent, in the Netherlands, called *La Maison de Force*, is founded on the system of isolation and separation, as well as that of Pennsylvania, but with this difference, that in the former the prisoners are confined to their separate cells during the night only; during the working hours in the day time they labor together in work shops appropriated to their use. They eat their meals together, but in such a manner as not to be able to speak with each other. Silence is also imposed upon them at their labor. They perform the labor of carpenters, blacksmiths, weavers, shoemakers, tailors, coopers, gardeners, wood sawyers, &c. The discipline of the prison is enforced by stripes, inflicted by the assistant keepers, on the backs of the prisoners, though this punishment is rarely exercised. The advantages of this plan are, that the convicts are in solitary confinement during the night; that their labor, by being joint, is more productive; that, inasmuch as a clergyman is employed to preach to the prisoners, the system affords an opportunity for mental and moral improvements. Among the objections made to it are, that the prisoners have opportunities of communicating with each other, and of forming plans of escape, and when they are out of prison, of associating together in consequence of their previous acquaintance, to the detriment of those who wish to return to virtue, and to the danger of the public; that the discipline is degrading, and that it engenders bitter resentment in the mind of the convict.

Vide, generally, on the subject of penitentiaries, Report of the Commissioners, (Messrs. King, Shaler, and Wharton,) on the Penal Code of Pennsylvania; De Beaumont and De Toqueville, on the Penitentiary System of the United States; Mease on the Penitentiary System of Pennsylvania; Carey on ditto; Reports of the Boston Prison Discipline Society; Livingston's excellent Introductory Report to the Code of Reform and Prison Discipline, prepared for the state of Louisiana; Encyclop. Americ. art. Prison Discipline; De l'Etat actuel des Prisons en France, par L. M. Moreau Christophe; Dalloz, Dict. mot Peine, § 1, n. 3, and Supplem. mots Prisons et Bagnes.

PENNSYLVANIA. The name of one of the original states of the United States

of America. Pennsylvania was occupied by planters of various nations, Dutch, Swedes, English, and others; but obtained no separate name until the year 1681, when Charles II. granted a charter to William Penn, by which he became its proprietary, saving, however, allegiance to the crown, which retained the sovereignty of the country. This charter authorized the proprietary, his heirs and successors, by and with the assent of the freemen of the country, or their deputies assembled for the purpose, to make laws. Their laws were required to be consonant to reason, and not repugnant or contrary, but as near as conveniently could be to the laws and statutes of England. Pennsylvania was governed by this charter till the period of the Revolution.

2. The constitution of the state was adopted on the second day of September, 1790, and amended by a convention selected by the people, on the twenty-second day of February, 1838. The powers of the government are divided into three distinct branches: the legislative, the executive and the judiciary.

3.—1st. The *legislative* power is vested in a general assembly, which consists of a senate and house of representatives.

4.—1. The *senate* will be considered with reference to the qualification of the electors; the qualification of the members; the length of time for which they are elected; and the time of their election. 1. In elections by the citizens, every white freeman of the age of twenty-one years having resided in this state one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this state and removed therefrom and returned, and who shall have resided in the election district and paid taxes as aforesaid, shall be entitled to vote after residing in the state six months: *Provided*, that white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the state one year, and in the election district ten days as aforesaid, shall be entitled to vote although they shall not have paid taxes. Art. 3, s. 1. 2. No person shall be a senator who

shall not have attained the age of twenty-five years, and have been a citizen and inhabitant of the state four years next before his election, and the last year thereof an inhabitant of the district for which he shall be chosen, unless he shall have been absent on the public business of the United States or of this state; and no person elected as aforesaid, shall hold the said office after he shall have removed from such district. Art. 1, s. 8. 3. The number of senators shall never be less than one-fourth, nor greater than one-third of the number of representatives. Art. 1, s. 6. 4. The senators hold their office for three years. 5. Their election takes place on the second Tuesday of October, one-third of the senate each year.

5.—2. The *house of representatives* will be treated of in the same manner which has been observed in considering the senate. 1. The electors are qualified in the same manner as the electors of the senate. 2. No person shall be a representative who shall not have attained the age of twenty-one years, and have been a citizen and inhabitant of the state three years next preceding his election, and the last year thereof an inhabitant of the district in and for which he shall be chosen a representative, unless he shall have been absent on the public business of the United States or of this state. Art. 1, s. 3. 3. The number of representatives shall never be less than sixty, nor greater than one hundred. Art. 1, s. 4. 4. They are elected yearly. 5. Their election is on the second Tuesday of October, yearly.

6.—2d. The *supreme executive* power of this commonwealth is vested in a governor. 1. He is elected by the electors of the legislature. 2. He must be at least thirty years of age, and have been a citizen and an inhabitant of the state seven years next before his election, unless he shall have been absent on the public business of the United States or of this state. Art. 2, s. 4. 3. The governor shall hold his office during three years from the third Tuesday of January next ensuing his election, and shall not be capable of holding it longer than six in any term of nine years. Art. 2, s. 3. 4. His principal duties are enumerated in the second article of the constitution, as follows: The governor shall at stated times receive for his services a compensation which shall be neither increased or diminished during the period for which he shall

have been elected. He shall be commander-in-chief of the army and navy of this commonwealth, and of the militia, except when they shall be called into the actual service of the United States. He shall appoint a secretary of the commonwealth during pleasure; and he shall nominate, and by and with the advice and consent of the senate appoint, all judicial officers of courts of record, unless otherwise provided for in this constitution. He shall have power to fill all vacancies that may happen in such judicial offices during the recess of the senate, by granting commissions which shall expire at the end of their next session: Provided, that in acting on executive nominations the senate shall sit with open doors, and in confirming or rejecting the nominations of the governor, the vote shall be taken by yeas and nays. He shall have power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment. He may require information in writing from the officers in the executive department, upon any subject relating to the duties of their respective offices. He shall, from time to time, give to the general assembly information of the state of the commonwealth, and recommend to their consideration such measures as he shall judge expedient. He may, on extraordinary occasions, convene the general assembly; and, in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months. He shall take care that the laws be faithfully executed. In case of the death or resignation of the governor, or of his removal from office, the speaker of the senate shall exercise the office of governor until another governor shall be duly qualified; but in such case another governor shall be chosen at the next annual election of representatives, unless such death, resignation or removal shall occur within three calendar months, immediately preceding such next annual election, in which case a governor shall be chosen at the second succeeding annual election of representatives. And if the trial of a contested election shall continue longer than until the third Monday of January next ensuing the election of governor, the governor of the last year, or the speaker of the senate who may be in the exercise of the executive authority, shall continue therein until the determination of such con-

tested election, and until a governor shall be duly qualified as aforesaid.

7.—§ 3d. The *judicial* power of the commonwealth is vested by the fifth article of the constitution as follows :

§ 1. The judicial power of this commonwealth shall be vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' court, register's court, and a court of quarter sessions of the peace, for each county ; in justices of the peace, and in such other courts as the legislature may from time to time establish.

8.—§ 2. By an amendment to this constitution, the judges of the supreme court, of the several courts of common pleas, and of such other courts of record as are or shall be established by law, shall be elected by the qualified electors, as provided by act of April 15, 1851. Pam. Laws, 648. The judges of the supreme court shall hold their offices for the term of fifteen years if they shall so long behave themselves well. The president judges of the several courts of common pleas and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, shall hold their offices for the term of ten years if they shall so long behave themselves well. The associate judges of the courts of common pleas shall hold their offices for the term of five years if they shall so long behave themselves well. But for any reasonable cause which shall not be sufficient ground of impeachment, the governor may remove any of them on the address of two-thirds of each branch of the legislature. The judges of the supreme court and the presidents of the several courts of common pleas, shall at stated times receive for their services an adequate compensation to be fixed by law, which shall not be diminished during their continuance in office, but they shall receive no fees or perquisites of office, nor hold any other office of profit under this commonwealth.

9.—§ 3. Until otherwise directed by law, the courts of common pleas shall continue as at present established. Not more than five counties shall at any time be included in one judicial district organized for said courts.

10.—§ 4. The jurisdiction of the supreme court shall extend over the state ; and the judges thereof shall, by virtue of their offices be justices of oyer and termi-

ner and general jail delivery, in the several counties.

11.—§ 5. The judges of the court of common pleas, in each county, shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery, for the trial of capital and other offenders therein ; any two of the said judges, the president being one, shall be a quorum ; but they shall not hold a court of oyer and terminer, or jail delivery, in any county, when the judges of the supreme court, or any of them, shall be sitting in the same county. The party accused, as well as the commonwealth, may, under such regulations as shall be prescribed by law, remove the indictment and proceedings, or a transcript thereof, into the supreme court.

12.—§ 6. The supreme court, and the several courts of common pleas, shall, besides the powers heretofore usually exercised by them, have the power of a court of chancery, so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the state, and the care of the persons and estates of those who are non compotes mentis. And the legislature shall vest in the said courts such other powers to grant relief in equity, as shall be found necessary ; and may, from time to time, enlarge or diminish those powers, or vest them in such other courts as they shall judge proper for the due administration of justice.

13.—§ 7. The judges of the court of common pleas of each county, any two of whom shall be a quorum, shall compose the court of quarter sessions of the peace, and orphans' court thereof : and the register of wills, together with the said judges, or any two of them, shall compose the register's court of each county.

14.—§ 8. The judges of the courts of common pleas shall, within their respective counties, have the like powers with the judges of the supreme court, to issue writs of certiorari to the justices of the peace, and to cause their proceedings to be brought before them, and the like right and justice to be done.

15.—§ 9. The president of the court in each circuit within such circuit, and the judges of the court of common pleas within their respective counties, shall be justices of the peace, so far as relates to criminal matters.

16.—§ 10. A register's office, for the probate of wills and granting letters of ad-

ministration, and an office for the recording of deeds, shall be kept in each county.

17.—§ 11. The style of all process shall be "The commonwealth of Pennsylvania." All prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude, "against the peace and dignity of the same."

PENNY. The name of an English coin, of the value of one-twelfth part of a shilling. While the United States were colonies, each adopted a monetary system composed of pounds, shillings, and pence. The penny varied in value in the different colonies.

PENNYWEIGHT. A troy weight which weighs twenty-four grains, or one-twentieth part of an ounce. Vide *Weights*.

PENSION. A stated and certain allowance granted by the government to an individual, or those who represent him, for valuable services performed by him for the country. The government of the United States has, by general laws, granted pensions to revolutionary soldiers; vide 1 Story's Laws U. S. 68, 101, 224, 304, 363, 871, 451; 2 Id. 903, 915, 983, 1008, 1240; 3 Id. 1662, 1747, 1778, 1794, 1825, 1927; 4 Id. 2112, 2270, 2329, 2336, 2366; to naval officers and sailors; 1 Stor. L. U. S. 474, 677, 769; 2 Id. 1284; 3 Id. 1565; to the army generally; 1 Id. 360, 412, 448; 2 Id. 833; 3 Id. 1573; to the militia generally; 1 Id. 255, 360, 412, 488; 2 Id. 1382; 3 Id. 1873; in the Seminole war. 3 Id. 1706.

PENSIONER. One who is supported by an allowance at the will of another. It is more usually applied to him who receives an annuity or pension from the government.

PEONIA, Spanish law. A portion of land which was formerly given to a simple soldier, on the conquest of a country. It is now a quantity of land, of different size in different provinces. In the Spanish possessions in America, it measured fifty feet front and one hundred feet deep. 2 White's Coll. 49; 12 Pet. 444, notes.

PEOPLE. A state; as, the people of the state of New York; a nation in its collective and political capacity. 4 T. R. 783. See 6 Pet. S. C. Rep. 467.

2. The word people occurs in a policy of insurance. The insurer insures against "detaiments of all kings, princes and people." He is not by this understood to insure against any promiscuous or lawless rabble which may be guilty of attacking or

detaining a ship. 2 Marsh. Ins. 508. Vide *Body politic; Nation*.

PER. By. When a writ of entry is sued out against the alienee, or descendant of the original disseisor, it is then said to be brought in the *per*, because the writ states that the tenant had not the entry but *by* the original wrong doer. 3 Bl. Com. 181. See *Entry, writ of*.

PER CAPITA, by the head or polls. This term is applied when an estate is to be divided share and share alike. For example, if a legacy be given to the issue of A B, and A B at the time of his death, shall have two children and two grandchildren, his estate shall be divided into four parts, and the children and grandchildren shall each have one of them. 3 Ves. 257; 13 Ves. 344. Vide 1 Rop. on Leg. 126, 130.

PER AND CUI. When a writ of entry is brought against a second alienee or descendant from the disseisor, it is said to be in the *per* and *cui*, because the form of the writ is that the tenant had not entry but *by* and *under* a prior alienee, to whom the intruder himself demised it. 2 Bl. Com. 181. See *Entry, writ of*.

PER FRAUDEM. A replication to a plea where something has been pleaded which would be a discharge, if it had been honestly pleaded, that such a thing has been obtained by fraud; for example, where on debt on a statute, the defendant pleads a prior action depending, if such action has been commenced by fraud the plaintiff may reply *per fraudem*. 2 Chit. Pl. *675.

PER INFORTUNUM, criminal law. Homicide *per infortunium*, or by misadventure, is said to take place when a man in doing a lawful act, without any intent to hurt, unfortunately kills another. Hawk. bk. 1, c. 11; Foster, 258, 259; 3 Inst. 56.

PER MINAS. By threats. When a man is compelled to enter into a contract by threats or menaces, either for fear of loss of life, or mayhem, he may avoid it afterwards. 1 Bl. Com. 131; Bac. Ab. Duress; Id. Murder A. See *Duress*.

PER MY ET PER TOUT. By every part or parcel and by the whole. A joint tenant of lands is said to be seised *per my et per tout*. Litt. s. 288. See 7 Mann. & Gr. 172, note c.

PER QUOD, pleading. By which; whereby.

2. When the plaintiff sues for an injury to his relative rights, as for beating his wife, his child, or his servant, it is usual to lay the injury with a *per quod*. In such

case, after complaining of the injury, say to the wife, the declaration proceeds, "inasmuch that the said E F, (the wife,) by means of the premises, then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto, *whereby* he, the said A B, (the plaintiff,) lost," &c. 2 Chit. Pl. 422; 3 Bl. Com. 140. It seems that the *per quod* is not traversable. 1 Saund. 298; 1 Ld. Raym. 410; 2 Keb. 607; 1 Saund. 23, note 5.

PER STIRPES. By stock; by roots.

2. When, for example, a man dies intestate, leaving children and grandchildren, whose parents are deceased, the estate is to be divided not *per capita*, that is, by each of the children and grandchildren taking a share, but *per stirpes*, by each of the children taking a share, and the grandchildren, the children of a deceased child, taking a share to be afterwards divided among themselves *per capita*.

PERAMBULATIONE FACIENDA, WRIT DE, Eng. law. The name of a writ which is sued by consent of *both* parties, when they are in doubt as to the bounds of their respective estates; it is directed to the sheriff to make perambulation, and to set the bounds and limits between them in certainty. F. N. B. 309.

2. "The writ *de perambulatione faciendâ* is not known to have been adopted in practice in the United States," says Professor Greenleaf, Ev. § 146 note, "but in several of the states, remedies somewhat similar in principle have been provided by statutes."

PERCH, measure. The length of sixteen feet and a half: a pole or rod of that length. Forty perches in length and four in breadth make an acre of land.

PERDONATIO UTLAGARLÆ, Eng. law. A pardon for a man who, for contempt in not yielding obedience to the process of the king's courts, is outlawed, and afterwards, of his own accord, surrenders.

PEREGRINI, civil law. Under the denomination of peregrini were comprehended all who did not enjoy any capacity of the law, namely, slaves, alien enemies, and such foreigners as belonged to nations with which the Romans had not established relations. Sav. Dr. Rom. § 66.

PEREMPTORY. Absolute; positive. A final determination to act without hope of renewing or altering. Joined to a substantive, this word is frequently used in law; as peremptory action; F. N. B. 35, 38, 104,

108; peremptory nonsuit; Id. 5, 11; peremptory exception; Bract. lib. 4, c. 20; peremptory undertaking; 3 Chit. Pract. 112, 793; peremptory challenge of jurors, which is the right to challenge without assigning any cause. Inst. 4, 13, 9; Code, 7, 50, 2; Id. 8, 36, 8; Dig. 5, 1, 70 et 73.

PEREMPTORY DEFENCE, equity, pleading. A defence which insists that the plaintiff never had the right to institute the suit, or that if he had, the original right is extinguished or determined. 4 Bouv. Inst. n. 4206.

PEREMPTORY PLEA, pleading. A plea which denies the plaintiff's cause of action. 3 Bouv. Inst. n. 2891. Vide *Plea*.

PERFECT. Something complete.

2. This term is applied to obligations in order to distinguish those which may be enforced by law, which are called *perfect*, from those which cannot be so enforced, which are said to be *imperfect*. Vide *Imperfect*; *Obligations*.

PERFIDY. The act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. Wolff, § 390.

PERFORMANCE. The act of doing something; the thing done is also called a performance; as, Paul is exonerated from the obligation of his contract by its performance.

2. When a contract has been made by parol, which, under the statute of frauds and perjuries, could not be enforced, because it was not in writing, and the party seeking to avoid it, has received the whole or a part performance of such agreement, he cannot afterwards avoid it; 14 John. 15; S. C. 1 John. Ch. R. 273; and such part performance will enable the other party to prove it aliunde. 1 Pet. C. C. R. 380; 1 Rand. R. 165; 1 Blackf. R. 58; 2 Day, R. 255; 1 Desaus. R. 350; 5 Day, R. 67; 1 Binn. R. 218; 3 Paige, R. 545; 1 John. Ch. R. 131, 146. Vide *Specific performance*.

PERIL. The accident by which a thing is lost. Leg. Dr. Rom. § 911.

PERILS OF THE SEA, contracts. Bills of lading generally contain an exception that the carrier shall not be liable for "perils of the sea." What is the precise import of this phrase is not perhaps very exactly settled. In a strict sense, the words perils of the sea, denote the natural accidents peculiar to the sea; but in more than one instance they have been held to extend to events not attributable to natural

causes. For instance, they have been held to include a capture by pirates on the high sea; and a case of loss by collision by two ships, where no blame is imputable to either, or at all events not to the injured ship. Abbott on Sh. P. 3, c. 4, § 1, 2, 3, 4, 5, 6; Park. Ins. c. 3; Marsh. Ins. B. 1, c. 7, p. 214; 1 Bell's Comm. 579; 3 Kent's Comm. 251, n. (a); 3 Esp. R. 67.

2. It has indeed been said, that by perils of the sea are properly meant no other than inevitable perils or accidents upon the sea, and, that by such perils or accidents common carriers are, *prima facie*, excused, whether there be a bill of lading containing the expression of "peril of the sea," or not. 1 Conn. Rep. 487.

3. It seems that the phrase *perils of the sea*, on the western waters of the United States, signifies and includes *perils of the river*. 3 Stew. & Port. 176.

4. If the law be so, then the decisions upon the meaning of these words become important in a practical view in all cases of maritime or water carriage.

5. It seems that a loss occasioned by leakage, which is caused by rats gnawing a hole in the bottom of the vessel, is not, in the English law, deemed a loss by peril of the sea, or by inevitable casualty. 1 Wils. R. 281; 4 Campb. R. 203. But if the master had used all reasonable precautions to prevent such loss, as by having a cat on board, it seems agreed, it would be a peril of the sea, or inevitable accident. Abbott on Shipp. p. 3, c. 3, § 9; but see 3 Kent's Comm. 243, and note c. In conformity to this rule, the destruction of goods at sea by rats has, in Pennsylvania, been held a peril of the sea, where there has been no default in the carrier. 1 Binn. 592. But see 6 Cowen, R. 266, and 3 Kent's Com. 248, n. c. On the other hand, the destruction of a ship's bottom by worms in the course of a voyage, has, both in America and England, been deemed not to be a peril of the sea, upon the ground, it would seem, that it is a loss by ordinary wear and decay. Park. on Ins. c. 3; 1 Esp. R. 444; 2 Mass. R. 429; but see 2 Cain. R. 85. See generally, *Act of God; Fortuitous Event*; Marsh. Ins. ch. 7; and ch. 12, § 1; Hildy on Mar. Ins. 270.

PERIPHRAISIS. Circumlocution; the use of other words to express the sense of one.

2. Some words are so technical in their meaning that in charging offences in indict-

ments they must be used or the indictment will not be sustained; for example, an indictment for treason must contain the word *traitorously*; (q. v.) an indictment for burglary, *burglariously*; (q. v.) and *feloniously* (q. v.) must be introduced into every indictment for felony. 1 Chitty's Cr. Law, 242; 3 Inst. 15; Carth. 319; 2 Hale, P. C. 172; 184; 4 Bl. Com. 307; Hawk. B. 2, c. 25, s. 55; 1 East P. C. 115; Bac. Ab. Indictment, G 1; Com. Dig. Indictment, G 6; Cro. C. C. 37.

TO PERISH. To come to an end; to cease to be; to die.

2. What has never existed cannot be said to have perished.

3. When two or more persons die by the same accident, as a shipwreck, no presumption arises that one perished before the other. Vide *Death; Survivorship*.

PERISHABLE GOODS. Goods which are lessened in value and become worse by being kept. Vide *Bona Peritura*.

PERJURY, *crim. law*. This offence at common law is defined to be a wilful false oath, by one who being lawfully required to depose the truth in any judicial proceedings, swears absolutely in a matter material to the point in question, whether he be believed or not.

2. If we analyze this definition we will find, 1st. That the oath must be wilful. 2d. That it must be false. 3d. That the party was lawfully sworn. 4th. That the proceeding was judicial. 5th. That the assertion was absolute. 6th. That the falsehood was material to the point in question.

3.—1. *The intention must be wilful*. The oath must be taken and the falsehood asserted with deliberation, and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise or mistake of the import of the question, there was no corrupt motive; Hawk. B. 1, c. 69, s. 2; but one who swears wilfully and deliberately to a matter which he rashly believes, which is false, and which he had no probable cause for believing, is guilty of perjury. 6 Binn. R. 249. See 1 Baldw. 370; 1 Bailey, 50.

4.—2. *The oath must be false*. The party must believe that what he is swearing is fictitious; for, if intending to deceive, he asserts that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him. 3 Inst. 166; Hawk. B. 1, c. 69, s. 6.

5.—3. *The party must be lawfully sworn.* The person by whom the oath is administered must have competent authority to receive it; an oath, therefore, taken before a private person, or before an officer having no jurisdiction, will not amount to perjury. 3 Inst. 166; 1 Johns. R. 498; 9 Cowen, R. 30; 3 M'Cord, R. 308; 4 M'Cord, R. 165; 2 Russ. on Cr. 520; 3 Carr. & Payne, 419; S. C. 14 Eng. Com. Law Rep. 376; 2 Chitt. Cr. Law, 304; 4 Hawks, 182; 1 N. & M. 546; 3 M'Cord, 308; 2 Hayw. 56; 8 Pick. 453.

6.—4. *The proceedings must be judicial.* Proceedings before those who are in any way entrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose. 2 Chitt. Crim. C. 303; 2 Russ. on Cr. 518; Hawk. B. 1, c. 69, s. 3. Vide 3 Yeates, R. 414; 9 Pet. Rep. 238. Perjury cannot therefore be committed in a case of which the court had no jurisdiction. 4 Hawks, 182; 2 Hayw. 56; 3 M'Cord, 308; 8 Pick. 453; 1 N. & McC. 546.

7.—5. *The assertion must be absolute.* If a man, however, swears that he believes that to be true which he knows to be false, it will be perjury. 2 Russ. on Cr. 518; 3 Wils. 427; 2 Bl. Rep. 881; 1 Leach, 242; 6 Binn. Rep. 249; Lofft's Gilb. Ev. 662.

8.—6. *The oath must be material to the question depending.* Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to a legal perjury. 2 Russel on Cr. 521; 3 Inst. 167; 8 Ves. jun. 35; 2 Rolle, 41, 42, 369; 1 Hawk. B. 1, c. 69, s. 8; Bac. Ab. Perjury, A; 2 N. & M. 118; 2 Mis. R. 158. Nor can perjury be assigned upon the valuation under oath, of a jewel or other thing, the value of which consists in estimation. Sid. 146; 1 Keble, 510.

9. It is not within the plan of this work to cite all the statutes passed by the general government, or the several states on the subject of perjury. It is proper, however, here to transcribe a part of the 13th section of the act of congress of March 3, 1825, which provides as follows: "If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every per-

son, so offending, shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. And if any person or persons shall knowingly or willingly procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence."

10. In general it may be observed that a perjury is committed as well by making a false affirmation, as a false oath. Vide, generally, 16 Vin. Abr. 307; Bac. Abr. h. t.; Com. Dig. Justices of the Peace, B 102 to 106; 4 Bl. Com. 137 to 139; 3 Inst. 163 to 168; Hawk. B. 1, c. 69; Russ. on Cr. B. 5, c. 1; 2 Chitt. Cr. L. c. 9; Roscoe on Cr. Ev. h. t.; Burn's J. h. t.; Williams' J. h. t.

PERMANENT TRESPASSES. When trespasses of one and the same kind, are committed on several days, and are in their nature capable of renewal or continuation, and are actually renewed or continued from day to day, so that the particular injury, done on each particular day, cannot be distinguished from what was done on another day, these wrongs are called permanent trespasses. In declaring for such trespasses they may be laid with a *continuando*. 3 Bl. Com. 212; Bac. Ab. Trespass, B 2; Id. I 2; 1 Saund. 24, n. 1. Vide *Continuando*; *Trespass*.

PERMISSION. A license to do a thing; an authority to do an act which without such authority would have been unlawful. A permission differs from a law, it is a check upon the operations of the law.

2. Permissions are express or implied. 1. Express permissions derogate from something which before was forbidden, and may operate in favor of one or more persons, or for the performance of one or more acts, or for a longer or shorter time. 2. Implied, are those which arise from the fact that the law has not forbidden the act to be done.

3. But although permissions do not operate as laws, in respect of those persons in whose favor they are granted; yet they are laws as to others. See *License*.

PERMISSIVE. Allowed; that which

may be done; as permissive waste, which is the permitting real estate to go to waste; when a tenant is bound to repair he is punishable for permissive waste. 2 Bouv. Inst. n. 2400. See *Waste*.

PERMIT. A license or warrant to do something not forbidden by law; as, to land goods imported into the United States, after the duties have been paid or secured to be paid. Act of Cong. of 2d March, 1799, s. 49, cl. 2. See form of such a permit, Gord. Dig. Appendix, No. II. 46.

PERMUTATION, civil law. Exchange; barter.

2. This contract is formed by the consent of the parties, but delivery is indispensable; for, without it, it is a mere agreement. Dig. 31, 77, 4; Code, 4, 64, 8.

3. Permutation differs from sale in this, that in the former a delivery of the articles sold must be made, while in the latter it is unnecessary. It agrees with the contract of sale, however, in the following particulars: 1. That he to whom the delivery is made acquires the right or faculty of prescribing. Dig. 41, 3, 4, 17. 2. That the contracting parties are bound to guaranty to each other the title of the things delivered. Code, 4, 64, 1. 3. That they are bound to take back the things delivered, when they have latent defects which they have concealed. Dig. 21, 1, 63. See Aso & Man. Inst. B. 2, t. 16, c. 1; *Mutation; Transfer*.

PERNANCY. This word, which is derived from the French *prendre*, to take, signifies a taking or receiving.

PERNOR OF PROFITS. He who receives the profits of lands, &c. A *cestui que use*, who is legally entitled and actually does receive the profits, is the pernor of profits.

PERPETUAL. That which is to last without limitation as to time; as, a perpetual statute, which is one without limit as to time, although not expressed to be so.

PERPETUATING TESTIMONY. The act by which testimony is reduced to writing as prescribed by law, so that the same shall be read in evidence in some suit or legal proceedings to be thereafter instituted. The origin of this practice may be traced to the canon law cap. 5, *ut lite non contestata*, &c., *et ibi*. Bockmer, n. 4; 8 Toull. n. 22. Vide *Bill to perpetuate testimony*.

PERPETUITY, estates. Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives

in being, and twenty-one years beyond; and in case of a posthumous child, a few months more, allowing for the term of gestation; Randell on Perpetuities, 48; or it is such a limitation of property as renders it unalienable beyond the period allowed by law. Gilbert on Uses, by Sugden, 260, note.

2. Mr. Justice Powell, in *Scattergood v. Edge*, 12 Mod. 278, distinguished perpetuities into two sorts, absolute and qualified; meaning thereby, as it is apprehended, a distinction between a plain, direct and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate nevertheless, from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law. But this distinction would not now lead to a better understanding or explanation of the subject; for whether an estate be so limited that it cannot take effect, until a period too much protracted, or whether on a contingency which may happen within a moderate compass of time, it equally falls within the line of perpetuity and the limitation is therefore void; for it is not sufficient that an estate may vest within the time allowed, but the rule requires that it must. Randell on Perp. 49. Vide *Cruise*, Dig. tit. 32, c. 23; 1 Supp. to Ves. Jr. 406; 2 Ves. Jr. 357; 3 Saund. 388 h. note; Com. Dig. Chancery, 4 G 1; 3 Chan. Cas. 1; 2 Bouv. Inst. n. 1890.

PERQUISITES. In its most extensive sense, perquisites signifies anything gotten by industry, or purchased with money, different from that which descends from a father or ancestor. Bract. lib. 2, c. 30, n. 3; *et lib.* 4, c. 22. In a more limited sense it means something gained by a place or office beyond the regular salary or fee.

PERSON. This word is applied to men, women and children, who are called natural persons. In law, man and person are not exactly synonymous terms. Any human being is a man, whether he be a member of society or not, whatever may be the rank he holds, or whatever may be his age, sex, &c. A person is a man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes. 1 Bouv. Inst. n. 137.

2. It is also used to denote a corporation which is an artificial person. 1 Bl. Com. 123; 4 Bing. 669; S. C. 33 Eng. C. L.

R. 488; Wooddes. Lect. 116; Bac. Us. 57; 1 Mod. 164.

3. But when the word "persons" is spoken of in legislative acts, natural persons will be intended, unless something appear in the context to show that it applies to artificial persons. 1 Scam. R. 178.

4. Natural persons are divided into males, or men; and females or women. Men are capable of all kinds of engagements and functions, unless by reasons applying to particular individuals. Women cannot be appointed to any public office, nor perform any civil functions, except those which the law specially declares them capable of exercising. Civ. Code of Louis. art. 25.

5. They are also sometimes divided into free persons and slaves. Freemen are those who have preserved their natural liberty, that is to say, who have the right of doing what is not forbidden by the law. A slave is one who is in the power of a master to whom he belongs. Slaves are sometimes ranked not with persons but things. But sometimes they are considered as persons; for example, a negro is in contemplation of law a person, so as to be capable of committing a riot in conjunction with white men. 1 Bay, 358. Vide *Man*.

6. Persons are also divided into citizens, (q. v.) and aliens, (q. v.) when viewed with regard to their political rights. When they are considered in relation to their civil rights, they are living or civilly dead; vide *Civil Death*; outlaws; and infamous persons.

7. Persons are divided into legitimates and bastards, when examined as to their rights by birth.

8. When viewed in their domestic relations, they are divided into parents and children; husbands and wives; guardians and wards; and masters and servants.

9. For the derivation of the word person, as it is understood in law, see 1 Toull. n. 168; 1 Bouv. Inst. n. 1890, note.

PERSONABLE. Having the capacities of a person; for example, the defendant was judged *personable* to maintain this action. Old Nat. Brev. 142. This word is obsolete.

PERSONAL. Belonging to the person.

2. This adjective is frequently employed in connection with substantives, things, goods, chattels, actions, right, duties, and the like; as personal estate, put in opposi-

tion to real estate; personal actions, in contradistinction to real actions; personal rights are those which belong to the person; personal duties are those which are to be performed in person.

PERSONAL ACTIONS. Personal actions are those brought for the specific goods and chattels; or for damages or other redress for breach of contract or for injuries of every other description; the specific recovery of lands, tenements and hereditaments only excepted. Vide *Actions*, and 1 Com. Dig. 206, 450; 1 Vin. Ab. 197; 3 Bouv. Inst. n. 2641, et. seq.

PERSONAL LIBERTY. Vide *Liberty*.

PERSONAL PROPERTY. The right or interest which a man has in things personal; it consists of things temporary and movable, and includes all subjects of property not of a freehold nature, nor descendable to the heirs at law. Things of a movable nature, when a right can be had in them, are personal property, but some things movable are not the subject of property; as light and air. Under the term personal property, is also included some property which is in its nature immovable, distinguished by the name of chattels real, as an estate for years; and fixtures (q. v.) are sometimes classed among personal property. A crop growing in the ground is considered personal property so far as not to be considered an interest in land, under the statute of frauds. 11 East, 362; 1 Shepl. 337; 5 B. & C. 829; 10 Ad. & E. 753; 9 B. & C. 561; sed vide 9 B. & C. 561.

2. It is a general principle of American law, that stock held in corporations, is to be considered as personal property; Walk. Introd. 211; 4 Dane's Ab. 670; Sull. on Land Tit. 71; 1 Hill. Ab. 18; though it was held that such stock was real estate; 2 Conn. R. 567; but, this being found inconvenient, the law was changed by the legislature.

3. Property in personal chattels is either absolute or qualified; absolute, when the owner has a complete title and full dominion over it; qualified, when he has a temporary or special interest, liable to be totally divested on the happening of some particular event. 2 Kent, Com. 281.

4. Considered in relation to its use, personal property is either in possession, that is, in the actual enjoyment of the owner, or, in action, that is, not in his possession, but in the possession of another, and recoverable by action.

5. Title to personal property is acquired, 1st. By original acquisition by occupancy; as, by capture in war; by finding a lost thing. 2d. By original acquisition; by accession. 3d. By original acquisition, by intellectual labor; as, copyrights and patents for inventions. 4th. By transfer, which is by act of law. 1. By forfeiture. 2. By judgment. 3. By insolvency. 4. By intestacy. 5th. By transfer, by act of the party. 1. Gifts. 2. Sale. Vide, generally, 16 Vin. Ab. 335; 8 Com. Dig. 474; Id. 562; 1 Supp. to Ves. Jr. 49, 121, 160, 198, 255, 368, 9, 399, 412, 478; 2 Ibid. 10, 40, 129, 290, 291, 341; 1 Vern. 3, 170, 412; 2 Salk. 449; 2 Ves. Jr. 59, 336, 176, 261, 271, 683; 7 Ves. 453. See *Pew; Property; Real property*.

PERSONAL REPRESENTATIVES. These words are construed to mean the *executors* or *administrators* of the person deceased. 6 Mad. R. 159; 2 Mad. R. 155; 5 Ves. 402; 1 Madd. Ch. 108.

PERSONAL SECURITY. The legal and uninterrupted enjoyment by a man of his life, his body, his health and his reputation. 1 Bouv. Inst. n. 202.

PERSONALITY OF LAWS. Those laws which regulate the condition, state, or capacity of persons. The term is used in opposition to those laws which concern property, whether real or personal, and things. See *Story, Confl. of L. 23*; and *Reality of laws*.

PERSONALTY. An abstract of personal; as, the action is in the personalty, that is, it is brought against a person for a personal duty which he owes. It also signifies what belongs to the person; as, personal property.

TO PERSONATE, crim. law. The act of assuming the character of another without lawful authority, and, in such character, doing something to his prejudice, or to the prejudice of another, without his will or consent.

2. The bare fact of personating another for the purpose of fraud, is no more than a cheat or misdemeanor at common law, and punishable as such. 2 East, P. C. 1010; 2 Russ. on Cr. 479.

3. By the act of congress of the 30th April, 1790, s. 15, 1 Story's Laws U. S. 86, it is enacted, that "if any person shall acknowledge, or procure to be acknowledged in any court of the United States, any recognizance, bail or judgment, in the name or names of any other person or persons not

privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes. Provided nevertheless, that this act shall not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted, for any person or persons against whom any such judgment or judgments shall be had or given." Vide, generally, 2 John. Cas. 293; 16 Vin. Ab. 336; Com. Dig. Action on the case for a deceit, A 3.

TO PERSUADE, PERSUADING. To persuade is to induce to act: persuading is inducing others to act. Inst. 4, 6, 23; Dig. 11, 3, 1, 5.

2. In the act of the legislature which declared that "if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, &c. by *persuading* others to enlist for that purpose, &c., he shall be adjudged guilty of high treason;" the word *persuading*, thus used, means to succeed: and there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause. 1 Dall. R. 39; Carr. Crim. L. 237; 4 Car. & Payne, 369; S. C. 19 E. C. L. R. 425; 9 Car. & P. 79; and article *Administering*; vide 2 Lord Raym. 889. It may be fairly argued, however, that the attempt to persuade without success would be a misdemeanor. 1 Russ. on Cr. 44.

3. In England it has been decided, that to incite and procure a person to commit suicide, is not a crime for which the party could be tried. 9 C. & P. 79; 38 E. C. L. R. 42; M. C. C. 356. Vide *Attempt; Solicitation*.

PERSUASION. The act of influencing by expostulation or request. While the persuasion is confined within those limits which leave the mind free, it may be used to induce another to make his will, or even to make it in his own favor; but if such persuasion should so far operate on the mind of the testator, that he would be deprived of a perfectly free will, it would vitiate the instrument. 3 Serg. & Rawle, 269; 5 Serg. & Rawle, 207; 13 Serg. & Rawle, 323.

PERTINENT, evidence. Those facts which tend to prove the allegations of the party offering them, are called *pertinent*; those which have no such tendency are

called impertinent, 8 Toull. n. 22. By pertinent is also meant that which belongs. Willes, 319.

PERTURBATION. This is a technical word which signifies disturbance, or infringement of a right. It is usually applied to the disturbance of pews, or seats in a church. In the ecclesiastical courts actions for these disturbances are technically called "suits for perturbation of seat." 1 Phillim. 323. Vide *Pew*.

PESAGE, mer. law. In England a toll bearing this name is charged for weighing avoirdupois goods other than wool. 2 Chit. Com. Law. 16.

PETIT, sometimes corrupted into *petty*. A French word signifying little, small. It is frequently used, as petit larceny, petit jury, petit treason.

PETIT TREASON, English law. The killing of a master by his servant; a husband by his wife; a superior by a secular or religious man. In the United States this is like any other murder. See *High Treason; Treason*.

PETITION. An instrument of writing or printing containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong, or the grant of some favor, which the latter has the right to give.

2. By the constitution of the United States the right "to petition the government for a redress of grievances," is secured to the people. Amendm. Art. 1.

3. Petitions are frequently presented to the courts in order to bring some matters before them. It is a general rule, in such cases, that an affidavit should be made that the facts therein contained are true as far as known to the petitioner, and that those facts which he states as knowing from others he believes to be true.

PETITION OF RIGHT, Eng. law. When the crown is in possession, or any title is vested in it which is claimed by a subject, as no suit can be brought against the king, the subject is allowed to file in chancery a *petition of right* to the king.

2. This is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the king to do him right and justice; and, upon a due and lawful trial of the right, to make him restitution. It is called a petition of right, because the king is bound of right to answer it, and let

the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. The petition is presented to the king, who subscribes it, with these words, *sout droit fait al partie*, and thereupon it is delivered to the chancellor to be executed according to law. Coke's Entr. 419, 422 b; Mitf. Eq. Pl. 30, 31; Coop. Eq. Pl. 22, 23.

PETITORY. That which demands or petitions; that which has the quality of a prayer or petition; a right to demand.

2. A petitory suit or action, is understood to be one in which the mere title to property is to be enforced by means of a demand or petition, as distinguished from a possessory suit. 1 Kent, Com. 371.

3. In the Scotch law, petitory actions are so called, not because something is sought to be awarded by the judge, for in that sense all actions must be petitory, but because some demand is made upon the defender, in consequence either of the right of property or credit in the pursuer. Thus, actions for restitution of movables, actions of pounding, of forthcoming, and indeed all personal actions upon contracts, or quasi contracts, which the Romans called *condictiones*, are petitory. Ersk. Inst. b. 4, t. 1, n. 47.

PETTY AVERAGE. A contribution by the owners of the ship, freight and goods on board, for losses sustained by the ship and cargo, which consist of small charges. Vide *Average*.

PETTY BAG, Engl. law. An office in the court of chancery, appropriated for suits against attorneys and officers of the court; and for process and proceedings, by extent on statutes, recognizances, *ad quod damnum* and the like. T. de la Ley.

PETTIFOGGER. One who pretends to be a lawyer, but possessing neither knowledge, law, nor conscience.

PEW. A seat in a church separated from all others, with a convenient space to stand therein.

2. It is an incorporeal interest in the real property. And, although a man has the exclusive right to it, yet, it seems, he cannot maintain trespass against a person entering it; 1 T. R. 430; but case is the proper remedy. 3 B. & Ald. 361; 8 B. & C. 294; S. C. 15 Eng. C. L. R. 221.

3. The right to pews is limited and usufructuary, and does not interfere with the right of the parish or congregation to pull down and rebuild the church. 4 Ohio R.

541; 5 Cowen's R. 496; 17 Mass. R. 485; 1 Pick. R. 102; 3 Pick. R. 344; 6 S. & R. 508; 9 Wheat. R. 445; 9 Cranch, R. 52; 6 John. R. 41; 4 Johns. Ch. R. 596; 6 T. R. 396. Vide Pow. Mortgages, Index, h. t.; 2 Bl. Com. 429; 1 Chit. Pr. 208, 210; 1 Pow. Mort. 17 n.

4. In Connecticut and Maine, and in Massachusetts, (except in Boston,) pews are considered real estate: in Boston they are personal chattels. In New Hampshire they are personal property. 1 Smith's St. 145. The precise nature of such property does not appear to be well settled in New York. 15 Wend. R. 218; 16 Wend. R. 28; 5 Cowen's R. 494. See Rev. St. Mass. 413; Conn. L. 432; 10 Mass. R. 323; 17 Mass. 438; 7 Pick. R. 138; 4 N. H. Rep. 180; 4 Ohio R. 515; 4 Harr. & McHen. 279; Harr. Dig. Ecclesiastical Law. Vide *Perturbation of seat*; Best on Pres. 111; Crabb on R. P. § 481 to 497.

PHAROS. A light-house or beacon. It is derived from *Pharus*, a small island at the mouth of the Nile, on which was built a watch-tower.

PHYSICIAN. One lawfully engaged in the practice of medicine.

2. A physician in England cannot recover for fees, as his practice is altogether honorary. Peake C. N. P. 96, 123; 4 T. R. 317.

3. But in Pennsylvania, and perhaps in all the United States, he may recover for his services. 5 Serg. & Rawle, 416. The law implies, therefore, a contract on the part of a medical man, as well as those of other professions, to discharge their duty in a skilful and attentive manner; and the law will redress the party injured by their neglect or ignorance. 1 Saund. 312, a; 1 Ld. Raym. 213; 2 Wils. 359; 8 East, 348.

4. They are sometimes answerable criminally for *mala praxis*. (q. v.) 2 Russ. on Cr. 288; Ayl. Pand. 213; Com. Dig. h. t.; Vin. Ab. h. t.

PHYSIOLOGY, *med. jur.* The science which treats of the functions of animals; it is the science of life.

2. The legal practitioner who expects to rise to eminence, must acquire some acquaintance with physiology. This subject is intimately connected with gestation, birth, life and death. Vide 2 Chit. Pr. 42, n.

PIGNORATION, *civil law*. This word is used by Justinian in the title of the 52d

novel, and signifies not only a pledge of property, but an engagement of the person.

PICKPOCKET. A thief; one who in a crowd or in other places, steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny.

PIGNORATIVE CONTRACT, *civ. law*. A contract by which the owner of an estate engages it to another for a sum of money, and grants to him and his successors the right to enjoy it, until he shall be reimbursed, voluntarily, that sum of money. Poth. h. t.

PIGNORIS CAPIO, *Rom. civil law*. The name given to one of the *legis actiones* of the Roman law. It consisted chiefly in the taking of a pledge, and was in fact a mode of execution. It was confined to special cases determined by positive law or by custom, such as taxes, duties, rents, &c., and is comparable in some respects to distresses at common law. The proceeding took place in the presence of a prætor.

PIGNUS, *civil law*. This word signifies in English, pledge or pawn. (q. v.) It is derived, says Gaius, from *pugnum*, the fist, because what is delivered in pledge is delivered in hand. Dig. 50, 16, 238, 2. This is one of several instances of the failure of the Roman jurists, when they attempted etymological explanation of words. The elements of *pignus* (*pig*) is contained in the word *pa(n)g-o*, and its cognate forms. Smith's Dict. Gr. and Rom. Antiq. h. v.

PILLAGE. The taking by violence of private property by a victorious army from the citizens or subjects of the enemy. This, in modern times, is seldom allowed, and then, only when authorized by the commander or chief officer, at the place where the pillage is committed. The property thus violently taken in general belongs to the common soldiers. See Dall. Dict. Propriété, art. 3, § 5; Wolff, § 1201; and *Booty; Prize*.

PILLORY, *punishment*. A wooden machine in which the neck of the culprit is inserted.

2. This punishment has been superseded by the adoption of the penitentiary system in most of the states. Vide 1 Chit. Cr. Law, 797. The punishment of standing in the pillory, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 27, 1839, s. 5. See Barr. on the Stat. 48, note.

PILOT, *mer. law*. This word has two

meanings. It signifies, first, an officer serving on board of a ship during the course of a voyage, and having the charge of the helm and of the ship's route; and, secondly, an officer authorized by law, who is taken on board at a particular place, for the purpose of conducting a ship through a river, road or channel, or from or into port.

2. Pilots of the second description are established by legislative enactments at the principal seaports in this country, and have rights, and are bound to perform duties, agreeably to the provisions of the several laws establishing them.

3. Pilots have been established in all maritime countries. After due trial and experience of their qualifications, they are licensed to offer themselves as guides in difficult navigation; and they are usually, on the other hand, bound to obey the call of a ship-master to exercise their functions. Abbott on Ship. 180; 1 John R. 305; 4 Dall. 205; 2 New R. 82; 5 Rob. Adm. Rep. 308; 6 Rob. Adm. R. 316; Laws of Oler. art. 23; Molloy, B. 2, c. 9, s. 3 and 7; Wesk. Ins. 395; Act of Congress of 7th August, 1789, s. 4; Merl. Répert. h. t.; Pardessus, n. 637.

PILOTAGE, contracts. The compensation given to a pilot for conducting a vessel in or out of port. Poth. Des Avaries, n. 147.

2. Pilotage is a lien on the ship, when the contract has been made by the master or quasi master of the ship, or some other person lawfully authorized to make it; 1 Mason, R. 508; and the admiralty court has jurisdiction, when services have been performed at sea. Id.; 10 Wheat. 428; 6 Pet. 682; 10 Pet. 108; and see 1 Pet. Adm. Dec. 227.

PIN MONEY. Money allowed by a man to his wife to spend for her own personal comforts.

2. When pin money is given to, but not spent by the wife, on his death it belongs to his estate. 4 Vin. Ab. 133, tit. Baron and Feme, E. a. 8; 2 Eq. Cas. Ab. 156; 2 P. Wms. 341; 3 P. Wms. 353; 1 Ves. 267; 2 Ves. 190; 1 Madd. Ch. 489, 490.

3. In the French law the term *Epingles*, pins, is used to designate the present which is sometimes given by the purchaser of an immovable to the wife or daughters of the seller to induce them to consent to the sale. This present is not considered as a part of the consideration, but a purely voluntary gift. Diet. de Jur. mot *Epingles*.

4. In England it was once adjudged that
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a promise to a wife, by the purchaser, that if she would not hinder the bargain for the sale of the husband's lands, he would give her ten pounds, was valid, and might be enforced by an action of assumpsit, instituted by husband and wife. Roll. Ab. 21, 22.

5. It has been conjectured that the term *pin money*, has been applied to signify the provision for a married woman, because anciently there was a tax laid for providing the English queen with pins. Barringt. on the Stat. 181.

PINT. A liquid measure containing half a quart or the eighth part of a gallon.

PIPE, Eng. law. The name of a roll in the exchequer otherwise called the *Great Roll*. A measure containing two hogsheads; one hundred and twenty-six gallons is also called a pipe.

PIRACY, crim. law. A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. 5 Wheat. 153, 163; 3 Wheat. 610; 3 Wash. C. C. R. 209. This is the definition of this offence by the law of nations. 1 Kent, Com. 183. The word is derived from *neipa deceptio*, deceit or deception: or from *neipor* wandering up and down, and resting in no place, but coasting hither and thither to do mischief. Ridley's View, Part 2, c. 1, s. 3.

2. Congress may define and punish piracies and felonies on the high seas, and offences against the law of nations. Const. U. S. Art. 1, s. 7, n. 10; 5 Wheat. 184, 153, 76; 3 Wheat. 336. In pursuance of the authority thus given by the constitution, it was declared by the act of congress of April 30, 1790, s. 8, 1 Story's Laws U. S. 84, that murder or robbery committed on the high seas, or in any river, haven, or bay, out of the jurisdiction of any particular state, or any offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, should be adjudged to be piracy and felony, and punishable with death. It was further declared, that if any captain or mariner should piratically and feloniously run away with a vessel, or any goods or merchandise of the value of fifty dollars; or should yield up such vessel voluntarily to pirates; or if any seaman should forcibly endeavor to hinder his commander from defending the ship or goods committed to his trust, or should make revolt in the ship; every such offender should be adjudged a pirate and felon, and be punishable with

death. Accessories before the fact are punishable as the principal; those after the fact with fine and imprisonment.

3. By a subsequent act, passed March 3, 1819, 3 Story, 1739, made perpetual by the act of May 15, 1820, 1 Story, 1798, congress declared, that if any person upon the high seas, should commit the crime of piracy as defined by the law of nations, he should, on conviction, suffer death.

4. And again by the act of May 15, 1820, s. 3, 1 Story, 1798, congress declared that if any person should, upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person should be adjudged to be a pirate, and suffer death. And if any person engaged in any piratical cruise or enterprize, or being of the crew or ship's company of any piratical ship or vessel, should land from such ship or vessel, and, on shore, should commit robbery, such person should be adjudged a pirate and suffer death. Provided that the state in which the offence may have been committed should not be deprived of its jurisdiction over the same, when committed within the body of a county, and that the courts of the United States should have no jurisdiction to try such offenders, after conviction or acquittal, for the same offence, in a state court. The 4th and 5th sections of the last mentioned act declare persons engaged in the slave trade, or in forcibly detaining a free negro or mulatto and carrying him in any ship or vessel into slavery, piracy, punishable with death. Vide 1 Kent, Com. 183; Beaussant, Code Maritime, t. 1, p. 244; Dalloz, Dict. Supp. h. t.; Dougl. 613; Park's Ins. Index, h. t.; Bac. Ab. h. t.; 16 Vin. Ab. 346; Ayl. Pand. 42; 11 Wheat. R. 39; 1 Gall. R. 247; Id. 524; 3 W. C. C. R. 209, 240; 1 Pet. C. C. R. 118, 121.

PIRACY, torts. By piracy is understood the plagiarisms of a book, engraving or other work, for which a copyright has been taken out.

2. When a piracy has been made of such a work, an injunction will be granted. 5 Ves. 709; 4 Ves. 681; 12 Ves. 270. Vide *Copyright*.

PIRATE. A sea robber, who, to enrich himself by subtlety or open force, setteth upon merchants and others trading by sea,

despoiling them of their loading, and sometimes bereaving them of life and sinking their ships; Ridley's View of the Civ. and Ecc. Law, part 2, c. 1, s. 3; or more generally one guilty of the crime of piracy. Merl. Répert. h. t. See, for the etymology of this word, Bac. Ab. *Piracy*.

PIRATICALLY, pleadings. This is a technical word, essential to charge the crime of piracy in an indictment, which cannot be supplied by another word, or any circumlocution. Hawk. B. 1, c. 37, s. 15; 3 Inst. 112; 1 Chit. Cr. Law, *244.

PISCARY. The right of fishing in the waters of another. Bac. Ab. h. t.; 5 Com. Dig. 366. Vide *Fishery*.

PISTAREEN. A small Spanish coin. It is not a coin made current by the laws of the United States. 10 Pet. 618.

PIT, fossa. A hole dug in the earth, which was filled with water, and in which women thieves were drowned, instead of being hung. The punishment of the pit was formerly common in Scotland.

PLACE, pleading, evidence. A particular portion of space; locality.

2. In local actions, the plaintiff must lay his venue in the county in which the action arose. It is a general rule, that the place of every traversable fact, stated in the pleading, must be distinctly alleged; Com. Dig. Pleader, c. 20; Cro. Eliz. 78, 98; Lawes' Pl. 57; Bac. Ab. Venue, B; Co. Litt. 303 a; and some place must be alleged for every such fact; this is done by designating the city, town, village, parish or district, together with the county in which the fact is alleged to have occurred; and the place thus designated, is called the venue. (q. v.)

3. In transitory actions, the place laid in the declaration, need not be the place where the cause of action arose, unless when required by statute. In local actions, the plaintiff will be confined in his proof to the county laid in the declaration.

4. In criminal cases the facts must be laid and proved to have been committed within the jurisdiction of the court, or the defendant must be acquitted. 2 Hawk. c. 25, s. 84; Arch. Cr. Pl. 40, 95. Vide, generally, Gould on Pl. c. 3, 102-104; Arch. Civ. Pl. 366; Hamm. N. P. 462; 1 Saund. 347, n. 1; 2 Saund. 5 n.

PLACE OF BUSINESS. The place where a man usually transacts his affairs or business. When a man keeps a store, shop, counting room or office, independently and distinctly

from all other persons, that is deemed his place of business; and when he usually transacts his business at the counting house, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for such private purpose, as in an insurance office, an exchange room, a banking room, a post office, and the like, where persons generally resort, these will not be considered as the party's place of business, although he may occasionally or transiently transact business there. 2 Pet. R. 121; 10 John. 501; 11 John. 231; 1 Pet. S. C. R. 582; 16 Pick. 392.

2. It is a general rule that a notice of the non-acceptance or non-payment of a bill, or of the non-payment of a note, may be sent either to the domicile or place of business of the person to be affected by such notice, and the fact that one is in one town and the other in the other will make no difference, and the holder has his election to send to either. A notice to partners may be left at the place of business of the firm or of any one of the partners. Story on Pr. Notes, § 312.

PLACITUM. A plea. This word is *nomen generalissimum*, and refers to all the pleas in the case. 1 Saund. 388, n. 6; Skinn. 554; S. C. Carth. 334; Yelv. 65. By *placitum* is also understood the subdivisions in abridgments and other works, where the point decided in a case is set down, separately, and generally numbered. In citing, it is abbreviated as follows: Vin. Ab. Abatement, pl. 3.

2. *Placita*, is the style of the English courts at the beginning of the record of Nisi Prius; in this sense, *placita* are divided into pleas of the crown, and common pleas.

3. The word is used by continental writers to signify jurisdictions, judgments, or assemblies for discussing causes. It occurs frequently in the laws of the Longobards, in which there is a title *de his qui ad placitum venire coguntur*. The word, it has been suggested, is derived from the German *platz*, which signifies the same as *area facta*. See Const. Car. Mag. Cap. IX. Hincmar's Epist. 227 and 197. The common formula in most of the capitularies is "*Placuit atque convenit inter Francos et eorum proceres*," and hence, says Dupin, the laws themselves are often called *placita*. Dupin, *Notions sur le Droit*, p. 73.

PLAGIARISM. The act of appropriating the ideas and language of another, and passing them for one's own.

2. When this amounts to piracy the party who has been guilty of it will be enjoined, when the original author has a copyright. Vide *Copyright*; *Piracy*; *Quotation*; Pard. Dr. Com. n. 169.

PLAGIARIUS, *civil law*. He who fraudulently concealed a freeman or slave who belonged to another.

2. The offence itself was called *plagium*.

3. It differed from larceny or theft in this, that larceny always implies that the guilty party intended to make a profit, whereas the plagiarist did not intend to make any profit. Dig. 48, 15, 6; Code, 9, 20, 9 and 15.

PLAGIUM. Manstealing, kidnapping. This offence is the crimen plagii of the Romans. Alia. Pr. Cr. Law, 280, 281.

PLAINT, *Eng. law*. The exhibiting of any action, real or personal, in writing; the party making his plaint is called the plaintiff.

PLAINTIFF, *practice*. He who, in a personal action, seeks a remedy for an injury to his rights. Ham. on Parties, h. t.; 1 Chit. Pl. Index, h. t.; Chit. Pr. Index, h. t.; 1 Com. Dig. 36, 205, 308.

2. Plaintiffs are legal or equitable. The legal plaintiff is he in whom the legal title or cause of action is vested. The equitable plaintiff is he who, not having the legal title, yet, is in equity entitled to the thing sued for; for example, when a suit is brought by Benjamin Franklin for the use of Robert Morris, Benjamin Franklin is the legal, and Robert Morris the equitable plaintiff. This is the usual manner of bringing suit, when the cause of action is not assignable at law, but is so in equity. Vide Bouv. Inst. Index, h. t.; *Parties to Actions*.

PLAINTIFF IN ERROR. A party who sues out a writ of error, and this whether in the court below he was plaintiff or defendant.

PLAN. The delineation or design of a city, a house or houses, a garden, a vessel, &c. traced on paper or other substance, representing the position, and the relative proportions of the different parts.

2. When houses are built by one person agreeably to a plan, and one of them is sold to a person, with windows and doors in it, the owner of the others cannot shut up those windows, nor has his grantee any greater right. 1 Price, R. 27; 2 Ry. & Mo. 24; 1 Lev. 122; 2 Saund. 114, n. 4

1 M. & M. 396; 9 Bing. 305; 1 Leigh's N. P. 559. See 12 Mass. 159; Hamm. N. P. 202; 2 Hill. Ab. c. 12, n. 6 to 12; Com. Dig. Action on the case for a nuisance, A. See *Ancients Lights; Windows*.

PLANTATIONS. Colonies, (q. v.) dependencies. (q. v.) 1 Bl. Com. 107. In England this word, as it is used in St. 12, Car. II. c. 18, is never applied to any of the British dominions in Europe, but only to the colonies in the West Indies and America. 1 Marsh. Ins. B. 1, c. 3, § 2, page 64.

2. By plantation is also meant a farm.

PLAT. A map of a piece of land, in which are marked the courses and distances of the different lines, and the quantity of land it contains.

2. Such a plat may be given in evidence in ascertaining the position of the land, and what is included, and may serve to settle the figure of a survey, and correct mistakes. 5 Monr. 160. See 17 Mass. 211; 5 Greenl. 219; 7 Greenl. 61; 4 Wheat. 444; 14 Mass. 149.

PLEA, chancery practice. "A plea," says Lord Bacon, speaking of proceedings in courts of equity, "is a foreign matter to discharge or stay the suit." Ord. Chan. (ed. Beam.) p. 26. Lord Redesdale defines it to be "a special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred." Mitf. Tr. Ch. 177; see Coop. Eq. Pl. 223; Beames' Pl. Eq. 1. A plea is a special answer to a bill, and differs in this from an answer in the common form, as it demands the judgment of the court in the first instance, whether the matter urged by it does not debar the plaintiff from his title to that answer which the bill requires. 2 Sch. & Lef. 721.

2. Pleas are of three sorts: 1. To the jurisdiction of the court. 2. To the person of the plaintiff. 3. In bar of the plaintiff's suit. Blake's Ch. Pr. 112.

See, generally, Beames' Elem. of Pleas in Eq.; Mitf. Tr. Cha. ch. 2, s. 2, pt. 2; Coop. Eq. Pl. ch. 5; 2 Madd. Ch. Pr. 295 to 331; Blake's Ch. Pr. 112 to 114; Bouv. Inst. Index, h. t.

PLEA, practice. The defendant's answer by matter of *fact*, to the plaintiff's declaration.

2. It is distinguished from a demurrer, which opposes matter of *law* to the declaration. Steph. Pl. 62.

3. Pleas are divided into pleas dilatory

and peremptory; and this is the most general division to which they are subject.

4. Subordinate to this is another division; they are either to the jurisdiction of the court, in suspension of the action; in abatement of the writ; or, in bar of the action; the first three of which belong to the dilatory class, the last is of the peremptory kind. Steph. Pl. 63; 1 Chit. Pl. 425; Lawes, Pl. 36.

5. The law has prescribed and settled the order of pleading, which the defendant is to pursue, to wit:

1st. To the jurisdiction of the court.

2d. To the disability, &c. of the person.

1st. Of the plaintiff. 2d. Of the defendant.

3d. To the count or declaration.

4th. To the writ. 1st. To the form of the writ; first, Matter apparent on the face of it, secondly, Matter *dehors*. 2d. To the action of the writ.

5th. To the action itself in bar.

6. This is said to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former. Such is the English law. 1 Ch. Plead. 425. The rule is different with regard to the plea of jurisdiction in the courts of the United States and those of Pennsylvania. 1. Binn. 188; Id. 219; 2 Dall. 368; 3 Dall. 19; 10 S. & R. 229.

7.—2. Plea, in its ancient sense, means suit or action, and it is sometimes still used in that sense; for example, A B was summoned to answer C D of a *plea* that he render, &c. Steph. Pl. 38, 39, n. 9; Warr. Law Studies, 272, note n.

8.—3. This variable word, *to plead*, has still another and more popular use, importing forensic argument in a cause, but it is not so employed by the profession. Steph. Pl. App. note 1.

9. There are various sorts of pleas, the principal of which are given below.

10. Plea in *abatement*, is when, for any default, the defendant prays that the writ or plaint do abate, that is, cease against him for that time. Com. Dig. Abatement, B.

11. Hence it may be observed, 1st. That the defendant may plead in abatement for faults apparent on the writ or plaint itself, or for such as are shown *dehors*, or out of the writ or plaint. 2d. That a plea in abatement is never perpetual, but only a temporary plea, in form at least, and if the cause revived, the plaintiff may sue again.

12. If the defendant plead a plea in

abatement, in his plea, he ought generally to give a better writ to the plaintiff, that is, show him what other and better writ can be adopted; Com. Dig. Abatement, I 1; but if the plea go to the matter and substance of the writ, &c., he need not give the plaintiff another writ. Nor need he do so when the plea avoids the whole cause of the action. *Id.* I 2.

13. Pleas in abatement are divided into those relating, first, to the disability of the plaintiff or defendant; secondly, to the count or declaration; thirdly, to the writ. 1 Chit. Pl. 435.

14.—1. Plea in abatement to the person of the plaintiff. Pleas of this kind are either that the plaintiff is not in existence, being only a fictitious person, or dead; or else, that being in existence, he is under some disability to bring or maintain the action, as by being an alien enemy; Com. Dig. Abatement, E 4; Bac. Abr. Abatement, B 3; 1 Chit. Pl. 436; or the plaintiff is a married woman, and she sues alone. See 3 T. R. 631; 6 T. R. 265.

15. Plea in abatement to the person of the defendant. These pleas are coverture, and, in the English law, infancy, when the parol shall demur. When a feme covert is sued, and the objection is merely that the husband ought to have been sued jointly with her; as when, since entering into the contract, or committing the tort, she has married; she must, when sued alone, plead her coverture in abatement, and aver that her husband is living. 3 T. R. 627; 1 Chit. Pl. 437, 8.

16.—2. Plea in abatement to the count. Pleas of this kind are for some uncertainty, repugnancy, or want of form, not appearing on the face of the writ itself, but apparent from the recital of it in the declaration only; or else for some variance between the writ and declaration. But it was always necessary to obtainoyer of the writ before the pleading of these pleas; and sinceoyer cannot now be had of the original writ for the purpose of pleading them, it seems that they can no longer be pleaded. See *Oyer*.

17. Plea in abatement to the form of the writ. Such pleas are for some apparent uncertainty, repugnancy, or want of form, variance from the record, speciality, &c., mentioned therein, or misnomer of the plaintiff or defendant. Lawes' Civ. Pl. 106; 1 Chit. Pl. 440.

18. Plea in abatement to the action of

the writ. Pleas of this kind are pleaded when the action is misconceived, or was prematurely commenced before the cause of action arose; or when there is another action depending for the same cause. Tidd's Pr. 579. But as these matters are ground for demurrer or nonsuit, it is now very unusual to plead them in abatement. See 2 Saund. 210, a.

19. Plea in avoidance, is one which confesses the matters contained in the declaration, and avoids the effect of them, by some new matter which shows that the plaintiff is not entitled to maintain his action. For example, the plea may admit the contract declared upon, and show that it was void or voidable, because of the inability of one of the parties to make it, on account of coverture, infancy, or the like. Lawes, Pl. 122.

20. Plea in bar, is one that denies that the plaintiff has any cause of action. 1 Ch. Pl. 459; Co. Litt. 303 b; 6 Co. 7. Or it is one which shows some ground for barring or defeating the action; and makes prayer to that effect. Steph. Pl. 70; Britton, 92. See *Bar*.

21. A plea in bar is, therefore, distinguished from all pleas of the dilatory class, as impugning the right of the action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ. It is in short a substantial and conclusive answer to the action. It follows, from this property, that in general, it must either deny all, or some essential part of the averments of fact in the declaration; or, admitting them to be true, allege new facts, which obviate and repel their legal effect. In the first case the defendant is said, in the language of pleading, to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse, and pleas by way of confession and avoidance. Steph. Pl. 70, 71.

22. Pleas in bar are also divided into general or special. General pleas in bar deny or take issue either upon the whole or part of the declaration, or contain some new matter which is relied upon by the defendant in his defence. Lawes Pl. 110.

23. Special pleas in bar are very various, according to the circumstances of the defendant's case; as, in personal actions, the defendant may plead any special matter in denial, avoidance, discharge, excuse, or

justification of the matter alleged in the declaration, which destroys or bars the plaintiff's action; or he may plead any matter which estops, or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration. The latter sort of pleas are called pleas in *estoppel*. In real actions, the tenant may plead any matter which destroys and bars the demandant's title; as, a general release. *Id.* 115, 116.

24. The general qualities of a plea in bar are, 1. That it be adapted to the nature and form of the action, and also conformable to the count. *Co. Litt.* 303, a 285, b; *Bac. Abr. Pleas*, I; 1 *Roll. Rep.* 216. 2. That it answers all it assumes to answer, and no more. *Co. Litt.* 303, a; *Com. Dig. Pleader*, E 1, 36; 1 *Saund.* 28, n. 1, 2, 3; 2 *Bos. & Pull.* 427; 3 *Bos. & Pull.* 174. 3. In the case of a special plea, that it confess and admit the fact. 3 *T. R.* 298; 1 *Salk.* 394; *Carth.* 380; 1 *Saund.* 28, n. and 14 n. 3; 10 *Johns. R.* 289. 4. That it be single. *Co. Litt.* 304; *Bac. Ab. Pleas*, K, 1, 2; *Com. Dig. Plead.* E 2; 2 *Saund.* 49, 50; *Plowd. Com.* 140, d. 5. That it be certain. *Com. Dig. Pleader*, E 5, 7, 8, 9, 10, 11; C 41; this *Dict. Certainty; Pleading*. 6. It must be direct, positive, and not argumentative. See 6 *Cranch*, 126; 9 *Johns. R.* 313. 7. It must be capable of trial. 8. It must be true and capable of proof. See *Plea, sham*.

25. The parts of a plea in bar may be considered with reference to,

1. The title of the court in which it is pleaded.

2. The title of the term.

3. The names of the parties in the margin. These, however, do not constitute any part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's; as, "*Roe vs. Doe*."

4. The commencement; which includes the statement of, 1. The name of the defendant; 2. The appearance; 3. The defence; see *Defence*; 4. The *actio non*; see *Actio non*.

5. The body, which may contain, 1. The inducement; 2. The protestation; 3. Ground of defence; 4. *Quæ est eadem*; 5. The traverse.

6. The conclusion.

26. *Dilatory* pleas are such as delay the plaintiff's remedy, by questioning, not the cause of action, but the propriety of the

suit, or the mode in which the remedy is sought.

27. Dilatory pleas are divided by Sir William Blackstone, into three kinds: 1. Pleas to the jurisdiction of the court; as, that the cause of action arose out of the limits of the jurisdiction of the court, when the action is local. 2. Pleas to the disability of the plaintiff, or, as they are usually termed, to the person of the plaintiff; as, that he is an alien enemy. 3. Pleas in abatement of the writ, or count; these are founded upon some defect or mistake, either in the writ itself; as, that the defendant is misnamed in it, or the like; or in the mode in which the count pursues it; as, that there is some variance or repugnancy between the count and writ; in which case, the fault in the count furnishes a cause for abating the writ. 2 *Bl. Com.* 301; *Com. Dig. Abatement*, G 1, 8; *Id. Pleader*, C 14, 15; *Bac. Ab. Pleas*, F 7.

28. All dilatory pleas are sometimes called pleas in abatement, as contradistinguished to pleas to the action; this is perhaps not strictly proper, because, though all pleas in abatement are dilatory pleas, yet all dilatory pleas are not pleas in abatement. *Gould on Pl.* ch. 2, § 35; vide 1 *Chit. Pl.* ch. 6; *Bac. Ab. Abatement*, O; 1 *Maass* 358; 1 *John. Cas.* 101.

29. A plea in *discharge*, as distinguished from a plea in avoidance, is one which admits the demand, and instead of avoiding the payment or satisfaction of it, shows that it has been discharged by some matter of fact. Such are pleas of payment, release, and the like.

30. A plea in *excuse*, is one which admits the demand or complaint stated in the declaration, but excuses the non-compliance of the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant having done all in his power to satisfy the former, or not having been the culpable author of the latter. A plea of tender is an example of the former, and a plea of *son assault demesne*, an instance of the latter.

31. A *foreign* plea is one which takes the cause out of the court where it is pleaded, by showing a want of jurisdiction in that court. 2 *Lill. Pr. Reg.* 374; *Carth.* 402. See the form of the plea in *Lill. Ent.* 475.

32. A plea of *justification* is one in which the defendant professes purposely to have done the acts which are the subject of the plaintiff's suit, in order to exercise that

right which he considers he might in point of law exercise, and in the exercise of which he conceives himself not merely excused, but justified.

33. A plea *puis darrein continuance*. Under the ancient law, there were continuances, *i. e.* adjournments of the proceedings for certain purposes, from one day or one term to another; and, in such cases, there was an entry made on the record, expressing the ground of the adjournment, and appointing the parties to reappear at a given day.

34. In the interval between such continuance and the day appointed, the parties were of course out of court, and consequently not in a situation to plead. But it sometimes happened, that after a plea had been pleaded, and while the parties were out of court, in consequence of such continuance, a new matter of defence arose, which did not exist, and which the defendant had consequently no opportunity to plead, before the last continuance. This new defence he was therefore entitled, at the day given for his re-appearance, to plead as a matter that had happened after the last continuance, *puis darrein continuance*. In the same cases that occasioned a continuance in the ancient common law, but in no other, a continuance shall take place. At the time indeed, when the pleadings are filed and delivered, no record exists, and there is, therefore, no entry at that time, made on the record, of the award of a continuance; but the parties are, from the day when, by the ancient practice, a continuance would have been entered, supposed to be out of court, and the pleading is suspended, till the day arrives to which, by the ancient practice, the continuance would extend. At that day, the defendant is entitled, if any new matter of defence has arisen in the interval, to plead it according to the ancient plan, *puis darrein continuance*.

35. A plea *puis darrein continuance* is not a departure from, but is a waiver of the first plea, and is always pleaded by way of substitution for it, on which no proceeding is afterwards had. 1 Salk. 178; 2 Stran. 1195; Hob. 81; 4 Serg. & Rawle, 239. Great certainty is requisite in pleas of this description. Doct. Pl. 297; Yelv. 141; Cro. Jac. 261; Freem. 112; 2 Lutw. 1143; 2 Salk. 519; 2 Wils. 139; Co. Entr. 517 b. It is not sufficient to say generally that after the last continuance such a thing happened, but the day of the continuance must

be shown, and also the time and place must be alleged where the matter of defence arose. *Id. ibid.*; Bull. N. P. 309.

36. Pleas *puis darrein continuance* are either in bar or abatement; Com. Dig. Abatement, I 24; and are followed, like other pleas, by a replication and other pleadings, till issue is attained upon them. Such pleas must be verified on oath before they are allowed. 2 Smith's R. 396; Freem. 352; 1 Strange, 493.

37. A *sham* plea is one which is known to the pleader to be false, and is entered for the purpose of delay. There are certain pleas of this kind, which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts; and, though discouraged, are tacitly allowed; as, for example, the common plea of *judgment recovered*, that is, that judgment has been already recovered by the plaintiff, for the same cause of action. Steph. on Pleading, 444, 445; 1 Chit. Pl. 505, 506.

38. Plea in *suspension of the action*. Such a plea is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed, until that ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of the parties, and termed *parol demurrer*. Stephen on Pleading, 64.

See, generally, Bac. Abr. Pleas, Q; Com. Dig. Abatement, I 24, 34; Doct. Pl. 297; Bull. N. P. 309; Lawes Civ. Pl. 173; 1 Chit. Pl. 634; Steph. Pl. 81; Bouv. Inst. Index, h. t.

TO PLEAD. The formal entry of the defendant's defence on the record. In a popular sense, it signifies the argument in a cause, but it is not so used by the profession. Steph. Pl. Appex. note I; Story, Eq. Pl. § 5, note.

PLEADING, *practice*. The statement in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence; it is the formal mode of alleging that on the record, which would be the support, or the defence of the party in evidence. 3 T. R. 159; Dougl. 278; Com. Dig. Pleader, A; Bac. Abr. Pleas and Pleading; Cowp. 682-3. Or in the language of Lord Coke, good pleading consists in good matter pleaded in good form, in apt time, and due order. Co. Lit. 303. In a general sense, it is that which either party to a suit at law alleges

for himself in a court, with respect to the subject-matter of the cause, and the mode in which it is carried on, including the demand which is made by the plaintiff; but in strictness, it is no more than setting forth those facts or arguments which show the justice or legal sufficiency of the plaintiff's demand, and the defendant's defence, without including the statement of the demand itself, which is contained in the declaration or count. *Bac. Abr. Pleas and Pleading.*

2. The science of pleading was designed only to render the facts of each party's case plain and intelligible, and to bring the matter in dispute between them to judgment. *Steph. Pl. 1.* It is, as has been well observed, admirably calculated for analyzing a cause, and extracting, like the roots of an equation, the true points in dispute; and referring them with all imaginable simplicity, to the court and jury. 1 *Hale's C. L. 301, n.*

3. The parts of pleading have been considered as arrangeable under two heads; first, the regular, or those which occur in the ordinary course of a suit; and secondly, the irregular, or collateral, being those which are occasioned by mistakes in the pleadings on either side.

4. The regular parts are, 1st. The *declaration* or count. 2d. The *plea*, which is either to the jurisdiction of the court, or suspending the action, as in the case of a parol demurrer, or in abatement, or in bar of the action, or in replevin, an avowry or cognizance. 3d. The *replication*, and, in case of an evasive plea, a *new assignment*, or in replevin the *plea in bar* to the avowry or cognizance. 4th. The *rejoinder*, or, in replevin, the replication to the plea in bar. 5th. The *sur-rejoinder*, being in replevin, the rejoinder. 6th. The *rebutter*. 7th. The *sur-rebutter*. *Vin. Abr. Pleas and Pleading, C*; *Bac. Abr. Pleas and Pleadings, A. 8th. Pleas puis darrein continuance*, when the matter of defence arises pending the suit.

5. The irregular or collateral parts of pleading are stated to be, 1st. *Demurrers* to any part of the pleadings above mentioned. 2dly. *Demurrers to evidence* given at trials. 3dly. *Bills of exceptions*. 4thly. *Pleas in scire facias*. And, 5thly. *Pleas in error*. *Vin. Abr. Pleas and Pleadings, C*; *Bouv. Inst. Index, h. t.*

PLEADING, SPECIAL. By special pleading is meant the allegation of special or new matter, as distinguished from a direct de-

nial of matter previously alleged on the opposite side. *Gould on Pl. c. 1, s. 18.*

PLEAS OF THE CROWN, Eng. law. This phrase is now employed to signify criminal causes in which the king is a party. Formerly it signified royal causes for offences of a greater magnitude than mere misdemeanors. These were left to be tried in the courts of the barons, whereas the greater offences, or royal causes, were to be tried in the king's courts, under the appellation of pleas of the crown. *Robertson's Hist. of Charles V., vol. 1, p. 48.*

PLEAS ROLL, Engl. practice. A record which contains the declaration, plea, replication, rejoinder, and other pleadings, and the issue. *Eunom. Dial. 2, § 29, p. 111.*

PLEBEIAN. One who is classed among the common people, as distinguished from the nobles. Happily in this country the order of nobles does not exist.

PLEBEIANS. One of the divisions of the people in ancient Rome; that class which was composed of those who were not nobles nor slaves. *Vide Smith's Dic. Gr. & Rom. Antiq. art. Plebes.*

PLEBISCIT, civil law. This is an anglicised word from the Latin *plebiscitum*, which is composed or derived from *plebs* and *scire*, and signifies, to establish or ordain.

2. A plebiscit was a law which the people, separated from the senators and the patricians, made on the requisition of one of their magistrates, that is, a tribune. *Inst. 1, 2, 4.*

PLEDGE or PAWN, contracts. These words seem indifferently used to convey the same idea. *Story on Bailm. § 286.*

2. In the civil code of Louisiana, however, they appear not to have exactly the same meaning. It is there said that pledges are of two kinds, namely, the pawn, and the antichresis. *Louis. Code, art. 3101.*

3. Sir William Jones defines a pledge to be a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. *Jones' Bailm. 117*; *Id. 36.* *Chancellor Kent, 2 Kent's Com. 449*, follows the same definition, and see 1 *Dane's Abr. c. 17, art. 4.* *Pothier, De Nantissement, art. prelim. 1*, defines it to be a contract by which a debtor gives to his creditor a thing to detain as security for his debt. The code Napoleon has adopted this definition, *Code Civ. art. 2071*, and the Civil Code of Louisiana has followed it. *Louis. Code, § 100.* Lord Holt's definition is, when

goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor; and this, he adds, is called in Latin *vadium*, and in English, a pawn or pledge. *Ld. Raym.* 909, 913.

4. The foregoing definitions are sufficiently descriptive of the nature of a pawn or pledge; but they are in terms limited to cases where a thing is given as a security for a debt; but a pawn may well be made as security for any other engagement. 2 *Bulst.* 306; *Pothier, De Nantissement*, n. 11. The definition of *Domat* is, therefore, more accurate, because it is more comprehensive, namely, that it is an appropriation of the thing given for the security of an engagement. *Domat*, B. 3, tit. 1, § 1, n. 1. And, according to Judge *Story*, it may be defined to be a bailment of personal property, as security for some debt or engagement. *Story on Bailm.* § 286.

5. The term pledge or pawn is confined to personal property; and where real or personal property is transferred by a conveyance of the title, as a security, it is commonly denominated a mortgage.

6. A mortgage of goods is, in the common law, distinguishable from a mere pawn. By a grant or a conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if not redeemed at the time stipulated, the title becomes absolute at law, though equity will interfere to compel a redemption. But in a pledge a special property only passes to the pledgee, the general property remaining in the pledger. 1 *Atk.* 167; 6 *East*, 25; 2 *Caines' C. Err.* 200; 1 *Pick.* 389; 1 *Pet. S. C. R.* 449; 2 *Pick. R.* 610; 5 *Pick. R.* 60; 8 *Pick. R.* 236; 9 *Greenl. R.* 82; 2 *N. H. Rep.* 13; 5 *N. H. Rep.* 545; 5 *John. R.* 258; 8 *John. R.* 97; 10 *John. R.* 471; 2 *Hall, R.* 63; 6 *Mass. R.* 425; 15 *Mass. R.* 480. A mortgage may be without possession, but a pledge cannot be without possession. 5 *Pick.* 59, 60; and see 2 *Pick.* 607.

7. Things which are the subject of a pledge or pawn are ordinarily goods and chattels; but money, negotiable instruments, choses in action, and indeed any other valuable thing of a personal nature, such as patent-rights and manuscripts, may, by the common law, be delivered in pledge. 10 *Johns. R.* 471, 475; 12 *Johns. R.* 146; 10 *Johns. R.* 389; 2 *Blackf. R.* 198; 7 *Greenl. R.* 28; 2 *Taunt. R.* 268; 13 *Mass.* 105; 15

Mass. 389; *Id.* 534; 2 *Caines' C. Err.* 200; 1 *Dane's Abr.* ch. 17, art. 4, § 11. See *Louis. Code*, art. 3121.

8. It is of the essence of the contract, that there should be an actual delivery of the thing. 6 *Mass.* 422; 15 *Mass.* 477; 14 *Mass.* 352; 2 *Caines' C. Err.* 200; 2 *Kent's Com.* 452; *Bac. Abr. Bailment*, B; 2 *Rolle R.* 439; 6 *Pick. R.* 59, 60; *Pothier, De Nantissement*, n. 8, 9; *Louis. Code*, 3129. What will amount to a delivery, is matter of law. See *Delivery*.

9. It is essential that the thing should be delivered as a security for some debt or engagement. *Story on Bailm.* § 300. And see 3 *Cranch*, 73; 7 *Cranch*, 34; 2 *John. Ch. R.* 309; 1 *Atk.* 236; *Prec. in Ch.* 419; 2 *Vern.* 691; *Gilb. Eq. R.* 104; 6 *Mass.* 339; *Pothier, Nantissement*, n. 12; *Civ. Code of Lo.* art. 3119; *Code Civ.* art. 2076.

10. In virtue of the pawn the pawnee acquires, by the common law, a special property in the thing, and is entitled to the possession of it exclusively, during the time and for the objects for which it is pledged. 2 *Bl. Com.* 396; *Jones' Bailm.* 80; *Owen R.* 123, 124; 1 *Bulst.* 29; *Yelv.* 178; *Cro. Jac.* 244; 2 *Ld. Raym.* 909, 916; *Bac. Abr. Bailment*, B; 1 *Dane's Abr.* ch. 17, art. 4, §§ 1, 6; *Code Civ.* art. 2082; *Civ. Code of Lo.* art. 3131. And he has a right to sell the pledge, when there has been a default in the pledger in complying with his engagement. Such a default does not divest the general property of the pawner, but still leaves him a right of redemption. But if the pledge is not redeemed within the stipulated time, by a due performance of the contract for which it is a security, the pawnee has then a right to sell it, in order to have his debt or indemnity. And if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to a prompt fulfilment of the agreement; and if the pawner refuses to comply, the pawnee may, upon demand and notice to the pawner, require the pawn to be sold. 2 *Kent's Com.* 452; *Story on Bailm.* § 308.

11. The pawnee is bound to use ordinary diligence in keeping the pawn, and consequently is liable for ordinary neglect in keeping it. *Jones' Bailm.* 75; 2 *Kent's Com.* 451; 1 *Dane's Abr.* ch. 17, art. 12; 2 *Ld. Raym.* 909, 916; *Domat*, B 1, tit. 1, § 4, n. 1.

12. The pawner has the right of re

demption. If the pledge is conveyed by way of mortgage, and thus passes the legal title, unless he redeems the pledge at a stipulated time, the title of the pledge becomes absolute at law; and the pledger has no remedy at law, but only a remedy in equity to redeem. 2 Ves. Jr. 378; 2 Caines' C. Err. 200. If, however, the transaction is not a transfer of ownership, but a mere pledge, as the pledger has never parted with the general title, he may, at law, redeem, notwithstanding he has not strictly complied with the condition of his contract. Com. Dig. Mortgage, B; 1 Pow. on Mortg. by Coventry & Rand. 401, and notes, *ibid.* See further, as to the pawner's right of redemption, Story on Bailm. §§ 345 to 349.

13. By the act of pawning, the pawner enters into an implied agreement or warranty that he is the owner of the property pawned, and that he has a good right to pass the title. Story on Bailm. § 354.

14. As to the manner of extinguishing the contract of pledge or mortgage of personal property, see Story on Bailm. §§ 359 to 366.

PLEDGE, contracts. He who becomes security for another, and, in this sense, every one who becomes bail for another, is a pledge. 4 Inst. 180; Com. Dig. Bail. C. See *Pledges*.

PLEDGER. The same as pawner. (q. v.)

PLEDGE. The same as pawnee. (q. v.)

PLEDGES, pleading. It was anciently necessary to find pledges or sureties to prosecute a suit, and the names of the pledges were added at the foot of the declaration; but in the course of time it became unnecessary to find such pledges because the plaintiff was no longer liable to be amerced, *pro falsa clamora*, and the pledges were merely nominal persons, and now John Doe and Richard Roe are the universal pledges; but they may be omitted altogether; 1 Tidd's Pr. 455; Arch. Civ. Pl. 171; or inserted at any time before judgment. 4 John. 190.

PLEGIS ACQUIETANDIS, WRIT DE. The name of an ancient writ in the English law, which lies where a man becomes pledge or surety for another to pay a certain sum of money at a certain day; after the day, if the debtor does not pay the debt, and the surety be compelled to pay, he shall have this writ to compel the debtor to pay the same. F. N. B. 321.

PLENA PROBATIO. A term used in

the civil law, to signify full proof, in contradistinction to *semi-plena probatio*, which is only a presumption. Code, 4, 19, 5, &c.; 1 Greenl. Ev. § 119.

PLENARTY, eccl. law. Signifies that a benefice is full. Vide *Avoidance*.

PLENARY. Full, complete.

2. In the courts of admiralty, and in the English ecclesiastical courts, causes or suits in respect of the different course of proceeding in each, are termed plenary or summary. Plenary, or full and formal suits, are those in which the proceedings must be full and formal: the term summary is applied to those causes where the proceedings are more succinct and less formal. Law's Oughton, 41; 2 Chit. Pr. 481.

PLENE ADMINISTRAVIT, pleading.

A plea in bar entered by an executor or administrator by which he affirms that he had not in his possession at the time of the commencement of the suit, nor has had at any time since any goods of the deceased to be administered; when the plaintiff replies that the defendant had goods, &c., in his possession at that time, and the parties join issue, the burden of the proof will be on the plaintiff. Vide 15 John. R. 323; 6 T. R. 10; 1 Barn. & Ald. 254; 11 Vin. Ab. 349; 12 Vin. Ab. 185; 2 Phil. Ev. 295; 3 Saund. (a) 316, n. 1; 6 Com. Dig. 311.

PLENE ADMINISTRAVIT PRÆTER. This is the usual plea of *plene administravit*, except that the defendant admits a certain amount of assets in his hands.

PLENE COMPUTAVIT, pleading. A plea in an action of account render, by which the defendant avers that he has fully accounted. Bac. Ab. Account, E. This plea does not admit the liability of the defendant to account. 15 S. & R. 153.

PLENIPOTENTIARY. Possessing full powers; as, a minister plenipotentiary, is one authorized fully to settle the matters connected with his mission, subject however to the ratification of the government by which he is authorized. Vide *Minister*.

PLENUM DOMINIUM. The unlimited right which the owner has to use his property as he deems proper, without accountability to any one.

PLOUGH-BOTE. An allowance made to a rural tenant, of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

PLOUGH-LAND, old Eng. law. An uncertain quantity of land; but, according

to some opinions, it contains one hundred and twenty acres. Co. Litt. 69 a.

TO PLUNDER. The capture of personal property on land by a public enemy, with a view of making it his own. The property so captured is called plunder. See *Booty*; *Prize*.

PLUNDERAGE, mar. law. The embezzlement of goods on board of a ship, is known by the name of plunderage.

2. The rule of the maritime law in such cases is, that the whole crew shall be responsible for the property thus embezzled, because there must be some negligence in finding out the depredator. Abbott on Ship. 457; 3 John. Rep. 17; 1 Pet. Adm. Dec. 243; 1 New Rep. 347; 1 Pet. Adm. Dec. 200, 239.

PLURAL. A term used in grammar, which signifies more than one.

2. Sometimes, however, it may be so expressed that it means only one, as, if a man were to devise to another all he was worth, if he, the testator, died without children, and he died leaving one child, the devise would not take effect. See Dig. 50, 16, 148; Id. 35, 1, 101, 1; Id. 36, 1, 17, 4; Code, 6, 49, 6, 2; Shelf. on Lum. 504, 518, 559, 589. See *Singular*.

PLURALITY, government. The greater number of votes given at an election; it is distinguished from a *majority*, (q. v.) which is a plurality of all the votes which might have been given; though in common parlance majority is used in the sense here given to plurality.

PLURIES, practice. A term by which a writ issued subsequently to an *alias* of the same kind, is denominated.

2. The pluries writ is made by adding after we command you, the words, "as often times we have commanded you." This is called the first pluries, the next is called the second pluries, &c.

POINDING, Scotch. law. That diligence, affecting movable subjects, by which their property is carried directly to the creditor. Poining is real or personal. Ersk. Pr. L. Scot. 3, 6, 11.

POINDING, PERSONAL, Scotch law. Poining of the goods belonging to the debtor, and of those goods only.

2. It may have for its warrant either letters of horning, containing a clause for poining, and then it is executed by messengers; or precepts of poining, granted by sheriffs, commissaries, &c., which are executed by their proper officers. No cattle

pertaining to the plough, nor instruments of tillage, can be poinded in the time of laboring or tilling the ground, unless where the debtor has no other goods that may be poinded. Ersk. Pr. L. Scot. 3, 6, 11. See *Distress*, to which this process is somewhat similar.

POINDING, REAL, or poining of the ground, Scotch law. Though it be properly a diligence, this is generally considered by lawyers as a species of real action, and is so called to distinguish it from personal poining, which is founded merely on an obligation to pay.

2. Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is therefore competent to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened; but, 1. Goods brought upon the ground by strangers are not subject to this diligence. 2. Even the goods of a tenant cannot be poinded for more than his term's rent. Ersk. Pr. L. Scot. 4, 1, 3.

POINT, practice. A proposition or question arising in a case.

2. It is the duty of a judge to give an opinion on every point of law, properly arising out of the issue, which is propounded to him. Vide *Resolution*.

POINT RESERVED. A point or question of law which the court, not being fully satisfied how to decide, in the hurried trial of a cause, rules in favor of the party offering it, but subject to revision on a motion for a new trial. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside.

POINTS, construction. Marks in writing and in print, to denote the stops that ought to be made in reading, and to point out the sense.

2. Points are not usually put in legislative acts or in deeds; Eunom. Dial. 2, § 33, p. 239; yet, in construing them, the courts must read them with such stops as will give effect to the whole. 4 T. R. 65.

3. The points are the comma, the semicolon, the colon, the full point, the point of interrogation and exclamation. Barr. on the Stat. 294, note; vide *Punctuation*.

POISON, crim. law. Those substances which, when applied to the organs of the body, are capable of altering or destroying, in a majority of cases, some or all of the

functions necessary to life, are called poisons. 3 Foderé, Traite de Med. Leg. 449; Guy, Med. Jur. 520.

2. When administered with a felonious intent of committing murder, if death ensues, it is murder the most detestable, because it can of all others, be least prevented by manhood or forethought. It is a deliberate act necessarily implying malice. 1 Russ. Cr. 429. For the signs which indicate poisoning, vide 2 Beck's Med. Jurisp. ch. 16, p. 236, et seq.; Cooper's Med. Jurisp. 47; Ryan's Med. Jurisp. ch. 15, p. 202, et seq.; Traill, Med. Jur. 109.

POLE. A measure of length, equal to five yards and a half. Vide *Measure*.

POLICE. That species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called the police.

2. The word *police* has three significations, namely; 1. The first relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, &c. 2. The second has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution, and delivered over to the justice of the country. 3. The third comprehends the laws, ordinances and other measures which require the citizens to exercise their rights in a particular form.

3. Police has also been divided into *administrative police*, which has for its object to maintain constantly public order in every part of the general administration; and into *judiciary police*, which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent.

POLICE JURY. In Louisiana this name is given to certain officers who collectively exercise jurisdiction in certain cases of police; as levying taxes, regulating roads, &c.

POLICY OF INSURANCE, contracts. An instrument in writing by which the contract of insurance is effected and reduced into form.

2. The term policy of insurance, or assurance, as it is sometimes called, is derived from the Italian *polizza di assicurazione*, or *di securanza*, or *di securta*; and in that lan-

guage signifies a *note* or *bill of security* or indemnity.

3. The policy is always considered as being made upon an *executed* consideration, namely, the payment or security for the payment of the premium, and contains only the promise of the underwriters, without anything in nature of a counter promise on the part of the insured. The policy may be effected by the owner of the property insured, his broker or agent.

4. As to its form, the policy has been considered in courts of law as an absurd and incoherent instrument; 4 T. R. 210; but courts of justice have always construed it according to the intention of the parties, and so that the indemnity of the insured, and the advancement of trade, which are the great objects of insurance, may be attained. It should contain, 1. The names of the parties. 2. The name of the vessel insured, in order to identify it; but to prevent the ill consequence that might result from a mistake in the name of the vessel or master, there are usually inserted in policies these words, "or by whatsoever name or names the same ship or the master thereof is, or shall be, named or called." 3. A specification of the subject-matter of the insurance, whether it be goods, ship, freight, respondentia or bottomry securities, or other things. Marsh. Ins. 315; 3 Mass. Rep. 476. 4. A description of the voyage, with the commencement and end of the risk. 5. A statement of the perils insured against. 6. A power in the insured to save goods in case of misfortune, without violating the policy. 7. The promise of the insurers, and an acknowledgment of their receipt of the premium. 8. The common memorandum. 9. The date and subscription.

5. Policies, with reference to the reality of the interest insured, are distinguished into *interest* and *wager* policies; with reference to the *amount* of interest, into *open* and *valued*.

6. An *interest policy*, is where the insured has a real, substantial, assignable interest in the thing insured; in which case only it is a contract of indemnity.

7. A *wager policy*, is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss, by the happening of any of the misfortunes insured against. These policies are strongly reprobated. 3 Kent, Com. 225.

8. An *open policy*, is where the amount

of the interest of the insured is not fixed by the policy; but is left to be ascertained by the insured in case a loss shall happen.

9. A *valued policy*, is where a value has been set on the ship or goods insured, and this value inserted in the policy in the nature of liquidated damages, to save the necessity of proving it in case of loss. Marsh. Ins. 287; and see Kent, Com. Lecture 48; Marsh. Ins. ch. 8; 16 Vin. Ab. 402; 1 Supp. to Ves. jr. 305; Park. Ins. 1, 14; Westcott, Ins. 400; Pardes. h. t.; Poth. h. t.; Boulay Paty, h. t.; Bouv. Inst. Index, h. t.

POLICY, PUBLIC. By public policy is meant that which the law encourages for the promotion of the public good.

2. That which is against public policy is generally unlawful. For example, to restrain an individual from marrying, or from engaging in business, when the restraint is general, in the first case, to all persons, and, in the second, to all trades, business, or occupations. But if the restraint be only partial, as that Titius shall not marry Mœvia, or that Caius shall not engage in a particular trade in a particular town or place, the restraint is not against public policy, and therefore valid. 1 Story, Eq. Jur. § 274. See Newl. Contr. 472.

POLITICAL. Pertaining to policy, or the administration of the government. Political rights are those which may be exercised in the formation or administration of the government; they are distinguished from civil rights, which are the rights which a man enjoys, as regards other individuals, and not in relation to the government. A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated. 1 Bouv. Inst. n. 182, 197, 198.

POLL. A head. Hence poll tax is the name of a tax imposed upon the people at so much a head.

2. To poll a jury is to require that each juror shall himself declare what is his verdict. This may be done at the instance of either party, at any time before the verdict is recorded. 3 Cowen, R. 23. See 18 John. R. 188. See *Deed Poll*.

POLLICITATION, civil law. A pollicitation is a promise not yet accepted by the person to whom it is made; it differs from a contract inasmuch as the latter includes a concurrence of intention in two parties, one

of whom promises something to the other, who accepts on his part of such promise. L. 3, ff. Pollicit. ; Grotius, lib. 2, c. 2; Poth. on Oblig. P. 1, c. 1, s. 1, art. 1, § 2.

2. An offer to guaranty, but not accepted, is not a contract on which an action will lie. 1 Stark. C. 10; 1 M. & S. 557; 3 B. & C. 668, 690; 5 D. & R. 512, 586; 7 Cranch, 69; 17 John. R. 134; 1 Mason's R. 323, 371; 16 John. R. 67; 3 Conn. R. 438; 1 Pick. R. 282, 3; 1 B. & A. 681.

POLLS. The place where electors cast in their votes.

POLYANDRY. The state of a woman who has several husbands.

2. Polyandry is legalized only in Thibet. This is inconsistent with the law of nature. Vide *Law of Nature*.

POLYGARCHY. A term used to express a government which is shared by several persons; as, when two brothers succeed to the throne, and reign jointly.

POLYGAMY, crim. law. The act of a person who, knowing he has two or more wives, or she has two or more husbands living, marries another. It differs from bigamy. (q. v.) Com. Dig. Justices, S 5, Dict. de Jur. h. t.

POND. A body of stagnant water; a pool.

2. Any one has a right to erect a fish pond; the fish in it are considered as real estate, and pass to the heir and not to the executor. Ow. 20. See *Pool*; *River*; *Water*.

PONE, English practice. An original writ issuing out of chancery, for the purpose of removing a plaint from an inferior court into the superior courts at Westminster. The word signifies "put;" put by gages, &c. The writ is called from the words it contained when in Latin, "Pone per vadium et salvos plegios," &c. Put by gage and safe pledges, &c. See F. N. B. 69, 70 a; Wilkinson on Replevin, Index.

PONTAGE. A contribution towards the maintenance, rebuilding or repairs of a bridge. The toll taken for this purpose also bears this name. Obsolete.

POOL. A small lake of standing water.

2. By the grant of a pool, it is said, both the land and water will pass. Co. Litt. 5. Vide *Stagnum*; *Water*. Undoubtedly the right to fish, and probably the right to use hydraulic works, will be acquired by such grant. 2 N. Hamps. Rep. 259; Ang.

on Wat. Courses, 47; Plowd. 161; Vaugh. 103; Bac. Ab. Grants, H 3; Com. Dig. Grant, E 5; 5 Cowen, 216; Cro. Jac. 150; 1 Lev. 44; Co. Litt. 5.

POPE. The chief of the catholic religion is so called. He is a temporal prince. He is elected by certain officers called cardinals, and remains in power during life. In the 9th Collation of the Authentics it is declared the bishop of Rome hath the first place of sitting in all assemblies, and the bishop of Constantinople the second. Ridley's View, part 1, chap. 3, sect. 10.

2. The pope has no political authority in the United States.

POPE'S FOLLY. The name of a small island, situated in the bay of Passamaquoddy, which, it has been decided, is within the jurisdiction of the United States. 1 Ware's R. 26.

POPULAR ACTION, punishment. An action given by statute to any one who will sue for the penalty. A *qui tam* action. Dig. 47, 23, 1.

PORT. A place to which the officers of the customs are appropriated, and which include the privileges and guidance of all members and creeks which are allotted to them. 1 Chit. Com. Law, 726; Postlewaith's Com. Diet. h. t.; 1 Chit. Com. L. Index, h. t. According to Dalloz, a port is a place within land, protected against the waves and winds, and affording to vessels a place of safety. Diet. Supp. h. t. By the Roman law a port is defined to be *locus, conclusus, quo importantur merces, et unde exportantur*. Dig. 50, 16, 59. See 7 N. S. 81.

2. A port differs from a haven, (q. v.) and includes something more. 1st. It is a place at which vessels may arrive and discharge, or take in their cargoes. 2. It comprehends a ville, city or borough, called in Latin *caput corpus*, for the reception of mariners and merchants, for securing the goods, and bringing them to market, and for victualling the ships. 3. It is impressed with its legal character by the civil authority. Hale de Portibus Mar. c. 2; 1 Harg. 46, 73; Bac. Ab. Prerogative, D 5; Com. Dig. Navigation, E; 4 Inst. 148; Callis on Sewers, 56; 2 Chit. Com. Law, 2; Dig. 50, 16, 59; Id. 43, 12, 1, 18; Id. 47, 10, 15, 7; Id. 39, 4, 15.

PORT-REEVE, Eng. law. In some places in England an officer bearing this name is the chief magistrate of a port-town. Jacob's Diet. h. t.

PORT TOLL, mer. law. By this phrase is understood the money paid for the privilege of bringing goods into a port.

PORTATICA, Engl. law. The generic name for port duties charged to ships. Harg. L. Tr. 74.

PORTER. The name of an ancient English officer who bore or carried a rod before the justices. The door-keeper of the English parliament also bears this name.

2. One who is employed as a common carrier to carry goods from one place to another in the same town, is also called a porter. Such person is in general answerable as a common carrier. Story, Bailm. § 496.

PORTION. That part of a parent's estate, or the estate of one standing in loco parentis, which is given to a child. 1 Vern. 204. Vide 8 Com. Dig. 539; 16 Vin. Ab. 432; 1 Supp. to Ves. Jr. 34, 58, 303, 308, 2 Id. 46, 370, 404.

PORTORIA, civil law. Duties paid in ports on merchandise. Code, 4, 61, 3.

PORTSALES. Auctions were anciently so called, because they took place in ports.

POSITIVE. Express; absolute; not doubtful. This word is frequently used in composition.

2. A *positive condition* is where the thing which is the subject of it *must* happen; as, if I marry. It is opposed to a negative condition, which is where the thing which is the subject of it *must not* happen; as, if I do not marry.

3. A *positive fraud* is the intentional and successful employment of any cunning, deception or artifice, to circumvent, cheat, or deceive another. 1 Story, Eq. § 186; Dig. 4, 3, 1, 2; Dig. 2, 14, 7, 9. It is cited in opposition to constructive fraud. (q. v.)

4. *Positive evidence* is that which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from circumstantial evidence. 3 Bouv. Inst. n. 3057.

POSSE. This word is used substantively to signify a possibility. For example, such a thing is *in posse*, that is, such a thing may possibly be; when the thing is in being, the phrase to express it is, *in esse*. (q. v.)

POSSE COMITATUS. These Latin words signify the power of the county.

2. The sheriff has authority by the common law, while acting under the authority

of the writ of the United States, common-wealth or people, as the case may be, and for the purpose of preserving the public peace, to call to his aid the *posse comitatus*.

3. But with respect to writs which issue, in the first instance, to arrest in civil suits, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them: though he may, if he pleases, on forcible resistance to the execution of the process. 2 Inst. 193; 3 Inst. 161.

4. Having the authority to call in the assistance of all, it seems to follow, that he may equally require that of any individual; but to this general rule there are some exceptions; persons of infirm health, or who want understanding, minors under the age of fifteen years, women, and perhaps some others, it seems, cannot be required to assist the sheriff, and are therefore not considered as a part of the power of the county. Vin. Ab. Sheriff, B.

5. A refusal on the part of an individual lawfully called upon to assist the officer in putting down a riot is indictable. 1 Carr. & Marsh. 314. In this case will be found the form of an indictment for this offence.

6. Although the sheriff is acting without authority, yet it would seem that any person who obeys his command, unless aware of that fact, will be protected.

7. Whether an individual not enjoined by the sheriff to lend his aid, would be protected in his interference, seems questionable. In a case where the defendant assisted sheriff's officers in executing a writ of replevin without their solicitation, the court held him justified in so doing. 2 Mod. 244. Vide Bac. Ab. Sheriff, N; Hamm. N. P. 63; 5 Whart. R. 437, 440.

POSSESSED. This word is applied to the right and enjoyment of a termor or a person having a term, who is said to be possessed, and not seized. Bac. Tr. 335; Poph. 76; Dy. 369.

POSSESSIO FRATRIS. The brother's possession. This is a technical phrase which is applied in the English law relating to descents. By the common law, the ancestor from whom the inheritance was taken by descent, must have had actual seisin of the lands, either by his own entry, or by the possession of his own, or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But there are qualifications as to this rule, one of which arises from the doctrine of *possessio fratris*. The possession

of a tenant for years, guardian or brother, is equivalent to that of the party himself, and is termed in law *possessio fratris*. Litt. sect. 8; Co. Litt. 15 a; 3 Wils. 516; 7 T. R. 386; 2 Hill Ab. 206.

2. In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and probably in other states, the real and personal estates of intestates are distributed among the heirs, without any reference or regard to the actual seisin of the ancestor. Reeve on Des. 377 to 379; 4 Mason's R. 467; 3 Day's R. 166; 2 Pet. R. 59. In Maryland, New Hampshire, North Carolina, and Vermont, the doctrine of *possessio fratris*, it seems, still exists. 2 Peters' Rep. 625; Reeve on Desc. 377; 4 Kent, Com. 384, 5.

POSSESSION, intern. law. By possession is meant a country which is held by no other title than mere conquest.

2. In this sense *possession* differs from a *dependency*, which belongs rightfully to the country which has dominion over it; and from *colony*, which is a country settled by citizens or subjects of the mother country. 3 Wash. C. C. R. 286.

POSSESSION, property. The detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name. By the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. Thus, the seaman possesses his ship, but not the water in which it moves, although he makes each subserve his purpose.

2. In order to complete a possession two things are required. 1st. That there be an occupancy, *apprehension*, (q. v.) or taking. 2dly. That the taking be with an intent to possess (*animus possidendi*), hence persons who have no legal wills, as children and idiots, cannot possess or acquire possession. Poth. h. t.; Etienne, h. t. See Mer. R. 358; Abbott on Shipp. 9, et seq. But an infant of sufficient understanding may lawfully acquire the possession of a thing.

3. Possession is natural or civil; natural, when a man detains a thing corporeal, as by occupying a house, cultivating grounds or retaining a movable in his custody; possession is civil, when a person ceases to reside in the house, or on the land which

he occupied, or to detain the movable he possessed, but without intending to abandon the possession. See, as to possession of lands, 2 Bl. Com. 116; Hamm. Parties, 178; 1 McLean's R. 214, 265.

4. Possession is also actual or constructive; actual, when the thing is in the immediate occupancy of the party. 3 Dev. R. 34. Constructive, when a man claims to hold by virtue of some title, without having the actual occupancy; as, when the owner of a lot of land, regularly laid out, is in possession of any part, he is considered constructively in possession of the whole. 11 Vern. R. 129. What removal of property or loss of possession will be sufficient to constitute larceny, vide 2 Chit. Cr. Law, 919; 19 Jurist, 14; Etienne, h. t.; Civ. Code of Louis. 3391, et seq.

5. Possession, in the civil law, is divided into natural and civil. The same division is adopted by the Civil Code of Louisiana.

6. Natural possession is that by which a man detains a thing corporeal, as by occupying a house, cultivating ground, or retaining a movable in his possession. Natural possession is also defined to be the corporeal detention of a thing, which we possess as belonging to us, without any title to that possession, or with a title which is void. Civ. Code of Lo. art. 3391, 3393.

7. Possession is civil, when a person ceases to reside in a house or on the land which he occupied, or to detain the movable which he possessed, but without intending to abandon the possession. It is the detention of a thing, by virtue of a just title, and under the conviction of possessing as owner. Id. art. 3392, 3394.

8. Possession applies properly only to corporeal things, movables and immovables. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a quasi possession, and is exercised by a species of possession of which these rights are susceptible. Id. art. 3395.

9. Possession may be enjoyed by the proprietor of the thing, or by another for him; thus the proprietor of a house possesses it by his tenant or farmer.

10. To acquire possession of a property, two things are requisite. 1. The intention of possessing as owner. 2. The corporeal possession of the thing. Id. art. 3399.

11. Possession is lost with or without the consent of the possessor. It is lost *with* his consent, 1. When he transfers this possession to another with the intention to

divest himself of it. 2. When he does some act, which manifests his intention of abandoning possession, as when a man throws into the street furniture or clothes, of which he no longer chooses to make use. Id. art. 3411. A possessor of an estate loses the possession *against* his consent. 1. When another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from reëntering. 2. When the possessor of an estate allows it to be usurped, and held for a year, without, during that time, having done any act of possession, or interfered with the usurper's possession. Id. art. 3412.

12. As to the effects of the purchaser's taking possession, see Sugd. Vend. 8, 9; 3 P. Wms. 193; 1 Ves. Jr. 226; 12 Ves. Jr. 27; 11 Ves. Jr. 464. Vide, generally, 5 Harr. & John. 230, 263; 6 Har. & John. 336; 1 Har. & John. 18; 1 Greenl. R. 109; 2 Har. & McH. 60, 254, 260; 3 Bibb, R. 209; 1 Har. & McH., 210; 4 Bibb, R. 412; 6 Cowen, R. 632; 9 Cowen, R. 241; 5 Wheat. R. 116, 124; Cowp. 217; Code Nap. art. 2228; Code of the Two Sicilies, art. 2134; Bavarian Code, B. 2, c. 4, n. 5; Prus. Code, art. 579; Domat, Lois Civ. liv. 3, t. 7, s. 1; Vin. Ab. h. t.; Wolff, Inst. § 200, and the note in the French translation; 2 Greenl. Ev. § 614, 615; Co. Litt. 57 a; Cro. El. 777; 5 Co. 13; 7 John. 1.

POSSESSOR. He who holds, detains or enjoys a thing, either by himself or his agent, which he claims as his own.

2. In general the possessor of personal chattels is presumed to be the owner; and in case of real estate he has a right to receive the profits, until a title adverse to his possession has been established, leaving him subject to an action for the *mesne profits*. (q. v.)

POSSESSORY ACTION, *old Eng. law.*

A real action in which the plaintiff called the demandant, sought to recover the *possession* of lands, tenements, and hereditaments. On account of the great nicety required in its management, and the introduction of more expeditious methods of trying titles by other actions, it has been laid aside. Finch's Laws, 257; 3 Bouv. Inst. n. 2640.

2. In Louisiana, by this term is understood an action by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed: or

to be reinstated to that possession, when he has been divested or evicted. Code of Practice, art. 6; 2 L. R.*227, 454.

POSSIBILITY. An uncertain thing which may happen; Lilly's Reg. h. t.; or it is a contingent interest in real or personal estate. 1 Mad. Ch. 549.

2. Possibilities are near, as when an estate is limited to one after the death of another; or remote, as that one man shall be married to a woman, and then that she shall die, and he be married to another. 1 Fonb. Eq. 212, n. e; 16 Vin. Ab. h. t., p. 460; 2 Co. 51 a.

3. Possibilities are also divided into, 1. A possibility coupled with an interest. This may, of course, be sold, assigned, transmitted or devised; such a possibility occurs in executory devises, and in contingent, springing or executory uses.

4.—2. A bare possibility, or hope of succession; this is the case of an heir apparent, during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release.

5.—3. A possibility or mere contingent interest, as a devise to Paul if he survive Peter. Dane's Ab. c. 1, a 5, § 2, and the cases there cited.

POST. After. When two or more alienations or descents have taken place between an original intruder and the tenant or defendant in a writ of entry, the writ is said to be in the *post*, because it states that the tenant had not entry unless *after* the ouster of the original intruder. 3 Bl. Com. 182. See *Entry, writ of*.

POST DATE. To date an instrument a time after that on which it is made. Vide *Date*.

POST DIEM. After the day; as a plea of payment *post diem*, after the day when the money became due. Com. Dig. Pleader, 2 W 29.

POST DISSEISIN, Engl. law. The name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. Jacob.

POST ENTRY, maritime law. When a merchant makes an entry on the importation of goods, and at the time he is not able to calculate exactly the duties which he is liable to pay, gave rise to the practice of allowing entries to be made after the goods have been weighed, measured or gauged, to make up the deficiency of the original or prime entry; the entry thus allowed to be

made is called a *post entry*. Chit. Com. Law, 746.

POST FACTO, after the fact. Vide *Ex post facto*.

POST LITEM MOTAM. After the commencement of the suit.

2. Declarations or acts of the parties made *post litem motam*, are presumed to be made with reference to the suit then pending, and, for this reason, are not evidence in favor of the persons making them; while those made before an action has been commenced, in some cases, as when a pedigree is to be proved, may in some cases be considered as evidence. 4 Camp. 401.

POST MARK. A stamp or mark put on letters in the post office.

2. Post marks are evidence of a letter having passed through the post office. 2 Camp. 620; 2 B. & P. 316; 15 East, 416; 1 M. & S. 201; 15 Com. R. 206.

POST MORTEM. After death; as, an examination *post mortem*, is an examination made of a dead body to ascertain the cause of death; an inquisition *post mortem*, is one made by the coroner.

POST NOTES. A species of bank notes payable at a distant period, and not on demand. 2 Watts & Serg. 463. A kind of bank notes intended to be transmitted at a distance by post. See 24 Maine, R. 36.

POST NATUS. Literally after born; it is used by the old law writers to designate the second son. See *Puisne*; *Post-nati*.

POST NUPTIAL. Something which takes place after marriage; as a post nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

2. A post nuptial settlement is either with or without consideration. The former is valid even against creditors, when in other respects it is untainted with fraud. 4 Mason, 443; 2 Bailey, 477. The latter, or when made without consideration, if *bona fide*, and the husband be not involved at the time, and it be not disproportionate to his means, taking his debts and situation into consideration, is valid. 4 Mason, 443. See 4 Dall. 304; *Settlement*; *Voluntary conveyance*.

POST OBIT, contract. An agreement, by which the obligor borrows a certain sum of money and promises to pay a larger sum, exceeding the lawful rate of interest, upon the death of a person, from whom he has some expectation, if the obligor be then living. 7 Mass. R. 119; 6 Madd. R. 111. 5 Ves. 57; 19 Ves. 628.

2. Equity will, in general, relieve a party from these unequal contracts, as they are fraudulent on the ancestor. See 1 Story, Eq. § 342; 2 P. Wms. 182; 2 Sim. R. 183, 192; 5 Sim. R. 524. But relief will be granted only on equitable terms, for he who seeks equity must do equity. 1 Fonb. B. 1, c. 2, § 13, note p; 1 Story, Eq. § 344. See *Catching Bargain*; *Macedonian Decree*.

POST OFFICE. A place where letters are received to be sent to the persons to whom they are addressed.

2. The post office establishment of the United States, is of the greatest importance to the people and to the government. The constitution of the United States has invested congress with power to establish post offices and post roads. Art. 1, s. 8, n. 7.

3. By virtue of this constitutional authority, congress passed several laws anterior to the third day of March, 1825, when an act, entitled "An act to reduce into one the several acts establishing and regulating the post office department," was passed. 3 Story, U. S. 1985. It is thereby enacted,

§ 1. That there be established, at the seat of the government of the United States, a general post office, under the direction of a postmaster general. The postmaster general shall appoint two assistants, and such clerks as may be necessary for the performance of the business of his office, and as are authorized by law; and shall procure, and cause to be kept, a seal for the said office, which shall be affixed to commissions of postmasters, and used to authenticate all transcripts and copies which may be required from the department. He shall establish post offices, and appoint postmasters, at all such places as shall appear to him expedient, on the post roads that are, or may be, established by law. He shall give his assistants, the postmasters, and all other persons whom he shall employ, or who may be employed, in any of the departments of the general post office, instructions relative to their duty. He shall provide for the carriage of the mail on all post roads that are, or may be, established by law, and as often as he, having regard to the productiveness thereof, and other circumstances, shall think proper. He may direct the route or road, where there are more than one, between places designated by law for a post road, which route shall be considered the post road. He shall obtain, from the postmasters, their accounts and vouchers for

their receipts and expenditures, once in three months, or oftener, with the balances thereon arising, in favor of the general post office. He shall pay all expenses which may arise in conducting the post office, and in the conveyance of the mail, and all other necessary expenses arising on the collection of the revenue, and management of the general post office. He shall prosecute offences against the post office establishment. He shall, once in three months, render, to the secretary of the treasury, a quarterly account of all the receipts and expenditures in the said department, to be adjusted and settled as other public accounts. He shall, also, superintend the business of the department in all the duties that are, or may be assigned to it: Provided, That, in case of the death, resignation, or removal from office, of the postmaster general, all his duties shall be performed by his senior assistant, until a successor shall be appointed, and arrive at the general post office, to perform the business.

4.—§ 2. That the postmaster general, and all other persons employed in the general post office, or in the care, custody, or conveyance of the mail, shall, previous to entering upon the duties assigned to them, or the execution of their trusts, and before they shall be entitled to receive any emolument therefor, respectively take and subscribe the following oath, or affirmation, before some magistrate, and cause a certificate thereof to be filed in the general post office: "I, A B, do swear or affirm, (as the case may be,) that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of the post office and post roads within the United States." Every person who shall be, in any manner, employed in the care, custody, or conveyance, or management of the mail, shall be subject to all pains, penalties, and forfeitures, for violating the injunctions, or neglecting the duties, required of him by the laws relating to the establishment of the post office and post roads, whether such person shall have taken the oath or affirmation, above prescribed, or not.

5.—§ 3. That it shall be the duty of the postmaster general, upon the appointment of any postmaster, to require, and take, of such postmaster, bond, with good and approved security, in such penalty as he may judge sufficient, conditioned for the faithful discharge of all the duties of such postmas-

ter, required by law, or which may be required by any instruction, or general rule, for the government of the department: Provided, however, That, if default shall be made by the postmaster aforesaid, at any time, and the postmaster general shall fail to institute suit against such postmaster, and said sureties, for two years from and after such default shall be made, then, and in that case, the said sureties shall not be held liable to the United States, nor shall suit be instituted against them.

6.—§ 4. That the postmaster general shall cause a mail to be carried from the nearest post office, on any established post road, to the court house of any county which is now, or may hereafter be established in any of the states or territories of the United States, and which is without a mail; and the road on which such mail shall be transported, shall become a post road, and so continue, until the transportation thereon shall cease. It shall also be lawful for the postmaster general to enter into contracts, for a term not exceeding four years, for extending the line of posts, and to authorize the persons, so contracting, as a compensation for their expenses, to receive during the continuance of such contracts, at rates not exceeding those for like distances, established by this act, all the postage which shall arise on all letters, newspapers, magazines, pamphlets, and packets, conveyed by any such posts; and the roads designated in such contracts, shall, during the continuance thereof, be deemed and considered as post roads, within the provision of this act: and a duplicate of every such contract shall, within sixty days after the execution thereof, be lodged in the office of the comptroller of the treasury of the United States.

7.—§ 5. That the postmaster general be authorized to have the mail carried in any steamboat, or other vessel, which shall be used as a packet, in any of the waters of the United States, on such terms and conditions as shall be considered expedient: Provided, That he does not pay more than three cents for each letter, and more than one half cent for each newspaper, conveyed in such mail.

8.—§ 8. That, whenever it shall be made appear, to the satisfaction of the postmaster general, that any road established, or which may hereafter be established as a post road, is obstructed by fences, gates, or bars, or other than those lawfully used on

turnpike roads to collect their toll, and not kept in good repair, with proper bridges and ferries, where the same may be necessary, it shall be the duty of the postmaster general to report the same to congress, with such information as can be obtained, to enable congress to establish some other road instead of it, in the same main direction.

9.—§ 39. That it shall be the duty of the postmaster general to report, annually, to congress, every post road which shall not, after the second year from its establishment, have produced one-third of the expense of carrying the mail on the same.

10. The act "to change the organization of the post office department, and to provide more effectually for the settlement of the accounts thereof," passed July 2, 1836, 4 Shars. cont. of Story L. U. S. 2464, contains a variety of minute provisions for the settlement of the revenue of the post office department.

11. By the act of the 3d of March, 1845, various provisions are made to protect the department from fraud and to prevent the abuse of franking.

12. Finding roads in use throughout the country, congress has established, that is, selected such as suited the convenience of the government, and which the exigencies of the people required, to be post roads. It has seldom exercised the power of making new roads, but examples are not wanting of roads having been made under the express authority of congress. Story, Const. § 1133.

Vide Dead Letter; Jeopardy; Letter; Mail; Newspaper; Postage; Postmaster; Postmaster general.

POSTAGE. The money charged by law for carrying letters, packets and documents by mail. By act of congress of March 8, 1851, Minot's Statute at Large, U. S. 587, it is enacted as follows:

2.—§ 1. That from and after the thirtieth day of June, eighteen hundred and fifty-one, in lieu of the rates of postage now established by law, there shall be charged the following rates, to wit:—For every single letter in manuscript, or paper of any kind, upon which information shall be asked for, or communicated, in writing, or by marks or signs, conveyed in the mail for any distance between places within the United States, not exceeding three thousand miles, when the postage upon such letter shall have been prepaid, three cents,

and five cents when the postage thereon shall not have been prepaid; and for any distance exceeding three thousand miles, double those rates. For every such single letter or paper when conveyed wholly or in part by sea, and to or from a foreign country, for any distance over twenty-five hundred miles, twenty cents, and for any distance under twenty-five hundred miles, ten cents, (excepting, however, all cases where such postages have been or shall be adjusted at different rates, by postal treaty or convention already concluded or hereafter to be made;) and for a double letter there shall be charged double the rates above specified; and for a treble letter, treble those rates; and for a quadruple letter, quadruple those rates; and every letter or parcel not exceeding half an ounce in weight shall be deemed a single letter, and every additional weight of half an ounce, or additional weight of less than half an ounce, shall be charged with an additional single postage. And all drop letters, or letters placed in any post office, not for transmission, but for delivery only, shall be charged with postage at the rate of one cent each; and all letters which shall hereafter be advertised as remaining over or uncalled for, in any post office, shall be charged with one cent in addition to the regular postage, both to be accounted for as other postages are.

3.—§ 2. That all newspapers not exceeding three ounces in weight, sent from the office of publication to actual and bona fide subscribers, shall be charged with postage as follows, to wit:—All newspapers published weekly only, shall circulate in the mail free of postage within the county where published, and that the postage on the regular numbers of a newspaper published weekly, for any distance not exceeding fifty miles out of the county where published, shall be five cents per quarter; for any distance exceeding fifty miles and not exceeding three hundred miles, ten cents per quarter; for any distance exceeding three hundred miles and not exceeding one thousand miles, fifteen cents per quarter; for any distance exceeding one thousand miles and not exceeding two thousand miles, twenty cents per quarter; for any distance exceeding two thousand miles and not exceeding four thousand miles, twenty-five cents per quarter; for any distance exceeding four thousand miles, thirty cents per quarter; and all newspapers published

monthly, and sent to actual and bona fide subscribers, shall be charged with one-fourth the foregoing rates; and on all such newspapers published semi-monthly shall be charged with one-half the foregoing rates; and papers published semi-weekly shall be charged double those rates; tri-weekly, treble those rates; and oftener than tri-weekly, five times those rates. And there shall be charged upon every other newspaper, and each circular not sealed, handbill, engraving, pamphlet, periodical, magazine, book, and every other description of printed matter, which shall be unconnected with any manuscript or written matter, and which it may be lawful to transmit through the mail, of no greater weight than one ounce, for any distance not exceeding five hundred miles, one cent; and for each additional ounce or fraction of an ounce, one cent; for any distance exceeding five hundred miles and not exceeding one thousand five hundred miles, double those rates; for any distance exceeding one thousand five hundred miles and not exceeding two thousand five hundred miles, treble those rates; for any distance exceeding two thousand five hundred miles and not exceeding three thousand five hundred miles, four times those rates; for any distance exceeding three thousand five hundred miles, five times those rates. Subscribers to all periodicals shall be required to pay one quarter's postage in advance, and in all such cases the postage shall be one-half the foregoing rates. Bound books, and parcels of printed matter not weighing over thirty-two ounces, shall be deemed mailable matter under the provisions of this section. And the postage on all printed matter other than newspapers and periodicals published at intervals not exceeding three months, and sent from the office of publication, to actual and bona fide subscribers, to be prepaid; and in ascertaining the weight of newspapers for the purpose of determining the amount of postage chargeable thereon, they shall be weighed when in a dry state. And whenever any printed matter on which the postage is required by this section to be prepaid, shall, through the inattention of postmasters or otherwise, be sent without prepayment, the same shall be charged with double the amount of postage which would have been chargeable thereon if the postage had been prepaid; but nothing in this act contained shall subject to postage any matter which is exempted from the payment of

postage by any existing law. And the postmaster general, by and with the advice and consent of the president of the United States, shall be, and he hereby is, authorized to reduce or enlarge, from time to time, the rates of postage upon all letters and other mailable matter conveyed between the United States and any foreign country, for the purpose of making better postal arrangements with other governments, or counteracting any adverse measures affecting our postal intercourse with foreign countries, and postmasters at the office of delivery are hereby authorized, and it shall be their duty, to remove the wrappers and envelopes from all printed matter and pamphlets not charged with letter postage, for the purpose of ascertaining whether there is upon or connected with any such printed matter, or in such package, any matter or thing which would authorize or require the charge of a higher rate of postage thereon. And all publishers of pamphlets, periodicals, magazines, and newspapers, which shall not exceed sixteen ounces in weight, shall be allowed to interchange their publications reciprocally, free of postage: Provided, That such interchange shall be confined to a single copy of each publication: And provided, also, That said publishers may enclose in their publications the bills for subscriptions thereto, without any additional charge for postage: And provided, further, That in all cases where newspapers shall not contain over three hundred square inches, they may be transmitted through the mails by the publishers to bona fide subscribers, at one-fourth the rates fixed by this act.

5. By the act of March 3, 1845, providing for the transportation of the mail between the United States and foreign countries, it is enacted by the 3d section, that the rates of postage to be charged and collected on all letters, packages, newspapers, and pamphlets, or other printed matter, between the ports of the United States and the ports of foreign governments enumerated herein, transported in the United States mail under the provisions of this act, shall be as follows: Upon all letters and packages not exceeding one-half ounce in weight, between any of the ports of the United States and the ports of England or France, or any other foreign port not less than three thousand miles distant, twenty-four cents, with the inland postage of the United States added when sent through the

United States mail to or from the post office at a port of the United States; upon letters and packets over one-half an ounce in weight, and not exceeding one ounce, forty-eight cents; and for every additional half ounce or fraction of an ounce, fifteen cents; upon all letters and packets not exceeding one-half ounce, sent through the United States mail between the ports of the United States and any of the West India islands, or islands in the Gulf of Mexico, ten cents; and twenty cents upon letters and packets not exceeding one ounce; and five cents for every additional half ounce or fraction of an ounce; upon each newspaper, pamphlet, and price current, sent in the mail between the United States and any of the ports and places above enumerated, three cents, with inland United States postage added when the same is transported to or from said port of the United States in the United States mail.

POSTAGE STAMPS. The act of congress, approved March 3, 1847, section 11, and the act of congress of March 3, 1841, sections 3, 4, provide that, to facilitate the transportation of letters in the mail, the postmaster general be authorized to prepare postage stamps, which, when attached to any letter or packet, shall be evidence of the payment of the postage chargeable on such letter. The same sections declare that any person who shall falsely or fraudulently make, utter, or forge any postage stamp, with the intent to defraud the post office department, shall be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment. And if any person shall use or attempt to use, in prepayment of postage, any postage stamp which shall have been used before for like purposes, such person shall be subject to a penalty of fifty dollars for every such offence, to be recovered in the name of the United States in any court of competent jurisdiction.

POSTEA, *practice*. Afterwards. The endorsement on the *nisi prius* record purporting to be the return of the judge before whom a cause is tried, of what has been done in respect of such record. It states the day of trial, before what judge, by name, the cause is tried, and also who is or was an associate of such judge; it also states the appearance of the parties by their respective attorneys, or their defaults; and

the summoning and choice of the jury, whether those who were originally summoned, or those who were tales, or taken from the standers by; it then states the finding of the jury upon oath, and, according to the description of the action, and the assessment of the damages with the occasion thereof, together with the costs.

2. These are the usual matters of fact contained in the *postea*, but it varies with the description of the action. See Lee's Dict. *Postea*; 2 Lill. P. R. 337; 16 Vin. Abr. 465; Bac. Use of the Law, Tracts, 127, 5.

3. When the trial is decisive, and neither the law nor the facts can afterwards be controverted, the *postea* is delivered by the proper officer to the attorney of the successful party, to sign his judgment; but it not unfrequently happens that after a verdict has been given, there is just cause to question its validity, in such case the *postea* remains in the custody of the court. Eunom. Dial. 2, § 33, p. 116.

POSTERIORES. This term was used by the Romans to denote the descendants in a direct line beyond the sixth degree. It is still used in making genealogical tables.

POSTERIORITY, rights. Being or coming after. It is a word of comparison, the correlative of which is *priority*; as, when a man holds lands from two landlords, he holds from his ancient landlord by priority, and from the other by posteriority. 2 Inst. 392.

2. These terms, priority and posteriority, are also used in cases of liens; the first are prior liens, and are to be paid in the first place; the last are posterior liens, and are not entitled to payment until the former have been satisfied.

POSTERITY, descents. All the descendants of a person in a direct line.

POSTHUMOUS CHILD. One born after the death of its father; or, when the Cæsarian operation is performed, after that of the mother.

2. Posthumous children are entitled to take by descent as if they had been born at the time of their deceased ancestor. When a father has made a will without providing for a posthumous child, such a will is in some states, as in Pennsylvania, revoked pro tanto by implication. 4 Kent, Com. 506; Dig. 28, 5, 92; Ferrière, Com. h. t.; Domat, Lois Civiles, part 2, liv. 2, t. 1, s. 1; Merl. Rép. h. t.; 2 Bouv. Inst. n. 2158.

POSTILS, postillæ. Marginal notes

made in a book or writing for reference to other parts of the same, or some other book or writing.

POSTLIMINIUM. That right in virtue of which persons and things taken by the enemy are restored to their former state, when coming again under the power of the nation to which they belong. Vat. Liv. 3, c. 14, s. 204; Chit. Law of Nat. 93 to 104; Lee on Captures, ch. 5; Mart. Law of Nat. 305; 2 Wooddes. p. 441, s. 34; 1 Rob. Rep. 134; 3 Rob. Rep. 236; Id. 97; 2 Burr. 683; 10 Mod. 79; 6 Rob. R. 45; 2 Rob. Rep. 77; 1 Rob. Rep. 49; 1 Kent, Com. 108.

2. The *jus postliminii* was a fiction of the Roman law. Inst. 1, 12, 5.

3. It is a right recognized by the law of nations, and contributes essentially to mitigate the calamities of war. When, therefore, property taken by the enemy is either recaptured or rescued from him, by the fellow subjects or allies of the original owner, it does not become the property of the recaptor or rescuer, as if it had been a new prize, but it is restored to the original owner by right of postliminy, upon certain terms.

POSTMAN, Eng. law. A barrister in the court of exchequer, who has precedence in motions.

POSTMASTER, or DEPUTY POSTMASTER. An officer of the United States appointed by the postmaster general to hold his office during the pleasure of the former. Before entering on the duties of his office, he is required to give bond with surety to be approved by the postmaster general. Act of 3d March, 1825, s. 3.

2. Every postmaster is required to keep an office in the place for which he may be appointed; and it is his duty to receive and forward by mail, without delay, all letters, papers, and packets as directed; to receive the mails and deliver, at all reasonable hours, all letters, papers and packets to the persons entitled thereto.

3. In lieu of commissions allowed deputy postmasters by the 14th section of the act of 3d March, 1845, the postmaster general is authorized by the act of March 1, 1847, s. 1, to allow, on the proceeds of their respective offices, a commission not exceeding the following rates on the amount received in any one year, or a due proportion thereof for less than a year: On a sum not exceeding one hundred dollars, forty per cent; on a sum over the first hundred

and not exceeding four hundred dollars, thirty-three and one-third per cent.; on a sum over and above the first four hundred dollars and not exceeding twenty-four hundred dollars, thirty per cent.; on a sum over twenty-four hundred dollars, twelve and one-half per cent.; on all sums arising from the postage on newspapers, magazines, and pamphlets, fifty per cent.; on the amount of postages on letters or packets received for distribution, seven per cent.: *Provided*, That all allowances, commissions, or other emoluments, shall be subject to the provisions of the forty-first section of the act which this is intended to amend; and that the annual compensation therein limited shall be computed for the fiscal year commencing on the first of July and ending the thirtieth of June each year, and that for any period less than a year the restrictions contained in said section shall be held to apply in a due proportion for such fractional period: *And provided further*, That the compensation to any deputy postmaster under the foregoing provisions to be computed upon the receipt at his office of a larger sum shall in no case fall short of the amount to which he would be entitled under a smaller sum received at his office.

4. By act of congress approved March 3, 1851, § 6, it is enacted, That to any postmaster whose commissions may be reduced below the amount allowed at his office for the year ending the thirtieth day of June, eighteen hundred and fifty-one, and whose labors may be increased, the postmaster general shall be authorized, in his discretion, to allow such additional commissions as he may deem just and proper: *Provided*, That the whole amount of commissions allowed such postmaster during any fiscal year, shall not exceed by more than twenty per centum the amount of commissions at such office for the year ending the thirtieth day of June, eighteen hundred and fifty-one.

5. Although not subject to all the responsibilities of a common carrier, yet a postmaster is liable for all losses and injuries occasioned by his own default in office. 3 Wils. Rep. 443; Cowp. 754; 5 Burr. 2709; 1 Bell's Com. 468; 2 Kent. Com. 474; Story on Bailm. § 463.

6. Whether a postmaster is liable for the acts of his clerks or servants seems not to be settled. 1 Bell's Com. 468, 9. In Pennsylvania it has been decided that he is not responsible for their secret delinquen-

cies, though perhaps he is answerable for want of attention to the official conduct of his subordinates. 8 Watts. R. 453. Vide *Frank; Post Office*.

POSTMASTER GENERAL. The chief officer of the post office department of the United States. Various duties are imposed upon this officer by the acts of congress of March 3, 1825, and July 2, 1836, which will be found under the articles *Mail; Post Office and Postage*.

2. The act of February 20, 1819, 3 Story's L. U. S. 1720, gives the postmaster general a salary of four thousand dollars per annum; and that of March 2, 1827, 3 Story's L. U. S. 2076, declares there shall be paid, annually, to the postmaster general two thousand dollars, in addition to his present salary.

POST NATI. Born after. This term is applied to persons who came to reside in the United States after the declaration of independence. They are generally considered aliens, unless they become naturalized, or are otherwise so declared by law. In Massachusetts, by statutory provision, and in Connecticut, by decision, a person born abroad, if he went there to reside before the treaty of peace of the 3d of September, 1783, is considered a citizen. 2 Pick. R. 394; 5 Day, R. 169; 2 Kent, Com. 51, 2.

POSTULATIO, *Rom. civ. law*. The name given to the first act in a criminal proceeding. A person who wished to accuse another of a crime, appeared before the prætor and asked his authority for that purpose, designating the person intended. This act was called *postulatio*. The postulant (*calumniam jurabat*) made oath that he was not influenced by a spirit of calumny, but acted in good faith, with a view to the public interest. The prætor received this declaration, at first made verbally, but afterwards in writing, and called a libel. The *postulatio* was posted up in the forum, to give public notice of the names of the accuser and the accused. A second accuser sometimes appeared and went through the same formalities.

2. Other persons were allowed to appear and join the postulant or principal accuser. These were said *postulare subscriptionem* and were denominated *subscriptores*. *Cic. in Cæcil Divin.* 15. But commonly such persons acted concurrently with the postulant, and inscribed their names at the time he first appeared. Only

one accuser, however, was allowed to act, and if the first inscribed did not desist in favor of the second, the right was determined, after discussion, by judges appointed for the purpose. Cic. in Verr. I. 6. The preliminary proceeding was called *divinatio*, and is well explained in the oration of Cicero, entitled *Divinatio*. See Aulus Gellius, Att. Noct. lib. II. cap. 4.

3. The accuser having been determined in this manner, he appeared before the prætor, and formally charged the accused by name, specifying the crime. This was called *nominis et criminis delatio*. The magistrate reduced it to writing, which was called *inscriptio*, and the accuser and his adjuncts, if any, signed it, *subscribebant*. This proceeding corresponds to the indictment of the common law.

4. If the accused appeared, the accuser formally charged him with the crime. If the accused confessed it, or stood mute, he was adjudged to pay the penalty. If he denied it, the *inscriptio* contained his answer, and he was then (*in reatu*) indicted, (as we should say) and was called *reus*, and a day was fixed, ordinarily after an interval of at least ten days, according to the nature of the case, for the appearance of the parties. In the case of Verres, Cicero obtained one hundred and ten days to prepare his proofs, although he accomplished it in fifty days, and renounced, as he might do, the advantage of the remainder of the time allowed him.

5. At the day appointed for the trial the accuser and his adjuncts or colleagues, the accused, and the judges, were summoned by the herald of the prætor. If the accuser did not appear, the case was erased from the roll. If the accused made default he was condemned. If both parties appeared, a jury was drawn by the prætor or *judex questionis*. The jury were called *jurati homines*, and the drawing of them *sortitio*, and they were taken from a general list made out for the year. Either party had a right to object to a certain extent to the persons drawn, and then there was a second drawing called *subsortitio*, to complete the number.

6. In some tribunals (*questiones*) the jury were (*editi*) produced in equal number by the accuser and the accused, and sometimes by the accuser alone, who were objected to or challenged in different ways, according to the nature of the case. The number of the jury also varied according to

the tribunal, (*questio*) they were sworn before the trial began. Hence they were called *jurati*.

7. The accusers and often the *subscriptores* were heard, and afterwards the accused, either by himself or by his advocates, of whom he commonly had several. The witnesses, who swore by Jupiter, gave their testimony after the discussions or during the progress of the pleadings of the accuser. In some cases it was necessary to plead the cause on the third day following the first hearing, which was called *comperendinatio*.

8. After the pleadings were concluded the prætor or the *judex questionis* distributed tablets to the jury, upon which each wrote secretly, either the letter A (*absolvo*) or the letter C, (*condemno*) or N. L. (non liquet.) These tablets were deposited in an urn. The president assorted and counted the tablets. If the majority were for acquitting the accused, the magistrate declared it by the words *fecisse non videtur*, and by the words *fecisse videtur* if the majority were for a conviction. If the tablets marked N. L. were so many as to prevent an absolute majority for a conviction or acquittal, the cause was put off for more ample information, *ampliatio*, which the prætor declared by the word *amplies*. Such in brief was the course of proceedings before the *questiones perpetuæ*.

9. The forms observed in the *comitia centuriata* and *comitia tributa* were nearly the same, except the composition of the tribunal, and the mode of declaring the vote.

10. It is easy to perceive in this account of a criminal action, the germ of the proceedings on an indictment at common law.

POT-DE-VIN, *French law*. A sum of money frequently paid, at the moment of entering into a contract, beyond the price agreed upon.

2. It differs from *arrha*, (q. v.) in this, that it is no part of the price of the thing sold, and, that the person who has received it, cannot by returning double the amount, or the other party by losing what he has paid, rescind the contract. 18 Toull. n. 52.

POTENTATE. One who has a great power over an extended country; a sovereign.

2. By the naturalization laws, an alien is required, before he can be naturalized, to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereign whatever.

POTESTAS, civil law. A Latin word which signifies power; authority; domination; empire. It has several meanings. 1. It signifies *imperium*, or the jurisdiction of magistrates. 2. The power of the father over his children, *patria potestas*. 3. The authority of masters over their slaves, which makes it nearly synonymous with *dominium*. See Inst. 1, 9, et 12; Dig. 2, 1, 13, 1; Id. 14, 1; Id. 14, 4, 1, 4.

POUND, weight. There are two kinds of weights, namely, the troy, and the avoirdupois. The pound avoirdupois is greater than the troy pound, in the proportion of seven thousand to five thousand seven hundred and sixty. The troy pound contains twelve ounces, that of avoirdupois sixteen ounces.

POUND, Eng. law. A place enclosed to keep strayed animals in. 5 Pick. 514; 4 Pick. 258; 9 Pick. 14.

POUND, money. The sum of twenty shillings. Previous to the establishment of the federal currency, the different states made use of the pound in computing money; it was of different value in the several states.

2. *Pound sterling*, is a denomination of money of Great Britain. It is of the value of a *sovereign*. (q. v.) In calculating the rates of duties, the pound sterling shall be considered and taken as of the value of four dollars and eighty cents. Act of March 3, 1833.

3. The pound sterling of *Ireland* is to be computed, in calculating said duties, at four dollars and ten cents. Id.

4. The pound of the *British provinces of Nova Scotia, New Brunswick, Newfoundland, and Canada*, is to be so computed at four dollars. Act of May, 22, 1846.

POUNDAGE, practice. The amount allowed to the sheriff, or other officer, for commissions on the money made by virtue of an execution. This allowance varies in different states, and to different officers.

POURPARLER, French law. The conversations and negotiations which have taken place between the parties in order to make an agreement. These form no part of the agreement. Pard. Dr. Com. 142.

2. The general rule in the common law is the same, parol proof cannot, therefore, be given to contradict, alter, add to, or diminish a written instrument, except in some particular cases. 1 Dall. 426; 4

Dall. 340; 3 Serg. & Rawle, 609; 7 Serg. Rawle, 114.

POURSUIVANT. A follower, a pursuer. In the ancient English law, it signified an officer who attended upon the king in his wars, at the council table, exchequer, in his court, &c., to be sent as a messenger. A *poursuivant* was, therefore, a messenger of the king.

POWER. This is either inherent or derivative. The former is the right, ability, or faculty of doing something, without receiving that right, ability, or faculty from another. The people have the power to establish a form of government, or to change one already established. A father has the legal power to chastise his son; a master, his apprentice.

2. Derivative power, which is usually known by the technical name of power, is an authority by which one person enables another to do an act for him. Powers of this kind were well known to the common law, and were divided into two sorts: naked powers or bare authorities, and powers coupled with an interest. There is a material difference between them. In the case of the former, if it be exceeded in the act done, it is entirely void; in the latter it is good for so much as is within the power, and void for the rest only.

3. Powers derived from the doctrine of uses may be defined to be an authority, enabling a person, through the medium of the statute of uses, to dispose of an interest, vested either in himself or another person.

4. The New York Revised Statutes define a power to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

5. They are powers of revocation and appointment which are frequently inserted in conveyances which owe their effect to the statute of uses; when executed, the uses originally declared cease, and new uses immediately arise to the persons named in the appointment, to which uses the statute transfers the legal estate and possession.

6. Powers being found to be much more convenient than conditions, were generally introduced into family settlements. Although several of these powers are not usually called powers of revocation, such as powers of jointuring, leasing, and charging settled estates with the payment of money, yet all these

are powers of revocation, for they operate as revocations, *pro tanto*, of the preceding estates. Powers of revocation and appointment may be reserved either to the original owners of the land or to strangers: hence the general division of powers into those which *relate to the land*, and those which are *collateral* to it.

7. *Powers relating to the land* are those given to some person having an interest in the land over which they are to be exercised. These again are subdivided into powers *appendant* and in *gross*.

8. A *power appendant* is where a person has an estate in land, with a power of revocation and appointment, the execution of which falls within the compass of his estate; as, where a tenant for life has a power of making leases in possession.

9. A *power in gross* is where a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but, notwithstanding, is annexed in privity to it, and takes effect in the appointee, out of an interest vested in the appointer; for instance, where a tenant for life has a power of creating an estate, to commence after the determination of his own, such as to settle a jointure on his wife, or to create a term of years to commence after his death, these are called powers in gross, because the estate of the person to whom they are given, will not be affected by the execution of them.

10. *Powers collateral*, are those which are given to mere strangers, who have no interest in the land: powers of sale and exchange given to trustees in a marriage settlement are of this kind. Vide, generally, Powell on Powers, *passim*; Sugden on Powers, *passim*; Cruise, Dig. tit. 32, ch. 13; Vin. Ab. h. t.; Com. Dig. Pojar; 1 Supp. to Ves. jr. 40, 92, 201, 307; 2 Id. 166, 200; 1 Vern. by Raithby, 406; 3 Stark. Ev. 1199; 4 Kent, Com. 309; 2 Lilly's Ab. 339; Whart. Dig. h. t. See 1 Story, Eq. Jur. § 169, as to the execution of a power, and when equity will supply the defect of execution.

11. This classification of powers is admitted to be important only with reference to the ability of the donee to suspend, extinguish or merge the power. The general rule is that a power shall not be exercised in derogation of a prior grant by the appointer. But this whole division of powers

has been condemned as too artificial and arbitrary.

12. Mr. Powell divides powers into general and particular powers. General powers are those to be exercised in favor of any person whom the appointer chooses. Particular powers are those which are to be exercised in favor of specific objects. 4 Kent, Com. 311, Vide, Bouv. Inst. Index, h. t.; *Mediate powers*; *Primary powers*.

POWER OF ATTORNEY. Vide *Letter of attorney*, and 1 Mood. Cr. Cas. 57, 58.

POYNING'S LAW, *Eng. law*. The name usually given to an act which was passed by a parliament holden in Ireland in the tenth of Henry the Seventh; it enacts that all statutes made in the realm of England before that time should be in force and put in use in the realm of Ireland. Irish Stat. 10 H. VII. c. 22; Co. Litt. 141 b; Harg. n. 3.

PRACTICE. The form, manner and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law, and the rules laid down by the respective courts.

2. By practice is also meant the business which an attorney or counsellor does; as, A B has a good practice.

3. The books on practice are very numerous; among the most popular are those of Tidd, Chitty, Archbold, Sellon, Graham, Dunlap, Caines, Troubat and Haly, Blake, Impey.

4. A settled, uniform, and long continued practice, without objection, is evidence of what the law is, and such practice is based on principles which are founded in justice and convenience. Buck, 279; 2 Russ. R. 19, 570; 2 Jac. R. 232; 5 T. R. 380; 1 Y. & J. 167, 168; 2 Crompt. & M. 55; Ram on Judgm. ch. 7.

PRÆDA BELLICA. Lat. Booty; property seized in war. Vide *Booty*; *Prize*.

PRÆCIPE or PRECIPE, *practice*. The name of the written instructions given by an attorney or plaintiff to the clerk or prothonotary of a court, whose duty it is to make out the writ, for the making of the same.

PRÆDIAL. That which arises immediately from the ground; as, grain of all sorts, hay, wood, fruits, herbs, and the like.

PRÆDIUM DOMINANS, *civil law*. The name given to an estate to which a servitude is due; it is called the ruling estate.

PRÆDIUM RUSTICUM, civil law. By this is understood all heritages which are not destined for the use of man's habitation; such, for example, as lands, meadows, orchards, gardens, woods, even though they should be within the boundaries of a city.

PRÆDIUM SERVIENS, civil law. The name of an estate which suffers or yields a service to another estate.

PRÆDIUM URBANUM, civil law. By this term is understood buildings and edifices intended for the habitation and use of man, whether they be built in cities or whether they be constructed in the country.

PRÆFECTUS VIGILUM, Roman civ. law. The chief officer of the night watch. His jurisdiction extended to certain offences affecting the public peace; and even to larcenies. But he could inflict only slight punishments.

PRÆMUNIRE. In order to prevent the pope from assuming the supremacy in granting ecclesiastical livings, a number of statutes were made in England during the reigns of Edward I., and his successors, punishing certain acts of submission to the papal authority, therein mentioned. In the writ for the execution of these statutes, the words *præmunire facias*, being used to command a citation of the party, gave not only to the writ, but to the offence itself, of maintaining the papal power, the name of *præmunire*. Co. Lit. 129; Jacob's L. D. h. t.

PRÆTOR, Roman civil law. A municipal officer of Rome, so called because, (*præiret populo*,) he went before or took precedence of the people. The consuls were at first called *prætors*. Liv. Hist. III. 55. He was a sort of minister of justice, invested with certain legislative powers, especially in regard to the forms or formalities of legal proceedings. Ordinarily, he did not decide causes as a judge, but prepared the grounds of decision for the judge and sent to him the questions to be decided between the parties. The judge was always chosen by the parties, either directly, or by rejecting, under certain rules and limitations, the persons proposed to them by the *prætor*. Hence the saying of Cicero, (*pro Cluentis*, 43,) that no one could be judged except by a judge of his own choice. There were several kinds of officers called *prætors*. See Vicat, Vocab.

2. Before entering on his functions, he published an edict, announcing the system adopted by him for the application and interpretation of the laws during his magis-

tracy. His authority extended over all jurisdictions, and was summarily expressed by the word *do, dico, addico*, i. e. *do* I give the action, *dico* I declare the law, I promulgate the edict, *addico* I invest the judge with the right of judging. There were certain cases which he was bound to decide himself, assisted by a council chosen by himself—perhaps the *Decemvirs*. But the greater part of causes brought before him, he sent either to a judge, an arbitrator, or to recuperators, (*recuperatores*), or to the centumvirs, as before stated. Under the empire the powers of the *prætor* passed by degrees to the *præfect* of the *prætorium*, or the *præfect* of the city; so that this magistrate, who at first ranked with the consuls, at last dwindled into a director or manager of the public spectacles or games.

3. Till lately, there were officers in certain cities of Germany denominated *prætors*. Vide 1 Kent, Com. 528.

PRAGMATIC SANCTION, French law. This expression is used to designate those ordinances which concern the most important object of the civil or ecclesiastical administration. Merl. Répert, h. t.; 1 Fournel, Hist. des Avocats, 24, 38, 39.

2. In the civil law, the answer given by the emperors on questions of law, when consulted by a corporation or the citizens of a province, or of a municipality, was called a pragmatic sanction. Leçons El. du Dr. Civ. Rom. § 53. This differed from a rescript. (q. v.)

PRAYER, chanc. pleadings. That part of a bill which asks for relief.

2. The skill of the solicitor is to be exercised in framing this part of the bill. An accurate specification of the matters to be decreed in complicated cases, requires great discernment and experience; Coop. Eq. Pl. 13; it is varied as the case is made out, concluding always with a prayer of general relief, at the discretion of the court. Mitf. Pl. 45.

PRAYER OF PROCESS, chanc. plead. That part of a bill which prays that the defendant be compelled to appear and answer the bill, and abide the determination of the court on the subject, is called *prayer of process*. This prayer must contain the names of all persons who are intended to be made parties. Coop. Eq. Pl. 16; Story, Eq. Pl. § 44.

PRAYER FOR RELIEF, chan. pleading. This is the name of that part of the bill, which, as the phrase imports, prays for relief. This prayer is either general or special

but the general course is for the plaintiff to make a special prayer for particular relief to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the court. Story, Eq. Pl. § 40; 4 Bouv. Inst. n. 4174-6.

PREAMBLE. A preface, an introduction or explanation of what is to follow: that clause at the head of acts of congress or other legislatures which explains the reasons why the act is made. Preambles are also frequently put in contracts to explain the motives of the contracting parties.

2. A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statutes. It cannot amount, by implication, to enlarge what is expressly given. 1 Story on Const. B. 3, c. 6. How far a preamble is to be considered evidence of the facts it recites, see 4 M. & S. 532; 1 Phil. Ev. 239; 2 Russ. on Cr. 720; and see, generally, Ersk. L. of Scotl. 1, 1, 18; Toull. liv. 3, n. 318; 2 Supp. to Ves. jr. 239; 4 L. R. 55; Barr. on the Stat. 353, 870.

PRECARIOUS RIGHT. The right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it.

2. If there is a time fixed during which the right may be used it is then vested for that time, and cannot be revoked until after its expiration. Wolff, Inst. § 833.

PRECARIUM. The name of a contract among civilians, by which the owner of a thing at the request of another person, gives him a thing to use as long as the owner shall please. Poth. h. t. n. 87; see Yelv. 172; Cro. Jac. 236; 9 Cowen, 687; Roll. R. 128; Bac. Ab. Bailment, C; Ersk. Prin. B. 3, t. 1, n. 9; Wolff, Ins. Nat. § 333.

2. A tenancy at will is a right of this kind.

PRECATORY WORDS. Expressions in a will praying or requesting that a thing shall be done.

2. Although recommendatory words used by a testator, of themselves, seem to leave the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, wish or desire that the devisee shall do certain things for the benefit of another person; yet, courts of equity have construed such

precatory expressions as creating a trust. 18 Ves. 41; 8 Ves. 380; Bac. Ab. Legacies, B, Bouv. ed.

3. But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach, is not sufficiently defined. 1 Bro. C. C. 142; 1 Sim. 542, 556. See 2 Story, Eq. Jur. § 1070; Lewin on Trusts, 77; 4 Bouv. Inst. n. 3953.

PRECEDENCE. The right of being first placed in a certain order; the first rank being supposed the most honorable.

2. In this country no precedence is given by law to men.

3. Nations, in their intercourse with each other, do not admit any precedence; hence in their treaties in one copy one is named first, and the other in the other. In some cases of officers when one must of necessity act as the chief, the oldest in commission will have precedence; as when the president of a court is not present, the associate who has the oldest commission will have a precedence; or if their commissions bear the same date, then the oldest man.

4. In the army and navy there is an order of precedence which regulates the officers in their command.

PRECEDENTS. The decision of courts of justice; when exactly in point with a case before the court, they are generally held to have a binding authority, as well to keep the scale of justice even and steady, as because the law in that case has been solemnly declared and determined. 9 M. R. 355.

2. To render precedents valid, they must be founded in reason and justice; Hob. 270; must have been made upon argument, and be the solemn decision of the court; 4 Co. 94; and in order to give them binding effect, there must be a current of decisions. Cro. Car. 528; Cro. Jac. 386; 8 Co. 163.

3. According to Lord Talbot, it is "much better to stick to the known general rules, than to follow any one particular precedent, which may be founded on reason, unknown to us." Cas. Temp. Talb. 26. Blackstone, 1 Com. 70, says, that a former decision is in general to be followed, unless "manifestly absurd or unjust," and, in the latter case, it is declared, when overruled, not that the former sentence was *bad law*, but that it was *not law*.

4. Precedents can only be useful when they show that the case has been decided

upon a certain principle, and ought not to be binding when contrary to such principle. If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there can be no possible correction of abuses, because the fact of their existence renders them above the law. It is always safe to rely upon principles. See *Principle; Reason*. Vide 16 Vin. Ab. 499; Weak. on Inst. h. t.: 2 Swanst. 163; 2 Jac. & W. 318; 3 Ves. 527; 2 Atk. 559; 2 P. Wms. 258; 2 Bro. C. C. 86; 1 Ves. jr. 11; and 2 Evans' Poth. 377, where the author argues against the policy of making precedents binding when contrary to reason. See also 1 Kent, Comm. 475-477; Liv. Syst. 104-5; Gresl. Ev. 300; 16 Johns. R. 402; 20 Johns. R. 722; Cro. Jac. 527; 33 H. VII. 41; Jones, Bailment, 46; and the articles *Reason* and *Stare decisis*.

PRECEPT. A writ directed to the sheriff or other officer, commanding him to do something. The term is derived from the operative *precipimus*, we command.

PRECINCT. The district for which a high or petty constable is appointed, is in England, called a precinct. Willc. Office of Const. xii.

2. In day time all persons are bound to recognize a constable acting within his own precincts; after night the constable is required to make himself known, and it is, indeed, proper he should do so at all times. Ibid. n. 265, p. 93.

PRECIPUT, French law. An object which is ascertained by law or the agreement of the parties, and which is first to be taken out of property held in common, by one having a right, before a partition takes place.

2. The preciput is an advantage, or a principal part to which some one is entitled, *precipium jus*, which is the origin of the word preciput. Dict. de Jur. h. t.; Poth. h. t. By preciput is also understood the right to sue out the preciput.

PRECLUDI NON, pleading. A technical allegation contained in a replication which denies or confesses and avoids the plea. It is usually in the following form; "And the said A B, as to the plea of the said C D, by him secondly above pleaded, says, that he the said A B, by reason of any thing by the said C D, in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof

against the said C D, because he says that," &c. 2 Wils. 42; 1 Chit. Pl. 573.

PRECOGNITION, Scotch law. The examination of witnesses who were present at the commission of a criminal act, upon the special circumstances attending it, in order to know whether there is ground for a trial, and to serve for direction to the prosecutor. But the persons examined may insist on having their declaration cancelled before they give testimony at the trial. Ersk. Princ. B. 4, t. 4, n. 49.

PRECONTRACT. An engagement entered into by a person, which renders him unable to enter into another; as a promise or covenant of marriage to be had afterwards. When made *per verba de presenti*, it is in fact a marriage, and in that case the party making it cannot marry another person.

PREDECESSOR. One who has preceded another.

2. This term is applied in particular to corporators who are now no longer such, and whose rights have been vested in their successor; the word ancestor is more usually applicable to common persons. The predecessor in a corporation stands in the same relation to the successor, that the ancestor does to the heir.

3. The term predecessor is also used to designate one who has filled an office or station before the present incumbent.

PRE-EMPTION, intern. law. The right of preëmption is the right of a nation to detain the merchandise of strangers passing through her territories or seas, in order to afford to her subjects the preference of purchase. 1 Chit. Com. Law, 103; 1 Bl. Com. 287.

2. This right is sometimes regulated by treaty. In that which was made between the United States and Great Britain, bearing date the 19th day of November, 1794, ratified in 1795, it was agreed, art. 18, after mentioning that the usual munitions of war, and also naval materials should be confiscated as contraband, that "whereas the difficulty of agreeing on precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise. It is further agreed that whenever any such articles so being contraband according to the existing laws of nations, shall for that reason be seized, the same shall not be confis-

cated, but the owners thereof shall be speedily and completely indemnified; and the captors, or in their default the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to such detention." See Mann. Com. B. 3, c. 8.

3. By the laws of the United States the right given to settlers of public lands, to purchase them in preference to others, is called the preëmption right. See act of April 29, 1830, 4 Sharsw. Cont. of Story, L. U. S. 2212.

PREFECT, *French law*. A chief officer invested with the superintendence of the administration of the laws in each department. Merl. Répert. h. t.

PREFERENCE. The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest. By preference is also meant the right which a creditor has acquired over others to be paid first out of the assets of his debtor, as, when a creditor has obtained a judgment against his debtor which binds the latter's land, he has a preference.

2. Voluntary preferences are forbidden by the insolvent laws of some of the states, and are void, when made in a general assignment for the benefit of creditors. Vide *Insolvent; Priority*.

PREGNANCY, *med. jurispr.* This is defined by medical writers to be the state of a female who has within her ovary or womb, a fecundated germ which gradually becomes developed in the latter receptacle. Dunglison's Med. Dict. h. t.

2. The subject may be considered with reference to the signs of pregnancy; its duration; and the laws relating to it.

3.—§ 1. The fact that women sometimes conceal their state of pregnancy in order to avoid disgrace, and to destroy their offspring in its mature or immature state; and that in other cases to gratify the wishes of relations, the desire to deprive the legal successor of his just claims, to gratify their avarice by extorting money, and to avoid or delay execution, pregnancy is *pretended*, renders it necessary that an inquiry should take place to ascertain whether a woman has or has not been pregnant.

4. There are certain signs which usually indicate this state; these have been divided

into those which affect the system generally, and those which affect the uterus.

5.—1. The changes observed in the system from conception and pregnancy, are principally the following; namely, increased irritability of temper, melancholy, a languid cast of countenance, nausea, heart-burn, loathing of food, vomiting in the morning, an increased salivary discharge, feverish heat, with emaciation and costiveness, occasionally depravity of appetite, a congestion in the head, which gives rise to spots on the face, to headache, and erratic pains in the face and teeth. The pressure of increasing pregnancy, occasions protrusion of the umbilicus, and, sometimes, varicose tumors or anasaruous swellings of the lower extremities. The breasts also enlarge, an areola, or brown circle is observed around the nipples, and a secretion of lymph, composed of milk and water, takes place. It should be remembered that these do not occur in every pregnancy, but many of them in most cases.

6.—2. The changes which affect the uterus, are, a suppression and cessation of the menses; an augmentation in size of the womb, which becomes perceptible between the eighth and tenth weeks; as time progresses, the enlargement continues; about the middle of pregnancy, the woman feels the motion of the child, and this is called *quickening*. (q. v.) The vagina is also subject to alteration, as its glands throw out more mucus, and apparently prepare the parts for the passage of the fœtus. Ryan's Med. Jur. 112, 113; 1 Beck's Med. Jur. 157, 158; 2 Dunglison's Human Physiology, 361. These are the general signs of pregnancy; it will be proper to consider them more minutely, though briefly, in detail.

7.—1. *The expansion and enlargement of the abdomen*. This sign is not visible during the early months of pregnancy, and by art in the disposition of the dress and the use of stays, it may be concealed for a much longer period. The corpulency of the woman, or the peculiarity of her form, may also contribute to produce the same effect. In common cases, where there is no such obstacle, this sign is generally manifest at the end of the fourth month, and continues till delivery. But the enlargement may originate from disease; from suppression or retention of the menses; tympanites; dropsy; or schirrosity of the liver and spleen. Patient and assiduous investigation and pro-

fessional skill, are requisite to pronounce as to this sign, and all these may fail. Foderé, tome i. p. 443. Cyclop. of Practical Medicine, h. t.; Cooper's Lect. vol. ii. p. 163.

8.—2. *Change in the state of the breasts.* They are said to grow larger and more firm; but this enlargement occurs in suppressed menses, and sometimes at the period of the cessation of the menses; and sometimes they do not enlarge till after delivery. The dark appearance of the *areola* is no safe criterion; and the milky fluid may occur without pregnancy.

9.—3. *The suppression of the menses.* Although this usually follows conception, yet in some cases menstruation is carried on till within a few weeks of delivery. When the suppression takes place, it is not always the effect of impregnation; it may, and frequently does arise, from disease. Some medical authors, however, deem the suppression to be a never-failing consequence of conception.

10.—4. *The loss of appetite, nausea, vomiting, &c.* Although attendant upon pregnancy in many cases, are very equivocal signs.

11.—5. *The motion of the fœtus in the mother's womb.* In the early months of pregnancy this is wanting, but afterwards it can be ascertained. In cases of concealed pregnancy it cannot be ascertained from the declarations of the mother, and the examiner must discover it by other means. When the fœtus is alive, the sudden application of the hand, immediately after it has been dipped in cold water, over the regions of the uterus, will generally produce a motion of the fœtus; but this is not an infallible test, the fœtus may be dead, or there may be twins; in the first case, then, there will be no motion, and in the latter, the motion is not felt sometimes until a late period. Vide *Quickening*.

12.—6. *Alteration in the state of the uterus.* This is ascertained by what is technically called the *touch*. This is an examination, made with the hand of the examiner, of the uterus.

13.—7. By the application of *auscultation* to the impregnated uterus, it is said certainty can be obtained. The indications of the presence of a living fœtus in the womb, as derived from auscultation, are two:—1. *The action of the fetal heart.* This is marked by double pulsations; that of the fœtus generally exceeds in frequency

the maternal pulse. These pulsations may be perceived at the fifth, or between the fifth and sixth months. Their situation varies with that of the child. 2. The other auscultatory sign to denote the presence of the fœtus has been variously denominated the *placental bellows sound*, the *placental sound*, and the *utero placental soufflet*. It is generally agreed that its seat is in the enlarged vessels of the portion of the uterus which is immediately connected with the placenta. According to Lænnec, it is an arterial pulsation perfectly isochronous with the pulse of the mother, and accompanied by a rushing noise, resembling the blast of a pair of bellows. It commonly begins to be heard with the aid of the stethoscope, (an instrument invented by Professor Lænnec, of Paris, for examining the chest) at the end of the fourth month of pregnancy. In the case of twins, Lænnec detected the pulsation of two fetal hearts before delivery, by means of this instrument.

14.—8. Another sign of pregnancy has been discovered, which is said by M. Jacquemin never to fail. It is the peculiar dark color which the mucous membrane of the vagina acquires during this state. It was only after an examination of four thousand five hundred women that M. Jacquemin came to the conclusion which he formed of the certainty of this sign. Parent Duchatelle, *De la Prostitution dans la ville de Paris*, c. 3, § 5.

15. It is always difficult though perhaps not impossible to ascertain the presence of the fœtus, and on the other hand, many of the signs which would indicate such presence, have been known to fail. 1 Beck's Med. Jur. ch. 6; Chit. Med. Jur. h. t.; Ryan's Med. Jur. 112, 113; Allison's Princ. of the Cr. Law of Scotl. ch. 3, p. 153; 1 Briand, Méd. Lég. c. 3.

16.—§ 2. *The duration of human pregnancy* is not certain, and probably is not the same in every woman. It may perhaps be safely stated that forty weeks is the ordinary duration, though much discussion has taken place among medico-legal writers on this subject, and opinions fluctuate largely. 1 Beck's Med. Jur. 363. This is occasioned perhaps by the difficulty of ascertaining the time from which this period begins to run. Chit. Med. Jur. 409; Dewees, Midwifery, 125; 1 Paris & Fonbl. 218, 230, 245; 2 Dunglison's Human Physiology, 362; Ryan's Med. Jur. 121; 1 Foderé, Méd. Lég. § 407-416.

17.—§ 3. *The laws relating to pregnancy* are to be considered, first, in reference to the fact of pregnancy; and, secondly, in relation to its duration.

18.—1. As to the *fact of pregnancy*. There are two cases where the fact whether a woman is or has been pregnant is of importance; when it is supposed she pretends pregnancy, and when she is charged with concealing it.

19.—1st. Pretended pregnancy may arise from two causes: the one when a widow feigns herself with child, in order to produce a supposititious heir to the estate. In this case in England the heir presumptive may have a writ *de ventre inspiciendo*, to examine whether she be with child or not; and if she be, to keep her under proper restraint until delivered; but if, upon examination, the widow be found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child within forty weeks from the death of the husband. 1 Bl. Com. 456; Cro. Eliz. 566; 4 Bro. C. C. 90; 2 P. Wms. 591; Cox's C. C. 297. In the civil law there was a similar practice. Dig. 25, 4.

20. The second cause of pretended pregnancy occurs when a woman has been sentenced to death, for the commission of a crime. At common law, in case this plea be made before execution, the court must direct a jury of twelve matrons, or discreet women, to ascertain the fact, and if they bring in their verdict *quick with child*, execution shall be staid generally till the next session of the court, and so from session to session till either she be delivered, or proves by the lapse of time, not to have been with child at all. 4 Bl. Com. 394, 395; 1 Bay, 487. It is proper to remark that a verdict of the matrons that the woman is pregnant is not sufficient, she must be found to be *quick with child*. (q. v.)

21. Whether under the English law a woman would be hanged who could be proved to be privement encointe, beyond all doubt, is not certain; but in this country, it is presumed if it could be made to appear, indubitably, that the woman was pregnant, though not quick with child, the execution would be respited until after delivery. Fatal errors have been made by juries of matrons. A case occurred at Norwich in England in the month of March, 1833, of a murderess who pleaded pregnancy. Twelve married women were im-

paneled on the jury; after an hour's examination, they returned a verdict that she was not quick with child. She was ordered for execution. Fortunately three of the principal surgeons in the place, fearing some error, waited upon the convict and examined her; they found her not only pregnant, but quick with child. The matter was represented to the judge, who respited the execution, and on the 11th day of July she was safely delivered of a living child. London Medical Gazette, vol. xii. p. 24, 585.

22. In New York it is provided by legislative enactment, (2 Rev. Stat. 658,) that "if a female convict, sentenced to the punishment of death, be pregnant, the sheriff shall summon a jury of six physicians, and shall give notice to the district attorney, who shall have power to subpoena witnesses. If, on such inquisition, it shall appear that the female is quick with child, the sheriff shall suspend the execution, and transmit the inquisition to the governor. Whenever the governor shall be satisfied that she is no longer quick with child, he shall issue his warrant for execution, or commute it, by imprisonment for life in the state prison."

23. By the laws of France, "if a woman condemned to death declares herself to be pregnant, and it is verified that she is pregnant, she shall not suffer her punishment till after her delivery. Code Pénal, art. 27.

24.—2d. Concealed pregnancy seldom takes place except for the criminal purpose of destroying the life of the fetus in utero, or of the child immediately after its birth. The extreme facility of extinguishing the infant life, at the time, or shortly after birth, and the experienced difficulty of proving this unnatural crime, has induced the passage of laws, in perhaps all the states, as well as in England and other countries, calculated to facilitate the proof, and also to punish the very act of concealment of pregnancy and death of the child, when, if born alive, it would have been a bastard.

25. The English statute of 21 Jac. 1, c. 27, required that any mother of such child who had endeavored to conceal its birth, should prove, by one witness at least, that the child was actually born dead; and for want of such proof it arrived at the forced conclusion that the mother murdered it. But it was considered a blot upon even the Eng-

lish code, and it was therefore repealed by 43 Geo. III. c. 58, s. 3. An act of assembly of Pennsylvania, of the 31st May, 1781, made the concealment of the death of a bastard child conclusive evidence to convict the mother of murder; which was repealed by the act of 5th of April, 1790, s. 6, which declared that the constrained presumption that the child whose death is concealed, was therefore murdered by the mother, shall not be sufficient to convict the party indicted, without probable presumptive proof is given that the child was born alive. The law was further modified by the act of 22d of April, 1794, s. 18, which declares that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted of the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury, that she did wilfully and maliciously destroy and take away the life of such a child. The last mentioned act, section 17, punishes the concealment of the death of a bastard child by fine and imprisonment. See, for the law of Connecticut on the subject, 2 Swift's Digest, 296. See Alison's Principles of the Criminal Law of Scotland, ch. 3.

26.—2. *As to the duration of pregnancy.* Lord Coke lays down the peremptory rule that forty weeks is the longest time allowed by law for gestation. Co. Litt. 123. There does not, however, appear to be any time fixed by the law as to the duration of pregnancy. Note by Hargr. & Butler, to 1 Inst. 123, b; 1 Rolle's Ab. 356, l. 10; Cro. Jac. 541; Palm. 9.

27. The civil code of Louisiana provides that the child capable of living, which is born before the one hundred and eightieth day after the marriage, is not presumed to be the child of the husband; every child born alive more than six months after conception, is presumed to be capable of living. Art. 205. The same rule applies with respect to the child born three hundred days after the dissolution of the marriage, or after sentence of separation from bed and board. Art. 206. The Code Civil of France contains the following provision. The child conceived during the marriage, has the husband for its father. Nevertheless the husband may disavow the child, if he can prove that during the time that has elapsed between the three hundredth and the one hundred and eightieth before its birth he was prevented either by absence, or in consequence of some accident, or on account of

some physical impossibility, from cohabiting with his wife. Art. 312. A child born before the one hundred and eightieth day after the marriage cannot be disavowed by the husband in the following cases:—1. When he had knowledge of the pregnancy before the marriage; 2. When he has assisted in writing the act of birth, [a certificate stating the birth and sex of the child, the time when born, &c. required by law to be filed with a proper officer and recorded,] and when that act has been signed by him, or when it contains his declaration that he cannot sign; 3. When the child is not declared capable of living. Art. 314. And the legitimacy of a child born three hundred days after the dissolution of the marriage may be contested. Art. 315.

PREGNANT, pleading. A fulness in the pleadings which admits or involves a matter which is favorable to the opposite party.

2. It is either an affirmative pregnant, or negative pregnant. See *Affirmative pregnant*; *Negative pregnant*.

PREJUDICE. To decide beforehand; to lean in favor of one side of a cause for some reason or other than its justice.

2. A judge ought to be without prejudice, and he cannot therefore sit in a case where he has any interest, or when a near relation is a party, or where he has been of counsel for one of the parties. Vide *Judge*.

3. In the civil law prejudice signifies a tort or injury; as the act of one man should never prejudice another. Dig. 50, 17, 74.

PRELATE. The name of an ecclesiastical officer. There are two orders of prelates; the first is composed of bishops, and the second, of abbots, generals of orders, deans, &c.

PRELEVEMENT, French law. The portion which a partner is entitled to take out of the assets of a firm before any division shall be made of the remainder of the assets, between the partners.

2. The partner who is entitled to a prélèvement is not a creditor of the partnership; on the contrary he is a part owner, for if the assets should be deficient, a creditor has a preference over the partner; on the other hand, should the assets yield any profit, the partner is entitled to his portion of it, whereas the creditor is entitled to no part of it, but he has a right to charge interest, when he is in other respects entitled to it.

PREHENSION. The lawful taking of.

a thing with an intent to assert a right in it.

PRELIMINARY. Something which precedes, as *preliminaries of peace*, which are the first sketch of a treaty, and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the basis of the treaty.

PREMEDITATION. A design formed to commit a crime or to do some other thing before it is done.

2. Premeditation differs essentially from *will*, which constitutes the crime, because it supposes besides an *actual will*, a *deliberation* and a *continued persistance* which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime, are indications of a premeditation, but are not absolute proof of it, as these preparations may have been intended for other purposes, and then suddenly changed to the performance of the criminal act. Murder by poisoning must of necessity be done with premeditation. See *Aforethought; Murder*.

PREMISES. That which is put before. The word has several significations; sometimes it means the statements which have been before made; as, I act upon these premises; in this sense, this word may comprise a variety of subjects, having no connexion among themselves; 1 East, R. 456; it signifies a formal part of a deed; and it is made to designate an estate.

PREMISES, estates. Lands and tenements are usually called premises, when particularly spoken of; as, the premises will be sold without reserve. 1 East, R. 453.

PREMISES, conveyancing. That part in the beginning of a deed, in which are set forth the names of the parties, with their titles and additions, and in which are recited such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the contract then entered into is founded; and it is here also the consideration on which it is made, is set down, and the certainty of the thing granted. 2 Bl. Com. 298. The technical meaning of the premises in a deed, is every thing which precedes the *habendum*. 8 Mass. R. 174; 6 Conn. R. 289. Vide *Deed*.

PREMISES, equity pleading. That part of a bill usually denominated the stating part of the bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains,

and the names of the persons by whom done, and against whom he seeks redress. Coop. Eq. Pl. 9; Bart. Suit in equity, 27; Mitf. Eq. Pl. by Jeremy, 43; Story, Eq. Pl. § 27; 4 Bouv. Inst. n. 4158.

PREMIUM, contracts. The consideration paid by the insured to the insurer for making an insurance. It is so called because it is paid *primo*, or before the contract shall take effect. Poth. h. t. n. 81; Marsh. Inst. 234.

2. In practice, however, the premium is not always paid when the policy is underwritten; for insurances are frequently effected by brokers, and open accounts are kept between them and the underwriters, in which they make themselves debtors for all premiums; and sometimes notes or bills are given for the amount of the premium.

3. The French writers, when they speak of the consideration given for maritime loans, employ a variety of words in order to distinguish it according to the nature of the case. Thus, they call it *interest* when it is stipulated to be paid by the month or at other stated periods. It is a *premium*, when a gross sum is to be paid at the end of a voyage, and here the risk is the principal object which they have in view. When the sum is a per centage on the money lent, they denominate it *exchange*, considering it in the light of money lent in one place to be returned in another, with a difference in amount between the sum borrowed and that which is paid, arising from the difference of time and place. When they intend to combine these various shades into one general denomination, they make use of the term *maritime profit*, to convey their meaning. Hall on Mar. Loans, 56, n. Vide Park, Ins., h. t.; Poth. h. t.; 3 Kent, Com. 285; 15 East, R. 309, Day's note, and the cases there cited.

PREMIUM PUDICITIÆ, contracts. Literally the price of chastity.

2. This is the consideration of a contract by which a man promises to pay to a woman with whom he has illicit intercourse a certain sum of money. When the contract is made as the payment of *past cohabitation*, as between the parties, it is good, and will be enforced against the obligor, his heirs, executors and administrators, but it cannot be paid, on a deficiency of assets, until all creditors are paid, though it has a preference over the heir, next of kin, or devisee. If the contract be for future cohabitation, it is void. Chit. Contr. 215;

1 Story, Eq. Jur. § 296; 5 Ves. 286; 2 P. Wms. 432; 1 Black. R. 517; 3 Burr. 1568; 1 Fonbl. Eq. B. 1, c. 4, § 4, and notes *s* and *y*; 1 Ball & Beat. 360; 7 Ves. 470; 11 Ves. 535; Rob. Fraud. Conv. 428; Cas. Temp. Talb. 153; and the cases there cited; 6 Ham. R. 21; 5 Cowen, R. 253; Harper, R. 201; 3 Monr. R. 35; 2 Rev. Const. Ct; 279; 11 Mass. R. 368; 2 N. & M. 251.

PRENDER or PRENDRE. To take. This word is used to signify the right of taking a thing before it is offered; hence the phrase of law, it lies in render, but not in prender. Vide *A prendre*; and Gale and Whatley on Easements, 1.

PRÆNOMEN. The first or Christian name of a person; Benjamin is the prænomen of Benjamin Franklin. See Cas. temp. Hard. 286; 1 Tayl. 148.

PREPENSE. The same as aforethought. (q. v.) Vide 2 Chit. Cr. Law, *784.

PREROGATIVE, civil law. The privilege, preëminence, or advantage which one person has over another; thus a person vested with an office, is entitled to all the rights, privileges, *prerogatives*, &c. which belong to it.

PREROGATIVE, English law. The royal prerogative is an arbitrary power vested in the executive to do good and not evil. Ruthf. Inst. 279; Co. Litt. 90; Chit. on Prerog.; Bac. Ab. h. t.

PREROGATIVE COURT, eccles. law. The name of a court in England in which all testaments are proved and administrations granted, when the deceased has left *bona notabilia* in the province in some other diocese than that in which he died. 4 Inst. 335.

2. The testamentary courts of the two archbishops, in their respective provinces, are styled prerogative courts, from the prerogative of each archbishop to grant probates and administrations, where there are *bona notabilia*; but still these are only inferior and subordinate jurisdictions; and the style of these courts has no connexion with the royal prerogative. Derivatively, these courts are the king's ecclesiastical courts; but immediately, they are only the courts of the ecclesiastical ordinary. The ordinary, and not the crown, appoints the judges of these courts; they are subject to the control of the king's courts of chancery and common law, in case they exceed their jurisdiction; and they are subject in some instances to the command of these courts,

if they decline to exercise their jurisdiction, when by law they ought to exercise it. Per Sir John Nicholl, In the Goods of George III.; 1 Addams, R. 255; S. C. 2 Eng. Eccl. R. 112.

PRESCRIPTIBLE. That which is subject to prescription.

PRESCRIPTION. The manner of acquiring property by a long, honest, and uninterrupted possession or use during the time required by law. The possession must have been *possessio longa, continua, et pacifica, nec sit legitima interruptio*, long, continued, peaceable, and without lawful interruption. Domat, Loix Civ. liv. 3, t. 29, s. 1; Bract. 52, 222, 226; Co. Litt. 113, b; *Pour pouvoir prescrire*, says the Code Civil, l. 3, t. 20, art. 22, *il faut une possession continue et non interrompue, paisible, publique, et a titre de proprietaire*. See Knapp's R. 79.

2. The law presumes a grant before the time of legal memory when the party claiming by prescription, or those from whom he holds, have had adverse or uninterrupted possession of the property or rights claimed by prescription. This presumption may be a mere fiction, the commencement of the user being tortious; no prescription can, however, be sustained, which is not consistent with such a presumption.

3. Twenty years' uninterrupted user of a way is *prima facie* evidence of a prescriptive right. 1 Saund. 323, a; 10 East, 476; 2 Br. & Bing. 403; Cowp. 215; 2 Wils. 53. The subjects of prescription are the several kinds of incorporeal rights. Vide, generally, 2 Chit. Bl. 35, n. 24; Amer. Jurist, No. 37, p. 96; 17 Vin. Ab. 256; 7 Com. Dig. 93; Ruthf. Inst. 63; Co. Litt. 113; 2 Conn. R. 584; 9 Conn. R. 162; Bouv. Inst. Index, h. t.

4. The Civil Code Louisiana, art. 3420, defines a prescription to be a manner of acquiring property, or of discharging debts, by the effect of time, and under the conditions regulated by law. For the law relating to prescription in that state, see Code, art. 3420 to 3521. For the difference between the meaning of the term prescription as understood by the common law, and the same term in the civil law, see 1 Bro. Civ. Law, 246.

5. The prescription which has the effect to liberate a creditor, is a mere bar which the debtor may oppose to the creditor, who has neglected to exercise his rights, or procured them to be acknowledged during the

time prescribed by law. The debtor acquires this right without any act on his part, it results entirely from the negligence of the creditor. The prescription does not extinguish the debt, it merely places a bar in the hands of the debtor, which he may use or not at his choice against the creditor. The debtor may therefore abandon this defence, which has been acquired by mere lapse of time, either by paying the debt, or acknowledging it. If he pay it, he cannot recover back the money so paid, and if he acknowledge it, he may be constrained to pay it. Poth. Intr. au titre xiv. des Prescriptions, sect. 2. Vide Bouv. Inst. Theopars prima, c. 1, art. 1, § 4, s. 3; *Limitations*.

PRESENCE. The existence of a person in a particular place.

2. In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid; for example, a party to a deed when it is executed by himself, must personally acknowledge it, when such acknowledgment is required by law, to give it its full force and effect, and his presence is indispensable, unless, indeed, another person represent him as his attorney, having authority from him for that purpose.

3. In the criminal law, presence is actual or constructive. When a larceny is committed in a house by two men, united in the same design, and one of them goes into the house, and commits the crime, while the other is on the outside watching to prevent a surprise, the former is actually, and the latter constructively, present.

4. It is a rule in the civil law, that he who is incapable of giving his consent to an act, is not to be considered present, although he be actually in the place; a lunatic, or a man sleeping, would not therefore be considered present. Dig. 41, 2, 1, 3. And so, if insensible; 1 Dougl. 241; 4 Bro. P. R. 71; 3 Russ. 441; or if the act were done secretly so that he knew nothing of it. 1 P. Wms. 740.

5. The English statute of fraud, § 5, directs that all devises and bequests of any lands or tenements shall be attested or subscribed in the presence of said devisor. Under this statute it has been decided that an actual presence is not indispensable, but that where there was a constructive presence it was sufficient; as, where the testatrix executed the will in her carriage standing in the street before the office of her

solicitor, the witness retired into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in a situation to see the witness sign the will through the window of the office. Bro. Ch. C. 98; see 2 Curt. R. 320; 2 Salk. 688; 3 Russ. R. 441; 1 Maule & Selw. 294; 2 Car. & P. 491; 2 Curt. R. 331. Vide *Constructive*.

PRESENT. A gift, or more properly the thing given. It is provided by the constitution of the United States, art. 1, s. 9, n. 7, that "no person holding any office of profit or trust under them, [the United States] shall, without the consent of congress, accept of any present, emolument, or office, or title of any kind whatever, from any king, prince, or foreign state."

PRESENTS. This word signifies the writing then actually made and spoken of; as, *these presents*; know all men by *these presents*, to all to whom *these presents* shall come.

PRESENTATION, eccl. law. The act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice.

PRESENTTEE, eccles. law. A clerk who has been presented by his patron to a bishop in order to be instituted in a church.

PRESENTMENT, crim. law, practice. The written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government; 4 Bl. Com. 301; upon such presentment, when proper, the officer employed to prosecute, afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. In an extended sense presentments include not only what is properly so called, but also inquisitions of office, and indictments found by a grand jury. 2 Hawk. c. 25, s. 1.

2. The difference between a presentment and an inquisition, (q. v.) is this, that the former is found by a grand jury authorized to inquire of offences generally, whereas the latter is an accusation found by a jury specially returned to inquire concerning the particular offence. 2 Hawk. c. 25, s. 6. Vide, generally, Com. Dig. Indictment, B; Bac. Ab. Indictment, A; 1 Chit. Cr. Law, 163; 7 East, R. 387; 1 Meigs. 112; 11 Humph. 12.

3. The writing which contains the accusation so presented by a grand jury, is

also called a presentment. Vide 1 Brock. C. C. R. 156; *Grand Jury*.

PRESENTMENT, contracts. The production of a bill of exchange or promissory note to the party on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment.

2. The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all the parties he intends to hold liable. And when a bill or note becomes payable, it must be presented for payment.

3. The principal circumstances concerning presentment, are the person to whom, the place where, and the time when, it is to be made.

4.—1. In general the presentment for payment should be made to the maker of a note, or the drawee of a bill for acceptance, or to the acceptor, for payment; but a presentment made at a particular place, when payable there, is in general sufficient. A personal demand on the drawee or acceptor is not necessary; a demand at his usual place of residence of his wife or other agent is sufficient. 2 Esp. Cas. 509; 5 Esp. Cas. 265; Holt's N. P. Cas. 813.

5.—2. When a bill or note is made payable at a particular place, a presentment, as we have seen, may be made there; but when the acceptance is general, it must be presented at the house or place of business of the acceptor. 3 Kent, Com. 64, 65.

6.—3. In treating of the time for presentment, it must be considered with reference, 1st. To a presentment for acceptance. 2d. To one for payment. 1st. When the bill is payable at sight, or after sight, the presentment must be made in reasonable time; and what this reasonable time is depends upon the circumstances of each case. 7 Taunt. 397; 1 Dall. 255; 2 Dall. 192; Ibid. 232; 4 Dall. 165; Ibid. 129; 1 Yeates, 531; 7 Serg. & Rawle, 324; 1 Yeates 147. 2d. The presentment of a note or bill for payment ought to be made on the day it becomes due, and notice of non-payment given, otherwise the holder will lose the security of the drawer and endorsers of a bill and the endorsers of a promissory note, and in case the note or bill be payable at a particular place and the money lodged there for its payment, the holder would probably have no recourse against the maker or acceptor, if he did not present them on the day, and the money should be lost. 5 Barn.

& Ald. 244. Vide 5 Com. Dig. 134; 2 John. Cas. 75; 3 John. R. 230; 2 Caines' Rep. 343; 18 John. R. 230; 2 John. R. 146, 168, 176; 2 Wheat. 373; Chit. on Bills, Index, h. t.; Smith on Mer. Law, 138; Byles on Bills, 102.

7. The excuses for not making a presentment are general or applicable to all persons, who are endorsers; or they are special and applicable to the particular endorser only.

8.—1. Among the former are, 1. Inevitable accident or overwhelming calamity; Story on Bills, § 308; 3 Wend. 488; 2 Smith's R. 224. 2. The prevalence of a malignant disease, by which the ordinary operations of business are suspended. 2 John. Cas. 1; 3 M. & S. 267; Anth. N. P. Cas. 35. 3. The breaking out of war between the country of the maker and that of the holder. 4. The occupation of the country where the note is payable or where the parties live, by a public enemy, which suspends commercial operations and intercourse. 8 Cranch, 155; 15 John. 57; 16 John. 438; 7 Pet. 586; 2 Brock. 20; 2 Smith's R. 224. 5. The obstruction of the ordinary negotiations of trade by the *vis major*. 6. Positive interdictions and public regulations of the state which suspend commerce and intercourse. 7. The utter impracticability of finding the maker, or ascertaining his place of residence. Story on Pr. N. §§ 205, 236, 238, 241, 264.

9.—2. Among the latter or special excuses for not making a presentment may be enumerated the following: 1. The receiving the note by the holder from the payee, or other antecedent party, too late to make a due presentment; this will be an excuse as to such party. 16 East, 248; 7 Mass. 488; Story, P. N. §§ 201, 265; 11 Wheat. 431; 2 Wheat. 373. 2. The note being an accommodation note of the maker for the benefit of the endorser. Story on Bills, § 370; see 2 Brock. 20; 7 Harr. & J. 381; 7 Mass. 452; 1 Wash. C. C. R. 461; 2 Wash. C. C. R. 514; 1 Hayw. 271; 4 Mason, 113; 1 Harr. & G. 468; 1 Caines, 157; 1 Stew. 175; 5 Pick. 88; 21 Pick. 327. 3. A special agreement by which the endorser waives the presentment. 6 Greenl. 213; 11 Wheat. 629; Story on Bills, §§ 371, 373; 6 Wheat. 572. 4. The receiving security or money by an endorser to secure himself from loss, or to pay the note at maturity. In this case, when the indemnity or money is a full security for the amount of the note or bill, no presentment

is requisite. Story on Bills, § 374; Story on P. N. § 281; 4 Watts, 328; 9 Gill & John. 47; 7 Wend. 165; 2 Greenl. 207; 5 Mass. 170; 5 Conn. 175. 5. The receiving the note by the holder from the endorser, as a collateral security for another debt. Story on Pr. Notes, § 284; Story on Bills, § 372; 2 How. S. C. R. 427, 457.

10. A want of presentment may be waived by the party to be affected, after a full knowledge of the fact. 8 S. & R. 438; see 6 Wend. 658; 3 Bibb, 102; 5 John. 385; 4 Mass. 347; 7 Mass. 452; Wash. C. C. R. 506; Bac. Ab. Merchant, &c. M. Vide, generally, 1 Hare & Wall. Sel Dec. 214, 224.

See *Notice of dishonor*.

PRESERVATION. Keeping safe from harm; avoiding injury. This term always presupposes a real or existing danger.

2. A jettison, which is always for the preservation of the remainder of the cargo, must therefore be made only when there is a real danger existing. See *Average; Jettison*.

PRESIDENT. An officer of a company who is to direct the manner in which business is to be transacted. From the decision of the president there is an appeal to the body over which he presides.

PRESIDENT OF THE UNITED STATES OF AMERICA. This is the title of the executive officer of this country.

2. The constitution directs that the executive power shall be vested in a president of the United States of America. Art. 2, s. 1.

3. This subject will be examined by considering, 1. His qualifications. 2. His election. 3. The duration of his office. 4. His compensation. 5. His powers.

4.—§ 1. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States. Art. 2, s. 1, n. 5. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president; and the congress may by law provide for the removal, death, resignation, or inability both of the president and vice-president, declaring what officer shall then

act as president; and such officer shall act accordingly, until the disability be removed, or a president shall be elected. Art. 2, s. 1, n. 6.

5.—§ 2. He is chosen by electors of president. (q. v.) See Const. U. S. art. 2, s. 1, n. 2, 3, and 4; 1 Kent, Com. 273; Story on the Const. § 1447, et seq. After his election and before he enters on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States." Article 2, s. 1, n. 8 and 9.

6.—§ 3. He holds his office for the term of four years; art. 2, s. 1, n. 1; he is re-eligible for successive terms, but no one has ventured, contrary to public opinion, to be a candidate for a third term.

7.—§ 4. The president shall, at stated times, receive for his services, a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive, within that period, any other emolument from the United States, or any of them. Art. 2, sect. 1, n. 7. The act of the 24th September, 1789, ch. 19, fixed the salary of the president at twenty-five thousand dollars. This is his salary now.

8.—§ 5. The powers of the president are to be exercised by him alone, or by him with the concurrence of the senate.

9.—1. The constitution has vested in him *alone*, the following powers: he is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officers of each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. Art. 2, s. 2, n. 2. He may appoint all officers of the United States, whose appointments are not otherwise provided for in the constitution, and which shall be established by law, when congress shall vest the appointment of such officers in the president alone. Art. 2, s. 2, n. 2. He shall have power to fill up all vacancies that may happen during the recess of the senate, by

granting commissions, which shall expire at the end of their next session. Art. 2, sect. 2, n. 3. He shall from time to time give congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all officers of the United States.

10.—2. His power, with the concurrence of the senate, is as follows: to make treaties, provided two-thirds of the senators present concur; nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not provided for in the constitution, and which have been established by law; but the congress may by law vest the appointment of such inferior officers, as they shall think proper, in the president alone, in the courts of law, or in the heads of departments. Art. 2, s. 2, n. 2. Vide 1 Kent, Com. Lect. 13; Story on the Const. B. 3, ch. 36; Rawle on the Const. Index, h. t.; Serg. Const. L. Index, h. t.

PRESS. By a figure this word signifies the art of printing. The press is free.

2. All men have a right to print and publish whatever they may deem proper, unless by doing so they infringe the rights of another, as in the case of copyrights, (q. v.) when they may be enjoined. For any injury they may commit against the public or individuals they may be punished, either by indictment, or by a civil action at the suit of the party injured, when the injury has been committed against a private individual. Vide Const. of the U. S. Amendm. art. 1, and *Liberty of the Press*.

PRESUMPTION, evidence. An inference as to the existence of one fact, from the existence of some other fact, founded on a previous experience of their connexion. 3 Stark. Ev. 1234; 1 Phil. Ev. 116; Gilb. Ev. 142; Poth. Tr. des. Ob. part. 4, c. 3, s. 2, n. 840. Or it is an opinion, which circumstances, give rise to,

relative to a matter of fact, which they are supposed to attend. Menthuél sur les Conventions, liv. 1, tit. 5.

2. To constitute such a presumption, a previous experience of the connexion between the known and inferred facts is essential, of such a nature that as soon as the existence of the one is established, admitted or assumed, an inference as to the existence of the other arises, independently of any reasoning upon the subject. It follows that an inference may be *certain* or not certain, but merely, *probable*, and therefore capable of being rebutted by contrary proof.

3. In general a presumption is more or less strong according as the fact presumed is a necessary, usual or infrequent consequence of the fact or facts seen, known, or proven. When the fact inferred is the necessary consequence of the fact or facts known, the presumption amounts to a proof; when it is the usual, but not invariable consequence, the presumption is weak; but when it is sometimes, although rarely, the consequence of the fact or facts known, the presumption is of no weight. Menthuél sur les Conventions, tit. 5. See Domat, liv. 9, tit. 6; *Dig. de probationibus et presumptionibus*.

4. Presumptions are either legal and artificial, or natural.

5.—1. Legal or artificial presumptions are such as derive from the law a technical or artificial operation and effect, beyond their mere natural tendency to produce belief, and operate uniformly, without applying the process of reasoning on which they are founded, to the circumstances of the particular case. For instance, at the expiration of twenty years, without payment of interest on a bond, or other acknowledgment of its existence, satisfaction is to be presumed; but if a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time, does not arise; this is evidently an artificial and arbitrary distinction. 4 Greenl. 270; 10 John. R. 338; 9 Cowen, R. 653; 2 M'Cord, R. 439; 4 Burr. 1963; Lofft, 320; 1 T. R. 271; 6 East, R. 215; 1 Campb. R. 29. An example of another nature is given under this head by the civilians. If a mother and her infant at the breast perish in the same conflagration, the law presumes that the mother survived, and that the infant perished first, on account of its weakness, and on this ground the succession belongs to the heirs of the mother. See *Death*, 9 to 14.

6. Legal presumptions are of two kinds: first, such as are made by the law itself, or presumptions of *mere law*; secondly, such as are to be made by a jury, or presumptions of *law and fact*.

7.—1st. Presumptions of *mere law*, are either absolute and conclusive; as, for instance, the presumption of law that a bond or other specialty was executed upon a good consideration, cannot be rebutted by evidence, so long as the instrument is not impeached for fraud; 4 Burr. 2225; or they are not absolute, and may be rebutted by evidence; for example, the law presumes that a bill of exchange was accepted on a good consideration, but that presumption may be rebutted by proof to the contrary.

8.—2d. Presumptions of *law and fact* are such artificial presumptions as are recognized and warranted by the law as the proper inferences to be made by juries under particular circumstances; for instance, an unqualified refusal to deliver up the goods on demand made by the owner, does not fall within any definition of a conversion, but inasmuch as the detention is attended with all the evils of a conversion to the owner, the law makes it, in its effects and consequences, equivalent to a conversion, by directing or advising the jury to infer a conversion from the facts of demand and refusal.

9.—2. *Natural* presumptions depend upon their own form and efficacy in generating belief or conviction on the mind, as derived from these connexions which are pointed out by experience; they are wholly independent of any artificial connexions and relations, and differ from mere presumptions of law in this essential respect, that those depend, or rather are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, from the course of nature and the ordinary habits of society.

Vide, generally, Stark. Ev. h. t.; 1 Phil. Ev. 116; Civ. Code of Lo. 2263 to 2267; 17 Vin. Ab. 567; 12 Id. 124; 1 Supp. to Ves. jr. 37, 188, 489; 2 Id. 51, 223, 442; Bac. Ab. Evidence, H; Arch. Civ. Pl. 384; Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 4, s. 3; Poth. Tr. des Obl. part 4, c. 3, s. 2; Matt. on Pres.; Gresl. Eq. Ev. pt. 3, c. 4, p. 368; 2 Poth. Ob. by Evans, 340; 3 Bouv. Inst. n. 3058, et seq.

PRESUMPTIVE HEIR. One who, if

the ancestor should die immediately, would under the present circumstances of things be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, who is the presumptive heir, may be defeated by the birth of a child to the ancestor. 2 Bl. Com. 208.

PRET A USAGE. Loan for use. This phrase is used in the French law instead of *commodatum*. (q. v.)

PRETENTION, French law. The claim made to a thing which a party believes himself entitled to demand, but which is not admitted or adjudged to be his.

2. The words *rights, actions and pretensions*, are usually joined, not that they are synonymous, for *right* is something positive and certain, *action* is what is demanded, while *pretention* is sometimes not even accompanied by a demand.

PRETERITION, civil law. The omission by a testator of some one of his heirs who is entitled to a legitime, (q. v.) in the succession.

2. Among the Romans, the preterition of children when made by the mother were presumed to have been made with design; the preterition of sons by any other testator was considered as a wrong and avoided the will, except the will of a soldier in service, which was not subject to so much form.

PRETEXT. The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation; or which if true are not the true reasons for such act. Vattel, liv. 3, c. 3, § 32.

PRETIUM AFFECTIONIS. An imaginary value put upon a thing by the fancy of the owner in his affection for it, or for the person from whom he obtained it. Bell's Dict. h. t.

2. When an injury has been done to an article, it has been questioned whether in estimating the damage, there is any just ground, in any case, for admitting the *pretium affectionis*? It seems that when the injury has been done accidentally by culpable negligence, such an estimation of damages would be unjust, but when the mischief has been intentional, it ought to be so admitted. Kames on Eq. 74, 75.

PREVARICATION. *Prævaricatio, civil law.* The acting with unfaithfulness and want of probity. The term is applied principally to the act of concealing a crime. Dig. 47, 15, 6.

PREVENTION, civil and French law. The right of a judge to take cognizance of an action over which he has concurrent jurisdiction with another judge.

2. In Pennsylvania it has been ruled that a justice of the peace cannot take cognizance of a cause which has been previously decided by another justice. 2 Dall. 77; Id. 114.

PRICE, contracts. The consideration in money given for the purchase of a thing.

2. There are three requisites to the quality of a price in order to make a sale.

3.—1. It must be serious, and such as may be demanded; if, therefore, a person were to sell me an article, and by the agreement, reduced to writing, he were to release me from the payment, the transaction would no longer be a sale, but a gift. Poth. Vente, n. 18.

4.—2. The second quality of a price is, that the price be certain and determinate; but what may be rendered certain is considered as certain; if, therefore, I sell a thing at a price to be fixed by a third person, this is sufficiently certain, provided the third person make a valuation and fix the price. Poth. Vente, n. 23, 24.

5.—3. The third quality of a price is, that it consists in money, to be paid down, or at a future time, for if it be of any thing else, it will no longer be a price, nor the contract a sale, but exchange or barter. Poth. Vente, n. 30; 16 Toull. n. 147.

6. The true price of a thing is that for which things of a like nature and quality are usually sold in the place where situated, if real property; or in the place where exposed to sale, if personal. Poth. Contr. de Vente, n. 243. The first price or cost of a thing does not always afford a sure criterion of its value. It may have been bought very dear or very cheap. Marsh. Ins. 620, et seq.; Ayliffe's Pand. 447; Merlin, Répert. h. t.; 4 Pick. 179; 8 Pick. 252; 16 Pick. 227.

7. In a declaration in trover it is usual, when the chattel found is a living one, to lay it as of such a price; when dead, of such a value. 8 Wentw. Pl. 372, n; 2 Lilly's Ab. 629. Vide Bouv. Inst. Index, h. t.; *Adjustment; Inadequacy of price; Pretium affectionis.*

PRICE CURRENT. The price for which goods usually sell in the market. A printed newspaper containing a list of such prices is also called a price current.

PRIMA FACIE. The first blush; the

first view or appearance of the business; as, the holder of a bill of exchange, indorsed in blank, is *prima facie* its owner.

2. **Prima facie** evidence of a fact, is in law sufficient to establish the fact, unless rebutted. 6 Pet. R. 622, 632; 14 Pet. R. 334. See, generally, 7 J. J. Marsh, 425; 3 N. H. Rep. 484; 3 Stew. & Port. 267; 5 Rand. 701; 1 Pick. 332; 1 South. 77; 1 Yeates, 347; Gilp. 147; 2 N. & McCord, 320; 1 Miss. 334; 11 Conn. 95; 2 Root, 286; 16 John. 66, 136; 1 Bailey, 174; 2 A. K. Marsh. 244. For example, when buildings are fired by sparks emitted from a locomotive engine passing along the road, it is *prima facie* evidence of negligence on the part of those who have the charge of it. 3 Man. Gr. & So. 229.

PRIMA TONSURA. A grant of a right to have the first crop of grass. 1 Chit. Pr. 181.

PRIMAGE, merc. law. A duty payable to the master and mariner of a ship or vessel; to the master for the use of his cables and ropes to discharge the goods of the merchant; to the mariners for lading and unlading in any port or haven. Merch. Dict. h. t.; Abb. on Ship. 270.

2. This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. It is sometimes called the master's hat money. 3 Chit. Com. Law, 431.

PRIMARY. That which is first or principal; as *primary evidence*, or that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

2. A *primary obligation* is one which is the principal object of the contract; for example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. 1 Bouv. Inst. n. 702.

PRIMARY EVIDENCE. The best evidence of which the case in its nature is susceptible. 3 Bouv. Inst. n. 3053. Vide *Evidence.*

PRIMARY POWERS. The principal authority given by a principal to his agent; it differs from *mediate powers*. (q. v.) Story, Ag. § 58.

PRIMATE, eccles. law. An archbishop who has jurisdiction over one or several other metropolitans.

PRIMER ELECTION. A term used to signify first choice.

2. In England, when coparcenary lands are divided, unless it is otherwise agreed, the eldest sister has the first choice of the purparts; this part is called the *enitia pars*. (q. v.) Sometimes the oldest sister makes the partition, and in that case, to prevent partiality, she takes the last choice. Hob. 107; Litt. §§ 243, 244, 245; Bac. Ab. Coparceners, C.

PRIMER SEISIN, Eng. law. The right which the king had, when any of his tenants died seised of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion, expectant on an estate for life. 2 Bl. Com. 66.

PRIMOGENITURE. The state of being first born; the eldest.

2. Formerly primogeniture gave a title in cases of descent to the oldest son in preference to the other children; this unjust distinction has been generally abolished in the United States.

PRIMOGENITUS. The first born. 1 Ves. 290; and see 3 M. & S. 25; 8 Taunt. 468; 3 Vern. 660.

PRIMUM DECRETUM. In the courts of admiralty, this name is given to a provisional decree. Bac. Ab. The Court of Admiralty, E.

PRINCE. In a general sense, a sovereign; the ruler of a nation or state. The son of a king or emperor, or the issue of a royal family; as, princes of the blood. The chief of any body of men.

2. By a clause inserted in policies of insurance, the insurer is liable for all losses occasioned by "arrest or detainment of all kings, princes, and people, of what nation, condition, or quality soever." 1 Bouv. Inst. n. 1218.

PRINCIPAL. This word has several meanings. It is used in opposition to *accessary*, to show the degree of crime committed by two persons; thus, we say, the principal is more guilty than the accessary after the fact.

2. In estates, principal is used as opposed to *incident* or *accessory*; as in the following rule: "the incident shall pass by the grant of the principal, but not the principal by the grant of the incident. Accessorium non ducit, sed sequitur suum principalem." Co. Litt. 152, a.

3. It is used in opposition to *agent*, and in this sense it signifies that the principal is the prime mover.

4. It is used in opposition to *interest*; as, the principal being secured the interest will follow.

5. It is used also in opposition to *surety*; thus, we say the principal is answerable before the surety.

6. Principal is used also to denote the more important; as, the principal person.

7. In the English law, the chief person in some of the inns of chancery is called principal of the house. Principal is also used to designate the best of many things; as, the best bed, the best table, and the like.

PRINCIPAL, contracts. One who, being competent to contract, and who is *sui juris*, employs another to do any act for his own benefit, or on his own account.

2. As a general rule, it may be said, that every person, *sui juris*, is capable of being a principal, for in all cases where a man has power as owner, or in his own right to do anything, he may do it by another. 16 John. 86; 9 Co. 75; Com. Dig. Attorney, C 1; Heinec. ad Pand. P. 1, lib. 3, tit. 1, § 424.

3. Married women, and persons who are deprived of understanding, as idiots, lunatics, and others, not *sui juris*, are wholly incapable of entering into any contract, and, consequently, cannot appoint an agent. Infants and married women are, generally, incapable; but, under special circumstances, they may make such appointments. For instance, an infant may make an attorney, when it is for his benefit; but he cannot enter into any contract which is to his prejudice. Com. Dig. Infant, C 2; Perk. 13; 9 Co. 75; 3 Burr. 1804. A married woman cannot, in general, appoint an agent or attorney, and when it is requisite that one should be appointed, the husband generally appoints for both. Perhaps for her separate property she may, with her husband, appoint an agent or attorney; Cro. Car. 165; 2 Leon. 200; 2 Buls. R. 13; but this seems to be doubted. Cro. Jac. 617; Yelv. 1; 1 Brownl. 134; 2 Brownl. 248; Adams' Ej. 174; Runn. Ej. 148.

4. A principal has rights which he can enforce, and is liable to obligations which he must perform. These will be briefly considered:

1. The *rights* to which principals are entitled arise from obligations due to them by their agents, or by third persons.

5.—1st. *The rights against their agents*, are, 1. To call them to an account at all times, in relation to the business of their agency. 2. When the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omissions in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity. Paley on Ag. by Lloyd, 7, 71, 74, and note 2; 12 Pick. 328; 1 B. & Adolph. 415; 1 Liverm. Ag. 398. 3. The principal has a right to supersede his agent, where each may maintain a suit against a third person, by suing in his own name; and he may, by his own intervention, intercept, suspend, or extinguish the right of the agent under the contract. Paley Ag. by Lloyd, 362; 7 Taunt. 237, 243; 1 M. & S. 576; 1 Liverm. Ag. 226-228; 2 W. C. C. R. 283; 3 Chit. Com. Law, 201-208.

6.—2d. *The principal's rights against third persons*. 1. When a contract is made by the agent with a third person in the name of his principal, the latter may enforce it by action. But to this rule there are some exceptions; 1st. When the instrument is under seal, and it has been exclusively made between the agent and the third person; as, for example, a charter party or bottomry bond; in this case the principal cannot sue on it. See 1 Paine, Cir. R. 252; 3 W. C. C. R. 560; 1 M. & S. 573; Abbott, Ship, pt. 3, c. 1, s. 2. 2d. When an exclusive credit is given to and by the agent, and therefore the principal cannot be considered in any manner a party to the contract, although he may have authorized it, and be entitled to all the benefits arising from it. The case of a foreign factor, buying or selling goods, is an example of this kind: he is treated as between himself and the other party, as the sole contractor, and the real principal cannot sue or be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usage of trade; and it is strictly adhered to for the safety and convenience of foreign commerce. Story, Ag. § 423; Smith, Mer. Law, 66; 15 East, R. 62; 9 B. & C. 87. 3d. When the agent has a lien or claim upon the property bought or sold, or upon its proceeds, when it equals or exceeds the amount of its value. Story, Ag. §§ 407, 408, 424.

7.—2. But contracts are not unfre-

quently made without mentioning the name of the principal; in such case he may avail himself of the agreement, for the contract will be treated as that of the principal, as well as of the agent. Story, Ag. § 109, 111, 403, 410, 417, 440; Paley, Ag. by Lloyd, 21, 22; Marsh. Ins. b. 1, c. 8, § 3, p. 311; 2 Kent's Com. 3d edit. 630; 3 Chit. Com. Law, 201; vide 1 Paine's C. C. Rep. 252.

8.—3. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency. Pal. Ag. by Lloyd, 363; Story, Ag. § 436; 3 Chit. Com. Law, 205, 206; 15 East, R. 38.

9.—2. *The liabilities of the principal* are either to his agent or to third persons.

10.—1st. *The liabilities of the principal to his agent*, are, 1. To reimburse him all expenses he may have lawfully incurred about the agency. Story, Ag. § 335; Story, Bailm. § 196, 197; 2 Liv. Ag. 11 to 33. 2. To pay him his commissions as agreed upon, or according to the usage of trade, except in cases of gratuitous agency. Story, Ag. § 323; Story, Bailm. 153, 154, 196 to 201. 3. To indemnify the agent when he has sustained damages in consequence of the principal's conduct; for example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal. Pal. Ag. by Lloyd, 152, 301; 2 John. Cas. 54; 17 John. 142; 14 Pick. 174.

11.—2d. *The liabilities of the principal to third persons*, are, 1. To fulfil all the engagements made by the agent, for or in the name of the principal, and which come within the scope of his authority. Story, Ag. § 126. 2. When a man stands by and permits another to do an act in his name, his authority will be presumed. Vide *Authority*, and 2 Kent, Com. 3d edit. 614; Story, Ag. § 89, 90, 91; and articles *Assent*; *Consent*. 3. The principal is liable to third persons for the misfeasance, negligence, or omission of duty of his agent; but he has a remedy over against the agent, when the injury has occurred in consequence of his misconduct or culpable neglect; Story, Ag. § 308; Paley, Ag. by Lloyd, 152, 3; 1 Metc. 560; 1 B. Monr. 292; 5 B. Monr. 25; 9 W. & S. 72; 8 Pick. 23; 6 Gill & John. 292; 4 Q. B. 298; 1 Hare & Wall. Sel. Dec. 467;

Dudl. So. Car. B. 265, 268; 5 Humph. 397; 2 Murph. 389; 1 Ired. 240; but the principal is not liable for torts committed by the agent without authority. 5 Humph. 397; 2 Murph. 389; 19 Wend. 343; 2 Metc. 353. A principal is also liable for the misconduct of a sub-agent, when retained by his direction, either express or implied. 1 B. & P. 404; 15 East, 66.

12. The general rule, that a principal cannot be charged with injuries committed by his agent without his assent, admits of one exception, for reasons of policy. A sheriff is liable, even under a penal statute, for all injurious acts, wilful or negligent, done by his appointed officers, *colore officii*, when charged and deputed by him to execute the law. The sheriff is, therefore, liable where his deputy wrongfully executes a writ; Dougl. 40; or where he takes illegal fees. 2 E. N. P. C. 585.

13. But the principal may be liable for his agent's misconduct, when he has agreed, either expressly or by implication, to be so liable. 8 T. R. 531; 2 Cas. N. P. C. 42. Vide Bouv. Inst. Index, h. t.; *Agency; Agent*.

PRINCIPAL, crim. law. A principal is one who is the actor in the commission of a crime.

2. Principals are of two kinds; namely, 1. *Principals in the first degree*, are those who have actually with their own hands committed the fact, or have committed it through an innocent agent incapable himself, of doing so; as an example of the latter kind, may be mentioned the case of a person who incites a child wanting discretion, or a person non compos, to the commission of murder, or any other crime, the incitor, though absent, when the crime was committed, is, *ex necessitate*, liable for the acts of his agent and is a principal in the first degree. Fost. 340; 1 East, P. C. 118; 1 Hawk. c. 31, s. 7; 1 N. R. 92; 2 Leach, 978. It is not requisite that each of the principals should be present at the entire transaction. 2 East, P. C. 767. For example, where several persons agree to forge an instrument, and each performs some part of the forgery in pursuance of the common plan, each is principal in the forgery, although one may be away when it is signed. R. & R. C. C. 304; Mo. C. C. 304, 307.

3.—2. *Principals in the second degree*, are those who were present aiding and abetting the commission of the fact. They are generally termed aiders and abettors, and

sometimes, improperly, accomplices. (q. v.) The presence which is required in order to make a man principal in the second degree, need not be a strict actual, immediate presence, such a presence as would make him an eye or ear witness of what passes, but may be a constructive presence. It must be such as may be sufficient to afford aid and assistance to the principal in the first degree. 9 Pick. R. 496; 1 Russell, 21; Foster, 350.

4. It is evident from the definition that to make a man a principal, he must be an actor in the commission of the crime; and, therefore, if a man happen merely to be present when a felony is committed without taking any part in it, or aiding those who do, he will not, for that reason, be considered a principal. 1 Hale, P. C. 439; Foster, 350.

PRINCIPAL CONTRACT. One entered into by both parties, on their own accounts, or in the several qualities they assume. It differs from an accessory contract. (q. v.) Vide *Contract*.

PRINCIPAL OBLIGATION. That obligation which arises from the principal object of the engagement which has been contracted between the parties. It differs from an accessory obligation. (q. v.) For example, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement. Poth. Obl. n. 182. By principal obligation is also understood the engagement of one who becomes bound for himself and not for the benefit of another. Poth. Obl. n. 186.

PRINCIPLES. By this term is understood truths or propositions so clear that they cannot be proved nor contradicted, unless by propositions which are still clearer. They are of two kinds, one when the principle is universal, and these are known as axioms or maxims; as, *no one can transmit rights which he has not; the accessory follows the principal*, &c. The other class are simply called first principles. These principles have known marks by which they may always be recognized. These are, 1. That they are so clear that they cannot be proved by anterior and more manifest truths. 2. That they are almost universally received. 3. That they are so strongly impressed on our minds that we conform ourselves to them, whatever may be our avowed opinions.

2. First principles have their source in the sentiment of our own existence, and that which is in the nature of things. A principle of law is a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule. Domat, *Lois Civiles*, liv. prélim. t. 1, s. 2; Toull. tit. prélim. n. 17. *The right to defend one's self, continues as long as an unjust attack, was a principle before it was ever decided by a court, so that a court does not establish but recognize principles of law.*

3. In physics, by principle is understood that which constitutes the essence of a body, or its constituent parts. 8 T. R. 107. See 2 H. Bl. 478. Taken in this sense, a principle cannot be patented; but when by the principle of a machine is meant the *modus operandi*, the peculiar device or manner of producing any given effect, the application of the principle may be patented. 1 Mason, 470; 1 Gallis, 478; Fessend. on Pat. 130; Phil. on Pat. 95, 101; Perpigna, *Manuel des Inventeurs, &c.*, c. 2, s. 1.

PRINTING. The art of impressing letters; the art of making books or papers by impressing legible characters.

2. The right to print is guarantied by law, and the abuse of the right renders the guilty person liable to punishment. See *Label; Liberty of the Press; Press.*

PRIORITY. Going before; opposed to posteriority. (q. v.)

2. He who has the precedency in time has the advantage in right, is the maxim of the law; not that time, considered barely in itself, can make any such difference, but because the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards. 1 Fonb. Eq. 320.

3. In the payment of debts, the United States are entitled to priority when the debtor is insolvent, or dies and leaves an insolvent estate. The priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding or absent debtor, on which an act of legal bankruptcy had been committed. 1 Kent, Com. 243; 1 Law Intell. 219, 251; and the cases there cited.

4. Among common creditors, he who has the oldest lien has the preference; it being a maxim both of law and equity, *qui prior est tempore, potior est jure*. 2 John.

Ch. R. 608. Vide *Insolvency*; and *Serg. Const. Law, Index*, h. t.

PRISAGE. The name of an ancient duty taken by the English crown on wines imported into England. Bac. Ab. *Smuggling and Customs*, C. 2; Harg. L. Tr. 75.

PRISON. A legal prison is the building designated by law, or used by the sheriff, for the confinement, or detention of those whose persons are judicially ordered to be kept in custody. But in cases of necessity, the sheriff may make his own house, or any other place, a prison. 6 John. R. 22.

2. An illegal prison is one not authorized by law, but established by private authority; when the confinement is illegal, every place where the party is arrested is a prison; as, the street, if he be detained in passing along. 4 Com. Dig. 619; 2 Hawk. P. C. c. 18, s. 4; 1 Russ. Cr. 378; 2 Inst. 589.

PRISON BREAKING. The act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. This is an offence at common law.

2. To constitute this offence, there must be, 1. A lawful commitment of the prisoner; vide *Regular and Irregular process*.

2. An actual breach with force and violence of the prison, (q. v.) by the prisoner himself or by others with his privity and procurement. Russ. & Ry. 458; 1 Russ. Cr. 380. 3. The prisoner must escape. 2 Hawk. P. C. c. 18, s. 12; vide 1 Hale P. C. 607; 4 Bl. Com. 130; 2 Inst. 500; 2 Swift's Dig. 327; Alis. Prin. 555; Dalloz, Dict. mot *Effraction*.

PRISONER. One held in confinement against his will.

2. Prisoners are of two kinds, those lawfully confined, and those unlawfully imprisoned.

3. Lawful prisoners are either prisoners charged with crimes, or for a civil liability. Those charged with crimes are either persons accused and not tried, and these are considered innocent, and are therefore entitled to be treated with as little severity as possible, consistently with the certain detention of their persons; they are entitled to their discharge on bail, except in capital cases, when the proof is great; or those who have been convicted of crimes, whose imprisonment, and the mode of treatment they experience, is intended as a punishment, these are to be treated agreeably to the requisitions of the law, and in the

United States, always with humanity. Vide *Penitentiary*. Prisoners in civil cases, are persons arrested on original or mesne process, and these may generally be discharged on bail; and prisoners in execution, who cannot be discharged, except under the insolvent laws.

4. Persons unlawfully confined, are those who are not detained by virtue of some lawful, judicial, legislative, or other proceeding. They are entitled to their immediate discharge on *habeas corpus*. For the effect of a contract entered into by a prisoner, see 1 Salk. 402, n.; 6 Toull. 82.

5. By the resolution of congress, of September 23, 1789, it was recommended to the legislatures of the several states, to pass laws, making it expressly the duty of the keepers of these jails to receive and safely keep therein, all persons committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such states respectively. And by the resolution of March 3, 1791, it is provided, that if any state shall not have complied with the above recommendation, the marshal in such state, under the direction of the judge of the district, shall be authorized to hire a convenient place to serve as a temporary jail. See 9 Cranch, R. 80.

PRISONER OF WAR. One who has been captured while fighting under the banner of some state. He is a prisoner, although never confined in a prison.

2. In modern times, prisoners are treated with more humanity than formerly; the individual captor has now no personal right to his prisoner. Prisoners are under the superintendence of the government, and they are now frequently exchanged. Vide 1 Kent, Com. 14.

3. It is a general rule, that a prisoner is out of the protection of the laws of the state, so far, that he can have no civil remedy under them, and he can, therefore, maintain no action. But his person is protected against all unlawful acts. Bac. Ab. Abatement, b. 3; Bac. Ab. Aliens, D.

PRIVATE. Not general, as a private act of the legislature; not in office; as, a private person, as well as an officer, may arrest a felon; individual, as your private interest; not public, as a private way, a private nuisance.

PRIVATEER war. A vessel owned by

one or by a society of private individuals, armed and equipped at his or their expense, for the purpose of carrying on a maritime war, by the authority of one of the belligerent parties.

2. For the purpose of encouraging the owners of private armed vessels, they are usually allowed to appropriate to themselves the property they capture, or, at least, a large proportion of it. 1 Kent, Com. 96; Poth. du Dr. de Propr. n. 90, et seq. See 2 Dall. 36; 3 Dall. 334; 4 Cranch, 2; 1 Wheat. 46; 3 Wheat. 546; 2 Gall. R. 19; Id. 526; 1 Mason, R. 365; 3 Wash. C. C. R. 209; 2 Gall. R. 56; 5 Wheat. 338; Mann. Comm. 116.

PRIVEMENT ENCEINTE. This term is used to signify that a woman is pregnant, but not *quick with child*; (q. v.) and vide Wood's Inst. 662; *Enceinte*; *Fetus*; *Pregnancy*.

PRIVIES. Persons who are partakers, or have an interest in any action or thing, or any relation to another. Wood, Inst. b. 2, c. 3, p. 255; 2 Tho. Co. Lit. 506; Co. Lit. 271, a.

2. There are several kinds of privies, namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together. Tho. Co. Lit. 506; Prest. Conv. 327 to 345. Privies have also been divided into privies in fact, and privies in law. 8 Co. 42 b. Vide Vin. Ab. Privity; 5 Com. Dig. 347; Ham. on Part. 131; Woodf. Land. & Ten. 279, 1 Dane's Ab. c. 1, art. 6.

PRIVILEGE, civil law. A right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors. Louis. Code, art. 3153; Dict. de Juris. art. Privilege; Domat, Lois Civ. liv. 2, t. 1, s. 4, n. 1.

2. Creditors of the same rank of privileges, are paid in concurrence, that is, on an equal footing. Privileges may exist either in movables, or immovables, or both at once. They are general or special, on certain movables. The debts which are privileged on *all the movables in general*, are the following, which are paid in this order. 1. Funeral charges. 2. Law charges, which are such as are occasioned by the prosecution of a suit before the courts. But this name

applies more particularly to costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. 3. Charges, of whatever nature, occasioned by the last sickness, concurrently among those to whom they are due; see *Last sickness*. 4. The wages of servants for the year past, and so much as is due for the current year. 5. Supplies of provisions made to the debtor or his family during the last six months, by retail dealers, such as bakers, butchers, grocers; and during the last year by keepers of boarding houses and taverns. 6. The salaries of clerks, secretaries, and other persons of that kind. 7. Dotal rights, due to wives by their husbands.

3. The debts which are privileged on *particular movables*, are, 1. The debt of a workman or artizan for the price of his labor, on the movable which he has repaired, or made, if the thing continues still in his possession. 2. That debt on the pledge which is in the creditor's possession. 3. The carrier's charges and accessory expenses on the thing carried. 4. The price due on movable effects, if they are yet in the possession of the purchaser; and the like. See *Lien*.

4. Creditors have a privilege on immovables, or real estate in some cases, of which the following are instances: 1. The vendor on the estate by him sold, for the payment of the price, or so much of it as is due whether it be sold on or without a credit. 2. Architects and undertakers, bricklayers and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works on such houses, buildings, or works by them constructed, rebuilt or repaired. 3. Those who have supplied the owner with materials for the construction or repair of an edifice or other work, which he has erected or repaired out of these materials, on the edifice or other work constructed or repaired. Louis. Code, art. 3216.

See, generally, as to privilege, Louis. Code, tit. 21; Code Civ. tit. 18; Dict. de Juris. tit. Privilege; *Lien*; *Last sickness*; *Preference*.

PRIVILEGE, mar. law. An allowance to the master of a ship of the general nature with primage, (q. v.) being compensation or rather a gratuity customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of

such usage by the parties. 3 Chit. Com. Law, 431.

PRIVILEGE, rights. This word, taken in its active sense, is a particular law, or a particular disposition of the law, which grants certain special prerogatives to some persons, contrary to common right. In its passive sense, it is the same prerogative granted by the same particular law.

2. Examples of privilege may be found in all systems of law; members of congress and of the several legislatures, during a certain time, parties and witnesses while attending court; and coming to and returning from the same; electors, while going to the election, remaining on the ground, or returning from the same, are all privileged from arrest, except for treason, felony or breach of the peace.

3. Privileges from arrest for civil cases are either general and absolute, or limited and qualified as to time or place.

4.—1. In the first class may be mentioned ambassadors, and their servants, when the debt or duty has been contracted by the latter since they entered into the service of such ambassador; insolvent debtors duly discharged under the insolvent laws; in some places, as in Pennsylvania, women for any debt by them contracted; and in general, executors and administrators, when sued in their representative character, though they have been held to bail. 2 Binn. 440.

5.—2. In the latter class may be placed, 1st. Members of congress; this privilege is strictly personal, and is not only his own, or that of his constituent, but also that of the house of which he is a member, which every man is bound to know, and must take notice of. Jeff. Man. § 3; 2 Wils. R. 151; Com. Dig. Parliament, D. 17. The time during which the privilege extends includes all the period of the session of congress, and a reasonable time for going to, and returning from the seat of government. Jeff. Man. § 3; Story, Const. §§ 856 to 862; 1 Kent, Com. 221; 1 Dall. R. 296. The same privilege is extended to the members of the different state legislatures.

6.—2d. Electors under the constitution and laws of the United States, or of any state, are protected from arrest for any civil cause, or for any crime except treason, felony, or a breach of the peace, *eundo, mórando, et redeundo*, that is, going to, staying at, or returning from the election.

7.—3d. Militia men, while engaged in

the performance of military duty, under the laws, and eundo, môrando et redeundo.

8.—4th. All persons who, either necessarily or of right are attending any court or forum of justice, whether as judge, juror, party interested or witness, and eundo, môrando et redeundo. See 6 Mass. R. 245; 4 Dall. R. 329, 487; 2 John. R. 294; 1 South. R. 366; 11 Mass. R. 11; 3 Cowen, R. 381; 1 Pet. C. C. R. 41.

9. Ambassadors are wholly exempt from arrest for civil or criminal cases. Vide *Ambassador*.

See, generally, Bac. Ab. h. t.; 2 Rolle's Ab. 272; 2 Lilly's Reg. 369; Brownl. 15; 13 Mass. R. 288; 1 Binn. R. 77; 1 H. Bl. 636; Bouv. Inst. Index, h. t.

PRIVILEGED COMMUNICATIONS.

Those statements made by a client to his counsel or attorney, or solicitor, in confidence, relating to some cause or action then pending or in contemplation.

2. Such communications cannot be disclosed without the consent of the client. 6 M. & W. 587; 8 Dowl. 774; 2 Yo. & C. 82; 1 Dowl. N. S. 651; 9 Mees. & W. 508. See *Confidential communication*.

PRIVILEGIUM CLERICALE. The same as benefit of clergy.

PRIVITY. The mutual or successive relationship to the same rights of property. 1 Greenl. Ev. § 189; 6 How. U. S. R. 60.

PRIVITY OF CONTRACT. The relation which subsists between two contracting parties. Hamm. on Part. 132.

2. From the nature of the covenant entered into by him, a lessee has both privity of contract and of estate; and though by an assignment of his lease he may destroy his privity of estate, still the privity of contract remains, and he is liable on his covenant notwithstanding the assignment. Dougl. 458, 764; Vin. Ab. h. t.; 6 How. U. S. R. 60. Vide *Privies*.

PRIVITY OF ESTATE. The relation which subsists between a landlord and his tenant.

2. It is a general rule that a termor cannot transfer the tenancy or privity of estate between himself and his landlord, without the latter's consent: an assignee, who comes in only in privity of estate, is liable only while he continues to be legal assignee; that is, while in possession under the assignment. Bac. Ab. Covenant, E 4; Woodf. L. & T. 279; Vin. Ab. h. t.; Hamm. on Part. 132. Vide *Privies*.

PRIVY. One who is a partaker, or has an interest in any action, matter or thing.

PRIVY COUNCIL, Eng. law. A council of state composed of the king and of such persons as he may select.

PRIVY SEAL, Eng. law. A seal which the king uses to such grants or things as pass the great seal. 2 Inst. 554.

PRIVY VERDICT. One which is delivered privily to a judge out of court.

PRIZE, mar. law, war. The apprehension and detention at sea, of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. 1 Rob. Adm. R. 228. The vessel or goods thus taken are also called a prize. Goods taken on land from a public enemy, are called booty, (q. v.) and the distinction between a prize and booty consists in this, that the former is taken at sea and the latter on land.

2. In order to vest the title of the prize in the captors, it must be brought with due care into some convenient port for adjudication by a competent court. The condemnation must be pronounced by a prize court of the government of the captor sitting in the country of the captor, or his ally; the prize court of an ally cannot condemn. Strictly speaking, as between the belligerent parties the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over, and the *spes recuperandi* was gone. 1 Kent, Com. 100; Abbott on Shipp. Index, h. t.; 13 Vin. Ab. 51; 8 Com. Dig. 885; 2 Bro. Civ. Law, 444; Harr. Dig. Ship. and Shipping, X; Merl. Répert. h. t.; Bouv. Inst. Index. h. t. Vide *Infra præsidia*.

PRIZE, contracts. A reward which is offered to one of several persons who shall accomplish a certain condition; as, if an editor should offer a silver cup to the individual who shall write the best essay in favor of peace.

2. In this case there is a contract subsisting between the editor and each person who may write such essay that he will pay the prize to the writer of the best essay. Wolff, Dr. de la Nat. § 675.

3. By prize is also meant a thing which is won by putting into a lottery.

PRIZE COURT, Engl. law. The name of a court which has jurisdiction of all captures made in war on the high seas.

2. In England this is a separate branch of the court of admiralty, the other branch being called the *instance court*. (q. v.)

3. The district courts of the United States have jurisdiction both as instance and prize courts, there being no distinction in this respect as in England. 3 Dall. 6; vide 1 Gall. R. 563; Bro. Civ. & Adm. Law, ch. 6 & 7; 1 Kent, Com. 356; Mann. Comm. B. 3, c. 12.

PRO. A Latin preposition signifying *for*. As to its effects in contracts, vide Plowd. 412.

PRO AND CON. For and against. For example, affidavits are taken *pro* and *con*.

PRO CONFESSO, chan. pract. For confessed.

2. When the defendant has been served personally with a subpoena, or when not being so served has appeared, and afterwards neglects to answer the matter contained in the bill, it shall be taken *pro confesso*, as if the matter were confessed by the defendant. Blake's Ch. Pr. 80; Newl. Ch. Pr. c. 1, s. 12; 1 Johns. Ch. Rep. 8. It may also be taken *pro confesso* if the manner is sufficient. 4 Vin. Ab. 446; 2 Atk. 24; 3 Ves. 209; Harr. Ch. Pr. 154. Vide 4 Ves. 619, and the cases there cited.

PRO-CURATORS, PRO-TUTORS. Persons who act as curators or tutors, without being lawfully authorized. They are, in general, liable to all the duties of curators or tutors, and are entitled to none of the advantages which legal curators or tutors can claim.

PRO EO QUOD, pleading. For this that. It is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; 1 Com. Dig. Pleader, c. 86; 2 Chit. Pl. 369-398; Gould on Pl. c. 3, § 34.

PRO INDIVISO. For an undivided part. The possession or occupation of lands or tenements belonging to two or more persons, and consequently neither knows his several portion till divided. Bract. l. 5.

PRO QUERENTE. For the plaintiff; usually abbreviated, *pro quer*.

PRO RATA. According to the rate, proportion or allowance. A creditor of an insolvent estate, is to be paid *pro rata* with creditors of the same class.

PRO RE NATA. For the occasion as it may arise.

PRO TANTO. For so much. See 17 Serg. & Rawle, 400.

PROAMITA. Great paternal aunt;

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the sister of one's grandfather. Inst. 3, 6, 8 & 4; Dig. 38, 10, 10, 14, et seq.

PROAVUS. Great grandfather. This term is employed in making genealogical tables.

PROBABILITY. That which is likely to happen; that which is most consonant to reason; for example, there is a strong probability that a man of a good moral character, and who has heretofore been remarkable for truth, will, when examined as a witness under oath, tell the truth; and, on the contrary, that a man who has been guilty of perjury, will not, under the same circumstances, tell the truth; the former will, therefore, be entitled to credit, while the latter will not.

PROBABLE. That which has the appearance of truth; that which appears to be founded in reason.

PROBABLE CAUSE. When there are grounds for suspicion that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a *probable cause* for making a charge against the accused, however malicious the intention of the accuser may have been. Cro. Eliz. 70; 2 T. R. 231; 1 Wend. 140, 345; 5 Humph. 357; 3 B. Munr. 4. See 1 P. S. R. 234; 6 W. & S. 236; 1 Meigs, 84; 3 Brev. 94. And probable cause will be presumed till the contrary appears.

2. In an action, then, for a malicious prosecution, the plaintiff is bound to show total absence of probable cause, whether the original proceedings were civil or criminal. 5 Taunt. 580; 1 Camp. N. P. C. 199; 2 Wils. 307; 1 Chit. Pr. 48; Hamm. N. P. 273. Vide *Malicious prosecution*, and 7 Cranch, 339; 1 Mason's R. 24; Stewart's Adm. R. 115; 11 Ad. & El. 488; 39 E. C. L. R. 150; 24 Pick. 81; 8 Watts, 240; 3 Wash. C. C. R. 31; 6 Watts & Serg. 836; 2 Wend. 424; 1 Hill, S. C. 82; 3 Gill & John. 377; 1 Pick. 524; 8 Mass. 122; 9 Conn. 309; 3 Blackf. 445; Bouv. Inst. Index, h. t.

PROBATE OF A WILL. The proof before an officer appointed by law, that an instrument offered to be recorded is the act of the person whose last will and testament it purports to be. Upon proof being so made, and security being given when the laws of the state require such security, the officer grants to the executors or administrators cum testamento annexo, when there

are no executors, letters testamentary, or of administration.

2. The officer who takes such probate is variously denominated; in some states he is called judge of probate, in others register, and surrogate in others. Vide 11 Vin. Ab. 58; 12 Vin. Ab. 126; 2 Supp. to Ves. jr. 227; 1 Salk. 302; 1 Phil. Ev. 298; 1 Stark. Ev. 231, note, and the cases cited in the note, and also, 12 John. R. 192; 14 John. R. 407; 1 Edw. R. 266; 5 Rawle, R. 80; 1 N. & McC. 326; 1 Leigh, R. 287; Penn. R. 42; 1 Pick. R. 114; 1 Gallis. R. 662, as to the effect of a probate on real and personal property.

3. In England, the ecclesiastical courts, which take the probate of wills, have no jurisdiction of devises of land. In a trial at common law, therefore, the original will must be produced, and the probate of a will is no evidence.

4. This rule has been somewhat changed in some of the states. In New York it has been adopted, but provision is made for perpetuating the evidence of a will. 12 John. Rep. 192; 14 John. R. 407. In Massachusetts, Connecticut, North Carolina, and Michigan, the probate is conclusive of its validity, and a will cannot be used in evidence till proved. 1 Pick. R. 114; 1 Gallis. R. 622; 1 Mich. Rev. Stat. 275. In Pennsylvania, the probate is not conclusive as to lands, and, although not allowed by the Register's court, it may be read in evidence. 5 Rawle's R. 80. In North Carolina, the will must be proved *de novo* in the court of common pleas, though allowed by the ordinary. 1 Nott & McCord, 326. In New Jersey, probate is necessary, but it is not conclusive. Penn. R. 42.

5. The probate is a judicial act, and while unimpeached, authorizes debtors of the deceased in paying the debts they owed him, to the executors although the will may have been forged. 3 T. R. 125; see 8 East, Rep. 187. Vide *Letters testamentary*.

PROBATION. The evidence which proves a thing. It is either by record, writing, the party's own oath, or the testimony of witnesses. Proof. (q. v.) It also signifies the time of a novitiate; a trial. Nov. 5.

PROBATOR. *Ancient English law.* Strictly, an accomplice in felony, who to save himself confessed the fact, and charged or accused any other as principal or accessory, against whom he was bound to make good his charge. It also signified an ap-

prover, or one who undertakes to prove a crime charged upon another. Jacob's Law Dict. h. t.

PROBATORY TERM. In the British courts of admiralty, after the issue is formed between the parties, a time for taking the testimony is assigned, this is called a probatory term.

2. This term is common to both parties, and either party may examine his witnesses. When good cause is shown the term will be enlarged. 2 Bro. Civ. and Adm. Law, 418; Dunl. Pr. 217.

PROBI ET LEGALES HOMINES. Good and lawful men; persons competent in point of law to serve on juries. Cro. Eliz. 654, 751; Cro. Jac. 635; Mart. & Yerg. 147; Hardin, 63; Bac. Ab. Juries, A.

PROBITY. Justice, honesty. A man of probity is one who loves justice and honesty, and who dislikes the contrary. Wolff, Dr. de la Nat. § 772.

PROCEDENDO, practice. A writ which issues where an action is removed from an inferior to a superior jurisdiction by *habeas corpus, certiorari* or *writ of privilege*, and it does not appear to such superior court that the suggestion upon which the cause has been removed, is sufficiently proved; in which case the superior court by this writ remits the cause to the court from whence it came, commanding the inferior court to proceed to the final hearing and determination of the same. See 1 Chit. R. 575; 2 Bl. R. 1060; 1 Str. R. 527; 6 T. R. 365; 4 B. & A. 535; 16 East, R. 387.

PROCEEDING. In its general acceptation, this word means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing.

2. Proceedings are ordinary and summary. 1. By ordinary proceedings are understood the regular and usual mode of carrying on a suit by due course at common law. 2. Summary proceedings are those when the matter in dispute is decided without the intervention of a jury; these must be authorized by the legislature, except perhaps in cases of contempts, for such proceedings are unknown to the common law.

3. In Louisiana, there is a third kind of proceeding, known by the name of executory proceeding, which is resorted to in the following cases: 1. When the creditor's right arises from an act importing a con-

fession of judgment, and which contains a privilege or mortgage in his favor. 2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code of Practice, art. 732.

4. In New York the code of practice divides remedies into actions and special proceedings. An action is a regular judicial proceeding, in which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding. § 2.

PROCERES. The name by which the chief magistrates in cities were formerly known. St. Armand, Hist. Eq. 88.

PROCES VERBAL, French law. A true relation in writing in due form of law of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.

2. The *procès verbal* should be dated, contain the name, qualities, and residence of the public functionary who makes it, the cause of complaint, the existence of the crime, that which serves to substantiate the charge, point out its nature, the time, the place, the circumstances, state the proofs and presumptions, describe the place, in a word, everything calculated to ascertain the truth. It must be signed by the officer. Dall. Dict. h. t.

PROCESS, practice. So denominated because it *proceeds* or issues forth in order to bring the defendant into court, to answer the charge preferred against him, and signifies the writ or judicial means by which he is brought to answer. 1 Paine, R. 368; Bouv. Inst. Index, h. t.

2. In the English law, process in civil causes is called *original* process, when it is founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like; *mesne* process is also sometimes put in contradistinction to *final* process, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit. 3 Bl. Com. 279.

3. In criminal cases that proceeding which is called a warrant, before the finding of the bill, is termed process when

issued after the indictment has been found by the jury. Vide 4 Bl. Com. 319; Dalt. J. c. 193; Com. Dig. Process, A 1; Burn's Dig. Process; Williams, J., Process; 1 Chit. Cr. Law, 338; 17 Vin. Ab. 535.

4. The word *process* in the 12th section of the 5th article of the constitution of Pennsylvania, which provides that "the style of all process shall be *The Commonwealth of Pennsylvania*," was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that *judicial power* which is established and provided for in the article of the constitution, and forms exclusively the subject matter of it. 3 Penns. R. 99.

PROCESS, rights. The means or method of accomplishing a thing.

2. It has been said that the word *manufacture*, (q. v.) in the patent laws, may, perhaps, extend to a new process, to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. 2 B. & Ald. 349. See *Perpigna, Manuel des Inventeurs, &c.*, c. 1, s. 5, § 1, p. 22, 4th ed.; *Manufacture; Method*.

PROCESS, MESNE, practice. By this term is generally understood any writ issued in the course of a suit between the original process and execution.

2. By this term is also meant the writ or proceedings in an action to summon or bring the defendant into court, or compel him to appear or put in bail, and then to hear and answer the plaintiff's claim. 3 Chit. Pr. 140.

PROCESS OF GARNISHMENT, practice. It was formerly the practice to deposit deeds and other things in the hands of third persons, to await the performance of covenants, upon which they were to be re-delivered to one of the parties. When one of the parties contended that he was entitled to such things, and the other denied it, and the claiming party brought an action of detinue for them, the defendant was allowed to interplead, and thereupon he prayed for a monition or notice to compel the other depositor to appear and become a defendant in his stead. This was called a process of garnishment. 3 Reeves, Hist. Eng. Law, ch. 23, p. 448.

PROCESS OF INTERPLEADER, practice. Formerly when two parties concurred in a

bailment to a third person of things which were to be delivered to one of them on the performance of a covenant or other thing, and the parties brought several actions of detinue against the bailee, the latter might plead the facts of the case and pray that the plaintiffs in the several actions might interplead with each other; this was called process of interpleader. 3 Reeves, Hist. Eng. Law, ch. 23; Mitford, Eq. Pl. by Jeremy, 141; 2 Story, Eq. Jur. § 802.

PROCESSIONING. A term used in Tennessee to signify the manner of ascertaining the boundaries of land, as provided for by the laws of that state. Carr. & Nich. Comp. of Stat. of Tenn. 348. The term is also used in North Carolina. 3 Murph. 504; 3 Dev. 268.

PROCHEIN. Next. This word is frequently used in composition; as, *prochein amy*, *prochein cousin*, and the like. Co. Lit. 10.

PROCHAIN AMY, more correctly *prochain ami*. Next friend.

2. He who, without being appointed guardian, sues in the name of an infant for the recovery of the rights of the latter, or does such other acts as are authorized by law; as, in Pennsylvania, to bind the infant apprentice. 3 Serg. & Rawle, 172; 1 Ashm. Rep. 27. For some of the rules with respect to the liability or protection of a *prochein amy*, see 4 Madd. 461; 2 Str. 709; 3 Madd. 468; 1 Dick. 346; 1 Atk. 570; Mosely, 47, 85; 1 Ves. Jr. 409; 10 Ves. 184; 7 Ves. 425; Edw. on Parties, 182 to 204.

PROCLAMATION, evidence. The act of causing some state matters to be published or made generally known. A written or printed document in which are contained such matters, issued by proper authority; as the president's proclamation, the governor's, the mayor's proclamation. The word proclamation is also used to express the public nomination made of any one to a high office; as, such a prince was *proclaimed* emperor.

2. The president's proclamation has not the force of law, unless when authorized by congress; as if congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the president by proclamation to have happened; in this case the proclamation would give the act the force of law, which, till then, it wanted. How far a proclamation is evidence of facts, see Bac.

Ab. Ev. F; Dougl. 594, n; B. N. P. 226; 12 Mod. 216; 8 State Tr. 212; 4 M. & S. 546; 2 Camp. Rep. 44; Dane's Ab. ch. 96, a. 2, 3 and 4; 1 Scam. R. 577; Bro. h. t.

PROCLAMATION, practice. The declaration made by the cryer, by authority of the court, that something is about to be done.

2. It usually commences with the French word *Oyez, do you hear*, in order to attract attention; it is particularly used on the meeting or opening of the court, and at its adjournment; it is also frequently employed to discharge persons who have been accused of crimes or misdemeanors.

PROCLAMATION OF EXIGENTS, Eng. law. On awarding an *exigent*, in order to outlawry, a writ of proclamation issues to the sheriff of the county where the party dwells, to make three proclamations for the defendant to yield himself, or be outlawed.

PROCLAMATION OF REBELLION, Eng. law. When a party neglects to appear upon a *subpœna*, or an attachment in the chancery, a writ bearing this name issues, and if he does not surrender himself by the day assigned, he is reputed and declared a rebel.

PROCREATION. The generation of children; it is an act authorized by the law of nature: one of the principal ends of marriage is the procreation of children. Inst. tit. 2, in pr.

PROCTOR. One appointed to represent in judgment the party who empowers him, by writing under his hand called a *proxy*. The term is used chiefly in the courts of civil and ecclesiastical law. The proctor is somewhat similar to the attorney. Ayl. Parerg. 421.

PROCURATION, civil law. The act by which one person gives power to another to act in his place, as he could do himself. A letter of attorney.

2. Procurations are either express or implied; an express procuration is one made by the express consent of the parties; the implied or tacit takes place when an individual sees another managing his affairs, and does not interfere to prevent it. Dig. 17, 1, 6, 2; Id. 50, 17, 60; Code 7, 32, 2.

3. Procurations are also divided into those which contain absolute power, or a general authority, and those which give only a limited power. Dig. 3, 3, 58; Id. 17, 1, 60, 4. 4. The procurations are ended in three ways: first, by the revocation of the authority; secondly, by the death of one of the parties; thirdly, by the renun-

ciation of the mandatory, when it is made in proper time and place, and it can be done without injury to the person who gave it. Inst. 3, 27; Dig. 17, 1; Code 4, 35; and see *Authority; Letter of Attorney; Mandate*.

PROCURATIONS, *eccles. law*. Certain sums of money which parish priests pay yearly to the bishops or archdeacons *ratione visitationis*. x 3, 89, 25; Ayl. Parerg. 429; 17 Vin. Ab. h. t., page 544.

PROCURATOR, *civil law*. A proctor; a person who acts for another by virtue of a procuration. *Procurator est, qui aliena negotia mandata Domini administrat*. Dig. 3, 3, 1. Vide *Attorney; Authority*.

PROCURATOR in rem suam. *Scotch law*. This imports that one is acting as attorney as to his own property. When an assignment of a thing is made, as a debt, and a procuration or power of attorney is given to the assignee to receive the same, he is in such case procurator in rem suam. 3 Stair's Inst. 1, § 2, 3, &c.; 3 Ersk. 5, § 2; 1 Bell's Com. B. 5, c. 2, s. 1, § 2.

PROCURATORIUM. The proxy or instrument by which a proctor is constituted and appointed.

PRODIGAL, *civil law, persons*. Prodigals were persons who, though of full age, were incapable of managing their affairs, and of the obligations which attended them, in consequence of their bad conduct, and for whom a curator was therefore appointed.

2. In Pennsylvania, by act of assembly, an habitual drunkard is deprived of the management of his affairs, when he wastes his property, and his estate is placed in the hands of a committee.

PRODITORIE. Treasonably. This is a technical word formerly used in indictments for treason, when they were written in Latin.

PRODUCENT. He who produces a witness to be examined. The term is used in the ecclesiastical courts.

PROFANE. That which has not been consecrated. By a profane place is understood one which is neither sacred, nor sanctified, nor religious. Dig. 11, 7, 2, 4. Vide *Things*.

PROFANELY. In a profane manner. In an indictment, under the act of assembly of Pennsylvania, against profanity, it is requisite that the words should be laid to have been spoken profanely. 11 S. & R. 394.

PROFANENESS or **PROFANITY**,

crim. law. A disrespect to the name of God, or his divine providence. This is variously punished by statute in the several states.

PROFECTITUS, *civil law*. That which descends to us from our ascendants. Dig. 28, 3, 5.

PROFERT IN CURIA, *plead*. Produces in court.

2. When the plaintiff declares on a deed, or the defendant pleads a deed, and makes title under it, he must do it with a *profert in curia*, by declaring that he "brings here into court, the said writing obligatory," or other deed.

3. The object of this is to enable the court to inspect the instrument pleaded, the construction and legal effect of which is matter of law, and to entitle the adverse party to oyer of it; 10 Co. 92, b.; 1 Chit. Pl. 414; 1 Archb. Pr. 164; but one who pleads a deed of any kind, *without making title under it*, is not bound to make profert of it. Gould on Pl. ch. 7, part 2, § 47. To the above rule that he who declares on, or pleads a deed, and makes title under it, must make profert of it, there are several exceptions, all of which are founded on the pleader's actual or presumed inability to produce the instrument. A stranger to a deed, therefore, may in general plead it, and make title under it, without profert. Com. Dig. Pleader, O 8; Cro. Jac. 217; Cro. Car. 441; Carth. 316. Also he who claims title by operation of law, under a deed, to another, may plead the deed without profert. Co. Litt. 225; Bac. Abr. Pleas, I 12; 5 Co. 75. When the deed is in the hands of the opposite party, or destroyed by him, no profert need be made; or when it has been lost or destroyed by time or casualty.

4. In all these cases, to excuse the want of a profert, the special facts which bring the case within the exception, should be alleged in the party's pleadings. Vide Gould, Pl. ch. 8, part 2; Lawes' Pl. 96; 1. Saund. 9, a, note.

PROFESSION. This word has several significations. 1. It is a public declaration respecting something. Code, 10, 41, 6. 2. It is a state, art, or mystery; as the legal profession. Dig. 1, 18, 6, 4; Domat, Dr. Pub. l. 1, t. 9, s. 1, n. 7. 3. In the ecclesiastical law, it is the act of entering into a religious order. See 17 Vin. Ab. 545.

PROFITS. In general, by this term is

understood the benefit which a man derives from a thing. It is more particularly applied to such benefit as arises from his labor and skill.

2. It has, however, several other meanings. 1. Under the term profits, is comprehended the produce of the soil, whether it arise above or below the surface; as herbage, wood, turf, coals, minerals, stones, also fish in a pond or running water. Profits are divided into *profits a prendre*, or those taken and enjoyed by the mere act of the proprietor himself; and *profits a rendre*, namely, such as are received at the hands of, and rendered by another. Ham. N. P. 172.

3.—2. When land is devised to pay debts and legacies out of rents and profits, the land may be sold; otherwise, if out of the annual rents and profits. 1 Vern. 104, ca. 90.

4.—3. The natural meaning of raising by rents and profits, is by the yearly profits; but to prevent an inconvenience the word profits has, in some particular instances, been extended to any profits the land will yield, either by sale or mortgage; 1 Ch. Ca. 176; 2 Ch. Ca. 205; 2 Vern. 420; 1 P. Wms. 468; Pre. Ch. 586; 2 P. Wms. 19; 2 Ves. Jr. 481, n.; 2 Bro. Par. Cas. 418; 1 Atk. 506; Id. 550; 2 Atk. 358; where cases on raising portions in the life of parents and to the prejudice of the remainder-man are considered; and vide Powell on Mort. 90, et seq. But in no case where there are subsequent restraining words, has the word profits been extended. Pre. Ch. 586, note, and the cases cited there; 1 Atk. 506; 2 Atk. 105.

5.—4. A devise of profits is even considered, at law and in equity, a devise of the land itself. 1 Atk. 506; 1 Ves. 171; et vide 1 Ves. 42; 2 Atk. 358; 1 Bro. Ch. R. 310; 9 Mass. R. 372; 1 Pick. R. 224; 2 Pick. R. 425; 4 Pick. R. 203.

6.—5. Where an assignment of rents and profits recites the intention of the parties then to make a security for money borrowed, and there is a covenant for further assurance, this amounts to an equitable lien, and would entitle the assignee to insist upon a mortgage. 2 Cox, 233; S. C. 1 Ves. Jr. 162; see also 3 Bro. C. C. 538; S. C. 1 Ves. Jr. 477.

7.—6. Much doubt has arisen upon the question, whether the profit expected to arise upon maritime commerce be a proper subject of insurance. 1 Marsh. on Ins. 94. In some countries, as Holland and France, Code de

Com. 347, it is illegal to insure profits; but in England, profits expected to arise from a cargo of goods may be insured. 1 Marsh. on Ins. 97.

8.—7. Personal representatives and trustees are generally bound to account for all the profits they make out of the assets entrusted to them. See Toll. Ex. 486; 1 Serg. & Rawle, 245; 1 T. R. 295; 1 M. & S. 412; Supp. to Ves. Jr., Notes to Wilkinson v. Strafford, 1 Ves. Jr. 32; Paley on Agency, 48, 9.

9.—8. In cases of breach of contract, the plaintiff cannot in general recover damages for the profits he might have made. 1 Pet. R. 85, 94; S. C. 3 W. C. C. R. 184; 1 Pet. R. 172; see also 1 Yeates, 36; 11 Serg. & Rawle, 445.

10.—9. It is a general rule that any participation in the profits of a trade or business, makes a person receiving such profits responsible as a partner. Gow on Partn.; 6 Serg. & Rawle, 259; 1 Com. on Contr. 287 to 293. See generally on this subject, 3 W. C. C. R. 110; 15 Serg. & Rawle, 137; Chit. on Contr. 67; 6 Watts & Serg. 139.

11. But it is proper to observe that to make one a partner he must have such an interest in the profits as will entitle him to an account as a partner; he must be entitled to them as a principal. A clerk who receives a salary to be paid out of the profits would not be so considered, for there is a distinction between receiving the profits as such, and a commission on the profits, and although this seems, at first sight, but a flimsy distinction, it appears to be a well settled rule of law. 15 S. & R. 157; 6 S. R. 259; 1 Denio, 337; 20 Wend. 70; 3 M. Gr. & Sc. 32; 17 Ves. 404; 1 Camp. 329; 2 H. Bl. 590; 3 M. G. & S. 651; 3 Kent, Com. 25, note (b) 4th ed.; Cary on Partn. 11; Colly on Part. p. 17; Addis on Contr. 451; 4 M. & S. 244; Russ. & Ry. 141; 3 M. & P. 48; 5 Taunt. 74; 4 T. R. 144. The Roman law, Dig. 17, 2, 44; Poth. Pand. 17, 2, 4; and the French law, 5 Duv. Dr. Civ. Fr. n. 48; 17 Dur. Dr. Fr. n. 332; Poth. du Contrat de Société, n. 13, recognize the same distinction. Such is also the law of Scotland. Burt. Man. P. L. 178. When there are no stipulations to the contrary, the profits are to be enjoyed, and the losses borne by all the partners in equal proportions. Wats. Partn. 59, 60; Colly. Partn. 105; 6 Wend. 263; Story, Partn. § 24; 7 Bligh, R. 482; Wilson & Shaw, 16.

12.—10. A purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate. Sugd. on Vend. 353. See 6 Ves. Jr. 143, 352.

13. Profits among merchants are divided into *gross profits* and *net profits*. The former are the profits without any deduction for losses; the latter are the same profits, after having deducted all the losses. Story, Partn. § 34.

PROGRESSION. That state of a business which is neither the commencement nor the end. Some act done after the matter has commenced and before it is completed. Plowd. 343. Vide *Consummation*; *Inception*.

PROHIBITION, practice. The name of a writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. 3 Bl. Com. 112; Com. Dig. h. t.; Bac. Ab. h. t.; Saund. Index, h. t.; Vin. Ab. h. t.; 2 Sell. Pr. 308; Ayliffe's Parerg. 434; 2 Hen. Bl. 533.

2. The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed; Bull. N. P. 219; or when, by the exercise of its jurisdiction, the inferior court would defeat a legal right. 2 Chit. Pr. 355.

PROHIBITIVE IMPEDIMENTS, canon law. Those impediments to a marriage which are only followed by a punishment, but do not render the marriage null. Bowy. Mod. Civ. Law, 44.

PROJET. In international law, the draft of a proposed treaty or convention is called a projet.

PROES. Progeny; such issue as proceeds from a lawful marriage; and, in its enlarged sense, it signifies any children.

PROLETARIUS, civil law. One who had no property to be taxed; and paid a tax only on account of his children, *proles*; a person of mean or common extraction. The word has become Frenchified, *proletaire* signifying one of the common people.

PROLICIDE, med. jurispr. Medical jurists have employed this word to designate the destruction of the human offspring, and

divided the subject into *feticide*, (q. v.) or the destruction of the fœtus in utero; and *infanticide*, (q. v.) or the destruction of the new-born infant. Ryan. Med. Jur. 137.

PROLYTÆ, Rom. civil law. The term used to denominate students of law during the fifth and last year of their studies. They were left during this year, very much to their own direction, and took the name (*προλυτοι*) *Prolytæ omnino soluti*. They studied chiefly the code and the imperial constitutions. See Dig. Prof. Prim. Const. 2; Calvini Lex ad Voc.

PROLIXITY. The unnecessary and superfluous statement of facts in pleading or in evidence. This will be rejected as impertinent. 7 Price, 278, n.

PROLOCUTOR. In the ecclesiastical law, signifies a president or chairman of a convocation.

PROLONGATION. Time added to the duration of something.

2. When the time is lengthened during which a party is to perform a contract, the sureties of such a party are in general discharged, unless the sureties consent to such prolongation. See *Giving time*.

3. In the civil law the prolongation of time to the principal did not discharge the surety. Dig. 2, 14, 27; Id. 12, 1, 40.

PROMATERTERA. Great maternal aunt; the sister of one's grandmother. Inst. 3, 6, 3; Dig. 38, 10, 10, 14, et seq.

PROMISE, contr. An engagement by which the promisor contracts towards another to perform or do something to the advantage of the latter.

2. When a promise is reduced to the form of a written agreement under seal, it is called a covenant.

3. In order to be binding on the promisor, the promise must be made upon a sufficient consideration; when made without consideration, however, it may be binding in *foro conscientiæ*, it is not obligatory in law, being *nudum pactum*. Rutherf. Inst. 85; 18 Eng. C. L. Rep. 180, note a; Merl. Rép. h. t.

4. When a promise is made, all that is said at the time, in relation to it, must be considered; if, therefore, a man promise to pay all he owes, accompanied by a denial that he owes anything, no action will lie to enforce such a promise. 15 Wend. 187.

5. And when the promise is conditional, the condition must be performed before it

becomes of binding force. 7 John. 36. *Vide Condition.* Promises are express or implied. *Vide Undertaking*, and 5 East, 17; 2 Leon. 224, 5; 4 B. & A. 595.

PROMISE OF MARRIAGE. A contract mutually entered into by a man and a woman capable of contracting matrimony, that they will marry each other.

2. When one of the contracting parties violates his or her promise to the other, the latter may support an action against the former for damages, which are sometimes very liberally given. To entitle the plaintiff to recover damages, however, the defendant must not have been incapable of making the contract at the time, and such incapacity must not have been known to the opposite party; as, if a married man were to promise to marry a woman, and he afterwards refused to do so.

3. The canon law punished these breaches of promises by ecclesiastical censures.

4. According to the ancient jurisprudence of France, damages could have been recovered for the inexecution of this engagement, and cases are reported which show a considerable liberality on this subject. M. Maynon, counsellor in the parliament of Paris, was condemned to sixty thousand livres damages; and a M. Hebert to fourteen thousand livres. D'Héricourt, *Lois Ecclesiastiques, titre du Mariage*, art. 1, n. 13. By the modern law of France, damages may be recovered for the violation of this contract.

5. In Germany and Holland damages may also be recovered. Voet, in *Pandectas*, tit. de sponsalibus, n. 12; Huberus, in *Pandectas*, eod. tit. n. 19. And the Prussian code regulates the amount of damages to be paid under a variety of circumstances. Part I, b. 2, tit. 2. *Vide* 2 Chit. Pr. 52; Rosc. Civ. Ev. 193; 2 Car. & P. 631; 4 Esp. R. 258; 1 C. & P. 350; Holt, R. 151; S. C. 3 E. C. L. R. 57; 7 Cowen, 22; 1 John. Cas. 116; 6 Cowen, 254; 4 Cowen, 355; 7 Wend. 142.

PROMISES, evidence. When a defendant has been arrested, he is frequently induced to make confessions in consequence of promises made to him, that if he will tell the truth, he will be either discharged or favored: in such a case evidence of the confession cannot be received, because being obtained by the flattery of hope, it comes in so questionable a shape, when it

is to be considered evidence of guilt, that no credit ought to be given to it. 1 Leach, 263. This is the principle, but what amounts to a promise is not so easily defined. *Vide Confession.*

PROMISEE. A person to whom a promise has been made.

2. In general a promisee can maintain an action on a promise made to him, but when the consideration moves not from the promisee, but some other person, the latter, and not the promisee, has a cause of action, because he is the person for whose use the contract was made. Latch, 272; Poph. 81; 3 Cro. 77; 1 Raym. 271, 368; 4 B. & Ad. 434; 1 N. & M. 303; S. C. Cowp. 437; S. C. Dougl. 142. But see Carth. 5; 2 Ventr. 307; 9 M. & W. 92, 96.

PROMISOR. One who makes a promise.

2. The promisor is bound to fulfil his promise, unless when it is contrary to law, as a promise to steal or to commit an assault and battery; when the fulfilment is prevented by the act of God, as where one has agreed to teach another drawing and he loses his sight, so that he cannot teach it; when the promisee prevents the promisor from doing what he agreed to do; when the promisor has been discharged from his promise by the promisee, when the promise has been made without a sufficient consideration; and, perhaps, in some other cases, the duties of the promisor are at an end.

PROMISSORY NOTE, contracts. A written promise to pay a certain sum of money, at a future time, unconditionally. 7 Watts & S. 264; 2 Humph. R. 143; 10 Wend. 675; Minor, R. 263; 7 Misso. 42; 2 Cowen, 536; 6 N. H. Rep. 364; 7 Vern. 22. A promissory note differs from a mere acknowledgment of debt, without any promise to pay, as when the debtor gives his creditor an I O U. (q. v.) See 2 Yerg. 50; 15 M. & W. 23. But see 2 Humph. 143; 6 Alab. R. 373. In its form it usually contains a promise to pay, at a time therein expressed, a sum of money to a certain person therein named, or to his order, for value received. It is dated and signed by the maker. It is never under seal.

2. He who makes the promise is called the *maker*, and he to whom it is made is the *payee*. Bayley on Bills, 1; 3 Kent, Com. 46.

3. Although a promissory note, in its original shape, bears no resemblance to a bill of exchange; yet, when indorsed, it is

exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay to the indorsee. The indorser is as it were the drawer; the maker, the acceptor; and the indorsee, the payee. 4 Burr. 669; 4 T. R. 148; Burr. 1224.

4. Most of the rules applicable to bills of exchange, equally affect promissory notes. No particular form is requisite to these instruments; a promise to deliver the money, or to be accountable for it, or that the payee shall have it, is sufficient. Chit. on Bills, 53, 54.

5. There are two principal qualities essential to the validity of a note; first, that it be payable at all events, not dependent on any contingency; 20 Pick. 132; 22 Pick. 132; nor payable out of any particular fund. 3 J. J. Marsh. 542; 5 Pike, R. 441; 2 Blackf. 48; 1 Bibb, 503; 1 S. & M. 393; 3 J. J. Marsh. 170; 3 Pick. R. 541; 4 Hawks, 102; 5 How. S. C. R. 382. And, secondly, it is required that it be for the payment of money only; 10 Serg. & Rawle, 94; 4 Watts, R. 400; 11 Verm. R. 268; and not in bank notes, though it has been held differently in the state of New York. 9 Johns. R. 120; 19 Johns. R. 144.

6. A promissory note payable to order or bearer passes by indorsement, and although a chose in action, the holder may bring suit on it in his own name. Although a simple contract, a sufficient consideration is implied from the nature of the instrument. Vide 5 Com. Dig. 133, n., 151, 472; Smith on Merc. Law, B. 3, c. 1; 4 B. & Cr. 235; 7 D. P. C. 598; 8 D. P. C. 441; 1 Car. & Marsh. 16. Vide *Bank note*; *Note*; *Re-issuable note*.

PROMOTERS. In the English law, are those who in popular or penal actions prosecute in their own names and the king's, having part of the fines and penalties.

PROMULGATION. The order given to cause a law to be executed, and to make it public; it differs from publication. (q. v.) 1 Bl. Com. 45; Stat. 6 H. VI., c. 4.

2 With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector. Paine's C. C. R. 32. See Paine's C. C. R. 23.

PROMUTUUM, *civil law*. A quasi contract, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts towards the payer the obligation of returning him as much. Poth. De l'Usure, 3eme part. s. 1, a. 1.

2. This contract is called *promutuum*, because it has much resemblance to that of *mutuum*. (q. v.) This resemblance consists, 1st. That in both a sum of money or some fungible things are required. 2d. That in both there must be a transfer of the property in the thing. 3d. That in both there must be returned the same amount or quantity of the thing received. Poth. h. t., n. 133. But though there is this general resemblance between the two, the *mutuum* differs essentially from the *promutuum*. The former is the actual contract of the parties, made expressly, but the latter is a quasi contract, which is the effect of an error or mistake. Id. 134; 1 Bouv. Inst. n. 1125-6.

PRONEPOS. Great Grandson.

PRONOTARY. An ancient word which signifies *first notary*. The same as *prothonotary*. (q. v.)

PRONURUS. The wife of a great grandson.

PROOF, *practice*. The conviction or persuasion of the mind of a judge or jury, by the exhibition of evidence, of the reality of a fact alleged: as, *to prove*, is to determine or persuade that a thing does or does not exist. 8 Toull. n. 2; Ayl. Parerg. 442; 2 Phil. Ev. 44, n. a. Proof is the perfection of evidence, for without evidence there is no proof, although, there may be evidence which does not amount to proof: for example, a man is found murdered at a spot where another had been seen walking by a short time before, this fact would be *evidence* to show that the latter was the murderer, but, standing alone, would be very far from *proof* of it.

2. Ayliffe defines *judicial proof* to be a clear and evident declaration or demonstration, of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods; first, by proper arguments, such as conjectures, presumptions, indicia, and other adminicular ways and means; and, secondly, by legal method, or methods according to law, such as witnesses, public instruments, and the like. Parerg. 442; Aso. & Man. Inst. B. 3, t. 7.

PROPER. That which is essential, suitable, adapted, and correct.

2. Congress is authorized by art. 1, s. 8, of the constitution of the United States, "to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution of the United States, in any department or officer thereof." See *Necessary and Proper*.

PROPERTY. The right and interest which a man has in lands and chattels to the exclusion of others. 6 Binn. 98; 4 Pet. 511; 17 Johns. 283; 14 East, 370; 11 East, 290, 518. It is the right to enjoy and to dispose of certain things in the most absolute manner as he pleases, provided he makes no use of them prohibited by law. See *Things*.

2. All things are not the subject of property; the sea, the air, and the like, cannot be appropriated; every one may enjoy them, but he has no exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them, or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases; so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any consideration, or even throwing them away. Rutherf. Inst. 20; Domat, liv. prélim. tit. 3; Poth. Des Choses; 18 Vin. Ab. 63; 7 Com. Dig. 175; Com. Dig. Biens. See also 2 B. & C. 281; S. C. 9 E. C. L. R. 87; 3 D. & R. 394; 9 B. & C. 396; S. C. 17 E. C. L. R. 404; 1 C. & M. 39; 4 Call, 472; 18 Ves. 193; 6 Bing. 680.

3. Property is divided into real property, (q. v.) and personal property. (q. v.) Vide *Estate; Things*.

4. Property is also divided, when it consists of goods and chattels, into *absolute* and *qualified*. Absolute property is that which is our own, without any qualification whatever; as when a man is the owner of a watch, a book, or other inanimate thing; or of a horse, a sheep, or other animal, which never had its natural liberty in a wild state.

5. Qualified property consists in the right which men have over wild animals

which they have reduced to their own possession, and which are kept subject to their power; as a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost, his property is gone, unless the animals, go *animo revertendi*. 2 Bl. Com. 396; 3 Binn. 546.

6. But property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. Vide *Bailee; Bailment*.

7. Personal property is further divided into property in possession, and property or choses in action. (q. v.)

8. Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise and the like; the latter consists in legal rights, as choses in action, easements, and the like.

9. Property is lost, in general, in three ways, by the act of man, by the act of law, and by the act of God.

10.—1. It is lost by the act of man by, 1st. Alienation; but in order to do this, the owner must have a legal capacity to make a contract. 2d. By the voluntary abandonment of the thing; but unless the abandonment be purely voluntary, the title to the property is not lost; as, if things be thrown into the sea to save the ship, the right is not lost. Poth. h. t., n. 270; 3 Toull. n. 346. But even a voluntary abandonment does not deprive the former owner from taking possession of the thing abandoned, at any time before another takes possession of it.

11.—2. The title to property is lost by operation of law. 1st. By the forced sale, under a lawful process, of the property of a debtor to satisfy a judgment, sentence, or decree rendered against him, to compel him to fulfil his obligations. 2d. By confiscation, or sentence of a criminal court. 3d. By prescription. 4th. By civil death. 5th. By capture of a public enemy.

12.—3. The title to property is lost by the act of God, as in the case of the death of slaves or animals, or in the total destruction of a thing; for example, if a house be

swallowed up by an opening in the earth during an earthquake.

13. It is proper to observe that in some cases, the moment that the owner loses his possession, he also loses his property or right in the thing: animals *fera natura*, as mentioned above, belong to the owner only while he retains the possession of them. But, in general, the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law. Vide, generally, *Bouv. Inst. Index*, h. t.

PROPINQUITY. Kindred; parentage. Vide *Affinity*; *Consanguinity*; *Next of kin*.

PROPIOS, or PROPRIOS, *Span. law*. Certain portions of ground laid off and reserved when a town was founded in Spanish America, as the unalienable property of the town, for the purpose of erecting public buildings, markets, &c., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues, or the prosperity of the place. 12 *Peters' R.* 442, note.

PROPONENT, *eccl. law*. One who propounds a thing; as "the party propo-
nent doth allege and propound." 6 *Eng. Ecclesiastical R.* 356, n.

PROPOSAL. An offer for consideration or acceptance.

2. It is a general rule that a proposal offered to another for acceptance may be withdrawn at any time before it is accepted, provided that notice of the withdrawal be given to the party to whom it was made. A bid (q. v.) may be withdrawn at any time before acceptance; and a proposal by letter may be withdrawn at any time before acceptance; 1 *Pick.* 278; and, if accepted, it must be in the very terms offered. 3 *Wheat.* 225. Vide *Bid*; *Correspondence*; *Letter*; *Offer*.

PROPOSITION. An offer to do something. Until it has been accepted, a proposition may be withdrawn by the party who makes it; and to be binding, the acceptance must be in the same terms, without any variation. Vide *Acceptance*; *Offer*; *To retract*; and 1 *L. R.* 190; 4 *L. R.* 80.

PROPOSITUS. The person proposed. In making genealogical tables, the person whose relations it is desirous to find out, is called the propositus.

TO PROPOUND. To offer, to propose; as, the *onus probandi* in every case lies upon the party who propounds a will. 1 *Curt. R.* 637; 6 *Eng. Eccl. R.* 417.

PROPRES, *French law*. The term *propres* or *biens propres*, is used to denote that property which has come to an individual from his relations, either in a direct line, ascending or descending, or from a collateral line, whether the same have come by operation of law or by devise. *Propres* is used in opposition to *acquets*. *Poth. Des. Propres*; 2 *Burge, Conf. of Laws*, 61; 2 *L. R. S.*

PROPRIA PERSONA. In his own person. It is a rule in pleading that pleas to the jurisdiction of the court must be pleaded in *propria personâ*, because, if pleaded by attorney, they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction. *Laves on Pl.* 91.

2. An appearance may be in *propria personâ*, and need not be by attorney.

PROPRIETARY. In its strict sense, this word signifies one who is master of his actions, and who has the free disposition of his property. During the colonial government of Pennsylvania, William Penn was called the proprietary.

2. The domain which William Penn and his family had in the state, was, during the Revolutionary war, divested by the act of June 28, 1779, from that family and vested in the commonwealth for the sum which the latter paid to them of one hundred and thirty thousand pounds sterling.

PROPRIETATE PROBANDA. The name of a writ. See *De proprietate probanda*.

PROPRIETOR. The owner. (q. v.)

PROPRIO VIGORE. By its own force or vigor. This expression is frequently used in construction. A phrase is said to have a certain meaning *proprio vigore*.

PROPTER AFFECTUM. For or on account of some affection or prejudice. A jurymen may be challenged *propter affectum*; as, because he is related to the party has eaten at his expense, and the like. See *Challenge*, practice.

PROPTER DEFECTUM. On account or for some defect. This phrase is frequently used in relation to challenges. A jurymen may be challenged *propter defectum*; as, that he is a minor, an alien, and the like. See *Challenge*, practice.

PROPTER DELICTUM. For or on account of crime. A juror may be challenged *propter delictum*, when he has been convicted of an infamous crime. See *Challenge*, practice.

PROROGATED JURISDICTION, *Scotch law*. That jurisdiction, which, by the consent of the parties, is conferred upon a judge, who, without such consent, would be incompetent. *Ersk. Prin. B. 1, t. 2, n. 15.*

2. At common law, when a party is entitled to some privilege or exemption from jurisdiction, he may waive it, and then the jurisdiction is complete; but the consent cannot give jurisdiction.

PROROGATION. To put off to another time. It is generally applied to the English parliament, and means the continuance of it from one day to another; it differs from adjournment, which is a continuance of it from one day to another in the same session. *1 Bl. Com. 186.*

2. In the civil law, prorogation signifies the time given to do a thing beyond the term prefixed. *Dig. 2, 14, 27, 1. See Pro-longation.*

PROSCRIBED, *civil law*. Among the Romans, a man was said to be proscribed when a reward was offered for his head; but the term was more usually applied to those who were sentenced to some punishment which carried with it the consequences of civil death. *Code, 9, 49.*

PROSECUTION, *crim. law*. The means adopted to bring a supposed offender to justice and punishment by due course of law.

2. Prosecutions are carried on in the name of the government, and have for their principal object the security and happiness of the people in general. *Hawk. B. 2, c. 25, s. 3; Bac. Ab. Indictment, A 3.*

3. The modes most usually employed to carry them on, are by indictment; *1 Chit. Cr. Law, 132; presentment of a grand jury; Ibid. 133; coroner's inquest; Ibid. 134; and by an information. Vide Merl. Répert. mot Accusation.*

PROSECUTOR, *practice*. He who prosecutes another for a crime in the name of the government.

2. Prosecutors are public or private. The public prosecutor is an officer appointed by the government, to prosecute all offences; he is the attorney general or his deputy.

3. A private prosecutor is one who prefers an accusation against a party whom he suspects to be guilty. Every man may become a prosecutor, but no man is bound except in some few of the more enormous offences, as treason, to be one; but if the prosecutor should compound a felony, he

will be guilty of a crime. The prosecutor has an inducement to prosecute, because he cannot, in many cases, have any civil remedy until he has done his duty to society by an endeavor to bring the offender to justice. If a prosecutor act from proper motives, he will not be responsible to the party in damages, though he was mistaken in his suspicions; but if, from a motive of revenge, he institute a criminal prosecution without any reasonable foundation, he may be punished by being mulcted in damages, in an action for a malicious prosecution.

4. In Pennsylvania a defendant is not bound to plead to an indictment where there is a private prosecutor, until his name shall have been indorsed on the indictment as such, and on acquittal of the defendant, in all cases except where the charge is for a felony, the jury may direct that he shall pay the costs. *Vide 1 Chit. Cr. Law, 1 to 10; 1 Phil. Ev. Index, h. t.; 2 Virg. Cas. 3, 20; 1 Dall. 5; 2 Bibb. 210; 6 Call. 245; 5 Rand. 669; and the article Informer.*

PROSPECTIVE. That which is applicable to the future; it is used in opposition to retrospective. To be just, a law ought always to be prospective. *1 Bouv. Inst. n. 116.*

PROSTITUTION. The common lewdness of a woman for gain.

2. In all well regulated communities this has been considered a heinous offence, for which the woman may be punished, and the keeper of a house of prostitution may be indicted for keeping a common nuisance.

3. So much does the law abhor this offence, that a landlord cannot recover for the use and occupation of a house let for the purpose of prostitution. *1 Esp. Cas. 13; 1 Bos. & Pull. 340, n.*

4. In a figurative sense, it signifies the bad use which a corrupt judge makes of the law, by making it subservient to his interest; as, the prostitution of the law, the prostitution of justice.

PROTECTION, *merc. law*. The name of a document generally given by notaries public, to sailors and other persons going abroad, in which is certified that the bearer therein named, is a citizen of the United States.

PROTECTION, *government*. That benefit or safety which the government affords to the citizens.

PROTECTION, *Eng. law*. A privilege granted by the king to a party to an action,

by which he is protected from a judgment which would otherwise be rendered against him. Of these protections there are several kinds. F. N. B. 65.

PROTEST, mar. law. A writing, attested by a justice of the peace or a consul, drawn by the master of a vessel, stating the severity of a voyage by which a ship has suffered, and showing it was not owing to the neglect or misconduct of the master. Vide Marsh. Ins. 715, 716. See 1 Wash. C. C. R. 145; Id. 238; Id. 408, n.; 1 Pet. C. C. R. 119; 1 Dall. 6; Id. 10; Id. 317; 2 Dall. 195; 3 Watts & Serg. 144; 3 Binn. 228, n.; 1 Yeates, 261.

PROTEST, legislation. A declaration made by one or more members of a legislative body that they do not agree with some act or resolution of the body; it is usual to add the reasons which the protestants have for such a dissent.

PROTEST, contracts. A notarial act, made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchanges, &c.

2. There are two kinds of protest, namely, protest for non-acceptance, and protest for non-payment. When a protest is made and notice of the non-payment or non-acceptance given to the parties in proper time, they will be held responsible. 3 Kent, Com. 63; Chit. on Bills, 278; 3 Pardes. n. 418 to 441; Merl. Répert. h. t.; Com. Dig. Merchant, F 8, 9, 10; Bac. Ab. Merchant, &c. M 7.

3. There is also a species of protest, common in England, which is called protest for better security. It may be made when a merchant who has accepted a bill becomes insolvent, or is publicly reported to have failed in his credit, or absents himself from 'change, before the bill he has accepted becomes due, or when the holder has any just reason to suppose it will not be paid; and on demand the acceptor refuses to give it. Notice of such protest must, as in other cases, be sent by the first post. 1 Ld. Raym. 745; Mar. 27.

4. In making the protest, three things are to be done: the noting; demanding acceptance or payment; or, as above, better security; and drawing up the protest. 1. The noting, (q. v.) is unknown to the law as distinguished from the protest.

2. The demand, (q. v.) which must be made by a person having authority to receive the money. 3. The drawing up of the protest, which is a mere matter of form. Vide *Acceptance; Bills of Exchange*.

PROTESTANDO, pleading. According to Lord Coke, Co. Litt. 124, it is an exclusion of a conclusion. It has been more fully defined to be a saving to the party who takes it, from being concluded by any matter alleged or objected against him, upon which he cannot join issue. Plowd. 276, b; Finch's L. 359, 366; Lawes, Pl. 141.

2. Matter on which issue may be joined, whether it be the gist of the action, plea, replication or other pleading, cannot be taken by protestation; Plowd. Com. 276, b; although a man may take by protestation matter that he cannot plead, as in an action for taking goods of the value of one hundred dollars, the defendant may make protestation that they were not worth more than fifty dollars. It is obvious that a protestation, repugnant to or inconsistent with the gist of the plea, &c., cannot be of any benefit to the party making it. Bro. Ab. tit. Protestation, pl. 1, 5. It is also idle and superfluous to make protestation of the same thing that is traversed by the plea; Plowd. 276, b: or of any matter of fact which must necessarily depend upon another fact protested against; as, to protest that A made no will, and that he made no executor, which he could not do if there was no will. Id.

3. The common form of making a protestando is in these words, "Because protesting that," &c., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando, if it be matter of fact; or if it be against the legal sufficiency of his pleading, "Because protesting that the plea by him above pleaded in bar, or by way of reply, or rejoinder, &c., as the case may be, is wholly insufficient in law." No answer is necessary to a protestando, because it is never to be tried in the action in which it is made, but of such as is excluded from any manner of consideration in that action. Lawes' Civ. Pl. 143.

4. Protestations are of two sorts; first, when a man pleads anything which he dares not directly affirm, or cannot plead for fear of making his plea double; as if, in conveying to himself by his plea a title to land, the defendant ought to plead divers de-

scents from several persons, but dares not affirm that they were all seised at the time of their death; or, although he could do so, it would make his plea double to allege *two descents*, when *one* descent would be a sufficient bar, then the defendant ought to plead and allege the matter introducing the word "protesting," thus, protesting that such a one died seised, &c., and this the adverse party cannot traverse.

5. The other sort of protestation is, when a person is to answer two matters, and yet by law he can only plead one of them, then in the beginning of his plea he may say, *protesting or not acknowledging such part of the matter to be true*, and add, "*but for plea in this behalf*," &c., and so take issue, or traverse, or plead to the other part of the matter; and by this he is not concluded by any of the rest of the matter, which he has by protestation so denied, but may afterwards take issue upon it. Reg. Plac. 70, 71; 2 Saund. 103 a, n. 1. See 1 Chit. Pl. 534; Arch. Civ. Pl. 245; Doct. Pl. 402; Com. Dig. Pleader, N; Vin. Abr. Protestation; Steph. Pl. 235.

PROTESTATION. An asseveration made by taking God to witness. A protestation is a form of asseveration which approaches very nearly to an oath. Wolff, Inst. § 375.

PROTHONOTARY. The title given to an officer who officiates as principal clerk of some courts. Vin Ab. h. t.

2. In the ecclesiastical law, the name of prothonotary is given to an officer of the court of Rome, he is so called because he is the *first notary*; the Greek word *πρωτος* signifying *primus* or first. These notaries have preëminence over the other notaries, and are put in the rank of prelates. There are twelve of them. Dict. de Jur. h. t.

PROTOCOL, *civil law, international law.* A record or register. Among the Romans, *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabellions. Nov. 44.

2. In France the minutes of notarial acts were formerly transcribed on registers, which were called protocols. Toull. Dr. Civ. Fr. liv. 3, t. 3, c. 6, s. 1, n. 413.

3. By the German law it signifies the minutes of any transaction. Encyc. Amer. Protocol. In the latter sense the word has of late been received into international law. Ibid.

PROTUTOR, *civil law.* He who not being the tutor of a pupil or minor, has

administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor, or not.

2. He who marries a woman who is tutrix, becomes, by the marriage, a protutor. The protutor is equally responsible as the tutor.

PROUT PATET PER RECORDUM. As appears by the record. This phrase is frequently used in pleading; as, for example, in debt on a judgment or other matter of record, unless when it is stated as an inducement, it is requisite after showing the matter of record, to refer to it by the *prout patet per recordum*. 1 Chit. Pl. *356.

PROVINCE. Sometimes this signifies the district into which a country has been divided; as, the province of Canterbury, in England; the province of Languedoc, in France. Sometimes it means a dependency or colony; as, the province of New Brunswick. It is sometimes used figuratively, to signify power or authority; as, it is the province of the court to judge of the law, that of the jury to decide on the facts.

PROVISION, *com. law.* The property which a drawer of a bill of exchange places in the hands of a drawee; as, for example, by remittances, or when the drawee is indebted to the drawer when the bill becomes due, provision is said to have been made. Acceptance always presumes a provision. See Code de Comm. art. 115, 116, 117.

PROVISION, *French law.* An allowance granted by a judge to a party for his support; which is to be paid before there is a definitive judgment. In a civil case, for example, it is an allowance made to a wife who is separated from her husband. Dict. de Jurisp. h. t.

PROVISIONAL SEIZURE. A term used in Louisiana, which signifies nearly the same as attachment of property.

2. It is regulated by the Code of Practice as follows, namely:

Art. 284. The plaintiff may, in certain cases, hereafter provided, obtain the provisional seizure of the property which he holds in pledge, or on which he has a privilege, in order to secure the payment of his claim.

3.—Art. 285. Provisional seizure may be ordered in the following cases: 1. In executory proceedings, when the plaintiff sues on a title importing confession of judgment. 2. When a lessor prays for the

seizure of furniture or property used in the house, or attached to the real estate which he has leased. 3. When a seaman, or another person, employed on board of a ship or water craft, navigating within the state, or persons having furnished materials for, or made repairs to such ship or water craft, prays that the same may be seized, and prevented from departing, until he has been paid the amount of his claim. 4. When the proceedings are *in rem*, that is to say, against the thing itself, which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. Vide 6 N. S. 168; 8 N. S. 320; 7 N. S. 153; 1 Martin, R. 168; 12 Martin, R. 32.

PROVISIONS. Food for man; victuals.

2. As good provisions contribute so much to the health and comfort of man, the law requires that they shall be wholesome; he who sells unwholesome provisions, may therefore be punished for a misdemeanor. 2 East, P. C. 822; 6 East, R. 133 to 141; 3 M. & S. 10; 4 Campb. R. 10; 4 M. & S. 214.

3. And in the sale of provisions, the rule is, that the seller impliedly warrants that they are wholesome. 3 Bl. Com. 166.

PROVISO. The name of a clause inserted in an act of the legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect.

2. It always implies a condition, unless subsequent words change it to a covenant; but when a proviso contains the mutual words of the parties to a deed, it amounts to a covenant. 2 Co. 72; Cro. Eliz. 242; Moore, 707; Com. on Cov. 105; Lilly's Reg. h. t.; 1 Lev. 155.

3. A proviso differs from an exception. 1 Barn. & Ald. 99. An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment, something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse. 8 Amer. Jurist, 242; Plowd. 361; Carter, 99; 1 Saund. 234 a, note; Lilly's Reg. h. t.; and the cases there cited. Vide, generally, Amer. Jurist, No. 16, art. 1; Bac. Ab.

Conditions, A; Com. Dig. Condition, A 1, A 2; Dwar. on Stat. 660.

PROVOCATION. The act of inciting another to do something.

2. Provocation simply, unaccompanied by a crime or misdemeanor, does not justify the person provoked to commit an assault and battery. In cases of homicide, it may reduce the offence from murder to manslaughter. But when the provocation is given for the purpose of justifying or excusing an intended murder, and the party provoked is killed, it is no justification. 2 Gilb. Ev. by Lofft, 753.

3. The unjust provocation by a wife of her husband, in consequence of which she suffers from his ill usage, will not entitle her to a divorce on the ground of cruelty; her remedy, in such cases, is by changing her manners. 2 Lee, R. 172; 1 Hagg. Cons. Rep. 155. Vide *Cruelty; To Persuade*; 1 Russ. on Cr. B. 3, c. 1, s. 1, page 434, and B. 3, c. 3, s. 1, page 486; 1 East, P. C. 232 to 241.

PROVOST. A title given to the chief of some corporations or societies. In France, this title was formerly given to some presiding judges. The word is derived from the Latin *prepositus*.

PROXENETÆ, civil law. Among the Romans these were persons whose functions somewhat resembled the brokers of modern commercial nations. Dig. 50, 14, 3; Domat, l. 1, t. 17, § 1, art. 1.

PROXIMITY. Kindred between two persons. Dig. 38, 16, 8.

PROXY. A person appointed in the place of another, to represent him.

2. In the ecclesiastical law, a judicial proctor, or one who is appointed to manage another man's law concerns, is called a proxy. Ayl. Parerg.

3. The instrument by which a person is appointed so to act, is likewise called a proxy.

4. Proxies are also annual payments, made by the parochial clergy to the bishop, &c., on visitations. Toml. Law Dictionary, h. t. Vide Rutherf. Inst. 253; Hall's Pr. 14.

5. The right of voting at an election of an incorporated company by proxy, is not a general right, and the party claiming it must show a special authority for that purpose. Ang. on Corp. 67-69; 1 Paige's Ch. Rep. 590; 5 Day's Rep. 329; 5 Cowen, Rep. 426.

PUBERTY, civil law. The age in boys

after fourteen years until full age, and in girls after twelve years until full age. Ayl. Pand. 63; Hall's Praet. 14; Toull. Dr. Civ. Fr. tom. 6, p. 100; Inst. 1, 22; Dig. 1, 7, 40, 1; Code, 5, 60, 8.

PUBLIC. By the term the *public*, is meant the whole body politic, or all the citizens of the state; sometimes it signifies the inhabitants of a particular place; as, the New York public.

2. A distinction has been made between the terms *public* and *general*, they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large portion of the community. Greenl. Ev. § 128.

3. When the public interests and its rights conflict with those of an individual, the latter must yield. Co. Litt. 181. If, for example, a road is required for public convenience, and in its course it passes on the ground occupied by a house, the latter must be torn down, however valuable it may be to the owner. In such a case both law and justice require that the owner shall be fully indemnified.

4. This term is sometimes joined to other terms, to designate those things which have a relation to the public; as, a public officer, a public road, a public passage, a public house.

PUBLIC DEBT. That which is due or owing by the government.

2. The constitution of the United States provides, art. 6, s. 1, that "all debts contracted or engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation." It has invariably been the policy since the Revolution, to do justice to the creditors of the government. The public debt has sometimes been swelled to a large amount, and at other times it has been reduced to almost nothing.

PUBLIC ENEMY. This word, used in the singular number, designates a nation at war with the United States, and includes every member of such nation. Vatt. 1, 3, c. 5, § 70. To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy. 2 Marsh. Ins. 508; 3 Esp. R. 181, 182.

2. A common carrier is exempt from responsibility, whenever a loss has been occasioned to the goods in his charge by the act of a public enemy, but the burden of proof lies on him to show that the loss was so occasioned. 3 Munf. R. 239; 4 Binn. 127; 2 Bailey, 157. Vide *Enemy; People*.

PUBLIC PASSAGE. This term is synonymous with public highway, with this difference; by the latter is understood a right to pass over the land of another; by the former is meant the right of going over the water which is on another's land. Carth. 193; Hamm. N. P. 195. See *Passage*.

PUBLICAN, civil law. A farmer of the public revenue; one who held a lease of some property from the public treasury. Dig. 39, 4, 1, 1; Id. 39, 4, 12, 3; Id. 39, 4, 13.

PUBLICATION. The act by which a thing is made public.

2. It differs from promulgation, (q. v.) and see also Toullier, Dr. Civ. Fr. Titre Préliminaire, n. 59, for the difference in the meaning of these two words.

3. Publication has different meanings. When applied to a law, it signifies the rendering public the existence of the law; when it relates to the opening the depositions taken in a case in chancery, it means that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or orders of the court, to show the depositions openly, and to give out copies of them. Pract. Reg. 297; 1 Harr. Ch. Pr. 345; Blake's Ch. Pr. 143. When it refers to a libel, it is its communication to a second or third person, or a greater number. Holt on Libels, 254, 255, 290; Stark. on Slander, 350; Holt's N. P. Rep. 299; 2 Bl. R. 1088; 1 Saund. 112, n. 3. And when spoken of a will, it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will. Cruise, Dig. tit. 38, c. 5, s. 47; 3 Atk. 161; 4 Greenl. R. 220; 3 Rawle, R. 15; Com. Dig. Estates by devise, E 2. Vide Com. Dig. Chancery, Q; Id. Libel, B 1; Ibid. Action upon the case for defamation, G 4; Roscoe's Cr. Ev. 529; Bac. Ab. Libel, B; Hawk. P. C. B. 1, c. 73, s. 10; 3 Yeates' R. 128; 10 Johns. R. 442. As to the publication of an award, see 6 N. H. Rep. 86. See, generally, Bouv. Inst. Index, h. t.

PUBLICIANA, civil law. The name of an action introduced by the prætor Publicius, the object of which was to recover a thing which had been lost. Inst. 4, 6, 4; Dig. 6, 2, 1, 16 et 17. Its effects were similar to those of our action of trover.

PUBLICITY. The doing of a thing in the view of all persons who choose to be present.

2. The law requires that courts should be open to the public, there can therefore be no secret tribunal, except the grand jury; (q. v.) and all judgments are required to be given in public.

3. Publicity must be given to the acts of the legislature before they can be in force, but in general their being recorded in a certain public office is evidence of their publicity. Vide *Promulgation; Publication*.

PUBLISHER. One who does by himself or his agents make a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.

2. The publisher of a libel is responsible as if he were the author of it, and it is immaterial whether he has any knowledge of its contents or not; 9 Co. 59; Hawk. P. C. c. 73, § 10; 4 Mason, 115; and it is no justification to him that the name of the author accompanies the libel. 10 John, 447; 2 Moo. & R. 312.

3. When the publication is made by writing or printing, if the matter be libelous, the publisher may be indicted for a misdemeanor, provided it was made by his direction or consent; but if he was the owner of a newspaper merely, and the publication was made by his servants or agents, without any consent or knowledge on his part, he will not be liable to a criminal prosecution. In either case he will be liable to an action for damages sustained by the party aggrieved. 7 John. 260.

4. In order to render the publisher amenable to the law, the publication must be maliciously made, but malice will be presumed if the matter be libelous. This presumption, however, will be rebutted, if the publication be made for some lawful purpose, as, drawing up a bill of indictment, in which the libelous words are embodied, for the purpose of prosecuting the libeler; or if it evidently appear the publisher did not, at the time of publication, know that the matter was libelous; as, when a person reads a libel alone in the presence of others, without beforehand,

knowing it to be such. 9 Co. 59. See *Libel; Libeler; Publication*.

PUDICITY. Chastity; the abstaining from all unlawful carnal commerce or connexion. A married woman or a widow may defend her pudicity as a maid may her virginity. Vide *Chastity; Rape*.

PUDZELD, old Engl. law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 a. The same as *Woodgeld*. (q. v.)

PUER. In its enlarged sense this word signifies a child of either sex; though in its restrained meaning it is applied to a boy only.

2. A case once arose which turned upon this question, whether a daughter could take lands under the description of *puer*, and it was decided by two judges against one that she was entitled. Dy. 387 b. In another case, it was ruled the other way. Hob. 33.

PUERILITY, civil law. This commenced at the age of seven years, the end of the age of infancy, and lasted till the age of puberty, (q. v.) that is, in females till the accomplishment of twelve years, and in males, till the age of fourteen years fully accomplished. Ayl. Pand. 63.

2. The ancient Roman lawyers divided puerility into *proximus infantie*, as it approached infancy, and into *proximus pubertati*, as it became nearer to puberty. 6 Toullier, n. 100.

PUFFER, commerce, contracts. A person employed by the owner of property which is sold at auction to bid it up, who does so accordingly, for the purpose of raising the price upon bona fide bidders.

2. This is a fraud which at the choice of the purchaser invalidates the sale. 5 Madd. R. 37, 440; 3 Madd. R. 112; 12 Ves. 483; 1 Fonb. Eq. 227, n; 2 Kent, Com. 423; 11 Serg. & Rawle, 86; Cowp. 395; 3 Ves. jun. 628; 6 T. R. 642; 2 Bro. C. C. 326; 3 T. R. 93, 95; 1 P. A. Browne, Rep. 346; 2 Hayw. R. 328; Sugd. Vend. 16; 4 Harr. & McH. 282; 2 Dev. 126; 2 Const. Rep. 821; 3 Marsh. 526.

PUIS DARREIN CONTINUANCE, pleading. These old French words signify *since the last continuance*.

2. Formerly there were formal adjournments or continuances of the proceedings in a suit, for certain purposes, from one term to another; and during the interval the parties were of course out of court. When any matter arose which was a ground

of defence, since the last continuance, the defendant was allowed to plead it, which allowance was an exception to the general rule that the defendant can plead but one plea of one kind or class.

3. By the modern practice the parties are, from the day when, by the ancient practice, a continuance would have been entered, supposed to be out of court, and the pleading is suspended till the day arrives to which, by the ancient practice, the continuance would extend; at that day, the defendant is entitled, if any new matter of defence has arisen in the interval, to plead it, according to the ancient plan *puis darrein continuance*, before the next continuance.

4. Pleas of this kind may be either in abatement or in bar; and may be pleaded, even after an issue joined, either in fact or in law, if the new matter has arisen after the issue was joined, and is pleaded before the next adjournment. Gould on Pl. c. 6, § 123-126; Steph. Pl. 81, 398; Lawes on Pl. 173; 1 Chit. Pl. 637; 5 Peters, Rep. 232; 3 Bl. Com. 316; Arch. Civ. Pl. 353; Bac. Ab. Pleas, Q; 4 Mass. 659; 4 S. & R. 288; 1 Bailey, 369; 4 Verm. 545; 11 John. 424; 1 S. & R. 310; 3 Bouv. Inst. n. 3014-18.

PUISNE. Since born; the younger; as, a *puisne judge*, is an associate judge.

PUNCTUATION, construction. The act or method of placing points (q. v.) in a written or printed instrument.

2. By the word point is here understood all the points in grammar, as the comma, the semicolon, the colon, and the like.

3. All such instruments are to be construed without any regard to the punctuation; and in a case of doubt, they ought to be construed in such a manner that they may have some effect, rather than in one in which they would be nugatory. Vide Toull. liv. 3, t. 2, c. 5, n. 430; 4 T. R. 65; Barringt. on the Stat. 394, n. Vide article *Points*.

PUNISHMENT, crim. law. Some pain or penalty warranted by law, inflicted on a person, for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law, by the judgment and command of some lawful court.

2. The right of society to punish, is derived by Beccaria, Mably, and some others, from a supposed agreement which the persons who composed the primitive

societies entered into, in order to keep order, and, indeed, the very existence of the state. According to others, it is the interest and duty of man to live in society; to defend this right, society may exert this principle, in order to support itself, and this it may do, whenever the acts punishable would endanger the safety of the whole. And Bentham is of opinion that the foundation of this right is laid in public utility or necessity. Delinquents are public enemies, and they must be disarmed and prevented from doing evil, or society must be destroyed. But, if the social compact has ever existed, says Livingston, its end must have been the preservation of the natural rights of the members; and, therefore the effects of this fiction are the same with those of the theory which takes abstract justice as the foundation of the right to punish; for this justice, if well considered, is that which assures to each member of the state, the free exercise of his rights. And if it should be found that utility, the last source from which the right to punish is derived, is so intimately united to justice that it is inseparable from it in the practice of law, it will follow that every system founded on one of these principles must be supported by the others.

3. To attain their social end, punishments should be *exemplary*, or capable of intimidating those who might be tempted to imitate the guilty; *reformatory*, or such as should improve the condition of the convicts; *personal*, or such as are at least calculated to wound the feelings or affect the rights of the relations of the guilty; *divisible*, or capable of being graduated and proportioned to the offence, and the circumstances of each case; *reparable*, on account of the fallibility of human justice.

4. Punishments are either corporal or not corporal. The former are, death, which is usually denominated capital punishment; imprisonment, which is either with or without labor; vide *Penitentiary*; whipping, in some states, though to the honor of several of them, it is not tolerated in them; banishment and death.

5. The punishments which are not corporal, are fines; forfeitures; suspension or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office; compulsion to remove nuisances.

6. The object of punishment is to reform the offender; to deter him and others from

committing like offences; and to protect society. Vide 4 Bl. Com. 7; Rutherf. Inst. B. 1, ch. 18.

7. Punishment to be just ought to be graduated to the enormity of the offence. It should never exceed what is requisite to reform the criminal and to protect society; for whatever goes beyond this, is cruelty and revenge, the relic of a barbarous age. All the circumstances under which the offender acted should be considered. Vide *Moral Insanity*.

8. The constitution of the United States, amendments, art. 8, forbids the infliction of "cruel and unusual punishments."

9. It has been well observed by the author of Principles of Penal Law, that "when the rights of human nature are not respected, those of the citizen are gradually disregarded. Those eras are in history found fatal to liberty, in which cruel punishments predominate. Lenity should be the guardian of moderate governments; severe penalties, the instruments of despotism, may give a sudden check to temporary evils, but they have a tendency to extend themselves to every class of crimes, and their frequency hardens the sentiments of the people. *Une loi rigoureuse produit des crimes*. The excess of the penalty flatters the imagination with the hope of impunity, and thus becomes an advocate with the offender for the perpetrating of the offence." Vide *Théorie des Lois Criminelles*, ch. 2; Bac. on Crimes and Punishments; Merl. Rép. mot Peine; Dalloz, Dict. mot Peine; and *Capital crimes*.

10. Punishments are infamous or not infamous. The former continue through life, unless the offender has been pardoned, and are not dependant on the length of time for which the party has been sentenced to suffer imprisonment; a person convicted of a felony, perjury, and other infamous crimes cannot, therefore, be a witness nor hold any office, although the period for which he may have been sentenced to imprisonment, may have expired by lapse of time. As to the effect of a pardon, vide *Pardon*.

11. Those punishments which are not infamous, are such as are inflicted on persons for misdemeanors, such as assaults and batteries, libels, and the like. Vide *Crimes*; *Infamy*; *Penitentiary*.

PUNISHMENT OF DEATH. The deliberate killing, according to the forms of law, of a person who has been lawfully convicted of certain crimes. See *Capital crimes*.

PUPIL, civil law. One who is in his or her minority. Vide Dig. 1, 7; Id. 26, 7, 1, 2; Code, 6, 30, 18; Dig. 50, 16, 239. One who is in ward or guardianship.

PUPILLARITY, civil law. That age of a person's life which included infancy and puerility. (q. v.)

PUR. A corruption of the French word *par*, by or for. It is frequently used in old French law phrases; as, *pur autre vie*. It is also used in the composition of words, as *purparty*, *purlieu*, *purview*.

PUR AUTRE VIE, tenures. These old French words signify, *for another's life*. An estate is said to be *pur autre vie*, when a lease is made of lands or tenements to a man, to hold for the life of another person. 2 Bl. Com. 259; 10 Vin. Ab. 296; 2 Supp. to Ves. Jr. 41.

PURCHASE. In its most enlarged and technical sense, purchase signifies the lawful acquisition of real estate by any means whatever, except descent. It is thus defined by Littleton, section 12. "Purchase is called the possession of lands or tenements that a man hath by his own deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed."

2. It follows, therefore, that not only when a man acquires an estate by buying it for a good or valuable consideration, but also when it is given or devised to him he acquires it by purchase. 2 Bl. Com. 241.

3. There are six ways of acquiring a title by purchase, namely, 1. By deed. 2. By devise. 3. By execution. 4. By prescription. 5. By possession or occupancy. 6. By escheat. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money, or some other valuable consideration. Id. Cruise, Dig. tit. 30, s. 1 to 4; 1 Dall. R. 20. In common parlance, purchase signifies the buying of real estate and of goods and chattels.

PURCHASER, contracts. A buyer, a vendee.

2. It is a general rule that all persons, capable of entering into contracts, may become purchasers both of real and personal property.

3. But to this rule there are several exceptions. 1. There is a class of persons who are incapable of purchasing except *sub modo*; and, 2. Another class, who, in consequence of their peculiar relation with

regard to the owners of the thing sold, are totally incapable of becoming purchasers, while that relation exists.

4.—1. To the first class belong, 1st. *Infants* under the age of twenty-one years, who may purchase, and at their full age bind themselves by agreeing to the bargain, or waive the purchase without alleging any cause for so doing. If they do not agree to the purchase after their full age, their heirs may waive it in the same manner as they themselves could have done. Cro. Jac. 320; Rolle's Ab. 731 K; Co. Litt. 2 b; 6 Mass. R. 80; 6 John. R. 257.

5.—2d. *Femes covert*, who are capable of purchasing but their husbands may disagree to the contract, and divest the whole estate; the husband may further recover back the purchase-money. 1 Ld. Raym. 224; 1 Madd. Ch. R. 258; 6 Binn. R. 429. When the husband neither agrees nor disagrees, the purchase will be valid. After the husband's death, the wife may waive the purchase without assigning any cause for it, although the husband may have agreed to it; and if, after her husband's death, she do not agree to it, her heirs may waive it. Co. Litt. 3 a; Dougl. R. 452.

6.—3d. *Lunatics or idiots*, who are capable of purchasing. It seems that although they recover their senses, they cannot of themselves waive the purchase; yet if, after recovering their senses, they agree to it, their heirs cannot set it aside. 2 Bl. Com. 291; and see 3 Day's R. 101. Their heirs may avoid the purchase when they die during their lunacy or idiocy. Co. Litt. 2 b.

7.—2. It is a general rule that trustees; 2 Bro. C. C. 400; 3 Bro. C. C. 483; 1 John. Ch. R. 36; 3 Desaus. Ch. R. 26; 3 Binn. Y. 59; unless they are nominally so, to preserve contingent remainders; 11 Ves. Jr. 226; agents; 8 Bro. P. C. 42; 13 Ves. Jr. 95; Story, Ag. § 9; commissioners of bankrupts; assignees of bankrupts; solicitors to the commission; 6 Ves. Jr. 630, n. b.; auctioneers and creditors who have been consulted as to the mode of sale; 6 Ves. Jr. 617; 2 Johns. Ch. R. 257; or any other persons who, by their connexion with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, are generally incapable of purchasing such property themselves. And so stern is the rule, that when a person cannot purchase the estate himself, he cannot buy it, as agent for another; 9 Ves. Jr. 248; nor perhaps employ a third person to bid for it

on behalf of a stranger; 10 Ves. Jr. 381; for no court is equal to the examination and ascertainment of the truth in a majority of such cases. 8 Ves. Jr. 345.

8. The obligations of the purchaser resulting from the contract of sale, are, 1. To pay the price agreed upon in the contract. 2. To take away the thing purchased, unless otherwise agreed upon; and, 3. To indemnify the seller for any expenses he may have incurred to preserve it for him. Vide Sugd. on Vend. Index, h. t.; Ross on Vend. Index, h. t.; Long on Sales, Index, h. t.; 2 Supp. to Ves. Jr. 449, 267, 478; Yelv. 45; 2 Ves. Jr. 100; 8 Com. Dig. 349; 3 Com. Dig. 108.

PURCHASE-MONEY. The consideration which is agreed to be paid by the purchaser of a thing in money. It is the duty of the purchaser to pay the purchase-money as agreed upon in making the contract, and, in case of conveyance of an estate before it is paid, the vendor is entitled according to the laws of England, which have been adopted in several of the states, to a lien on the estate sold for the purchase-money so remaining unpaid. This is called an equitable lien. This doctrine is derived from the civil law. Dig. 18, 1, 19. The case of *Chapman v. Tanner*, 1 Vern. 267, decided in 1684, is the first where this doctrine was adopted. 7 S. & R. 78. It was strongly opposed, but is now firmly established in England, and in the United States. 6 Yerg. R. 50; 4 Bibb, R. 239; 1 John. Ch. R. 308; 7 Wheat. R. 46, 50; 5 Monr. R. 287; 1 Har. & John. 106; 4 Har. & John. 522; 1 Call. R. 414; 1 Dana, R. 576; 5 Munf. R. 342; Dev. Eq. R. 163; 4 Hawks, R. 256; 5 Conn. 468; 2 J. J. Marsh, 330; 1 Bibb, R. 590.

2. But the lien of the seller exists only between the parties and those having notice that the purchase-money has not been paid. 3 J. J. Marsh. 557; 3 Gill & John. 425; 6 Monr. R. 198.

PURE DEBT. In Scotland, this name is given to a debt actually due, in contradistinction to one which is to become due at a future day certain, which is called a future debt: and one due provisionally, in a certain event, which is called a contingent debt. 1 Bell's Com. 315; 5th ed.

PURE OR SIMPLE OBLIGATION. One which is not suspended by any condition, whether it has been contracted without any condition, or when thus contracted, the condition has been performed. Poth. Obl. n. 176.

PURE PLEA, *equity pleading*. One which relies wholly on some matter dehors the bill; as for example, a plea of a release or a settled account.

2. Pleas not pure, are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. 4 Bouv. Inst. n. 4275.

PURGATION. The clearing one's self of an offence charged, by denying the guilt on oath or affirmation.

2. There were two sorts of purgation, the vulgar, and the canonical.

3. Vulgar purgation consisted in superstitious trials by hot and cold water, by fire, by hot irons, by batell, by corsned, &c., which modes of trial were adopted in times of ignorance and barbarity, and were impiously called *judgments of God*.

4. Canonical purgation was the act of justifying one's self, when accused of some offence in the presence of a number of persons, worthy of credit, generally twelve, who would swear they believed the accused. See *Compurgator*; *Wager of Law*.

5. In modern times, a man may purge himself of an offence, in some cases where the facts are within his own knowledge; for example, when a man is charged with a contempt of court, he may purge himself of such contempt, by swearing that in doing the act charged, he did not intend to commit a contempt.

PURLIEU, *Eng. law*. A space of land near a forest, known by certain boundaries, which was formerly part of a forest, but which has been separated from it.

2. The history of purlieu is this. Henry II., on taking possession of the throne, manifested so great a taste for forests that he enlarged the old ones wherever he could, and by this means enclosed many estates, which had no outlet to the public roads, and things increased in this way until the reign of King John, when the public reclamations were so great that much of this land was disforested; that is, no longer had the privileges of the forests, and the land thus separated bore the name of purlieu.

PURPARTY. That part of an estate, which having been held in common by parceners, is by partition allotted to any of them. To make purparty is to divide and sever the lands which fall to parceners. Old Nat. Br. 11.

PURPORT, *pleading*. This word means the substance of a writing, as it appears on the face of it, to the eye that reads it; it

differs from tenor. (q. v.) 2 Russ. on Cr. 365; 1 Chit. Cr. Law, 235; 1 East, R. 179, and the cases in the notes.

PURPRESTURE. According to Lord Coke, purpresture is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many; as if an individual were to build between high and low water-mark on the side of a public river. In England this is a nuisance; and in cases of this kind an injunction will be granted, on ex parte affidavits, to restrain such a purpresture and nuisance. 2 Bouv. Inst. n. 2382; 4 Id. n. 3798; 2 Inst. 28; and see Skene, verbo *Purpresture*; Glanville, lib. 9, ch. 11, p. 239, note; Spelm. Gloss. *Purpresture*; Hale, de Port. Mar.; Harg. Law Tracts, 84; 2 Anstr. 606; Cal. on Sew. 174; Redes. Tr. 117.

PURSE. In Turkey the sum of five hundred dollars is called a purse. Merch. Dict. h. t.

PURSER. The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books, in which everything on board is inserted, as well the names of mariners as the articles of merchandise shipped. Rocc. Ins. note.

2. The act of congress concerning the naval establishment, passed March 30, 1812, provides, § 6, That the pursers in the Navy of the United States shall be appointed by the president of the United States, by and with the advice and consent of the senate; and that, from and after the first day of May next, no person shall act in the character of purser, who shall not have been thus first nominated and appointed, excepting pursers on distant service, who shall not remain in service after the first day of July next, unless nominated and appointed as aforesaid. And every purser, before entering upon the duties of his office, shall give bond, with two or more sufficient sureties, in the penalty of ten thousand dollars, conditioned faithfully to perform all the duties of purser in the United States.

3. And by the supplementary act to this act concerning the naval establishment, passed March 1, 1817, it is enacted, § 1, That every purser now in service, or who may hereafter be appointed, shall, instead of the bond required by the act to which this is a supplement, enter into bond, with two or more sufficient sureties, in the penalty of twenty-five thousand dollars, conditioned for the faithful discharge of all his duties as

purser in the navy of the United States, which said sureties shall be approved by the judge or attorney of the United States for the district in which such purser shall reside.

PURSUER, *canon law*. The name by which the complainant or plaintiff is known in the ecclesiastical courts. 3 Eng. Eccl. R. 350.

PURVEYOR. One employed in procuring provisions. Vide Code, 1, 34.

PURVIEW. That part of an act of the legislature which begins with the words "Be it enacted," &c., and ends before the repealing clause. Cooke's R. 330; 3 Bibb, 181. According to Cowell, this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvu*, provided. It always implies a condition. Interpreter, h. t.

TO PUT, pleading. To select, to demand; as, "the said C D puts himself upon the country;" that is, he selects the trial by jury, as the mode of settling the matter in dispute, and does not rely upon an issue in law. Gould, Pl. c. 6. part 1, § 19.

PUTATIVE. Reputed to be that which is not. The word is frequently used, as putative father, (q. v.) putative marriage, putative wife, and the like. And Toullier, tome 7, n. 29, uses the words putative owner, *propriétaire putatif*. Lord Kames uses the same expression. Princ. of Eq. 391.

PUTATIVE FATHER. The reputed father.

2. This term is most usually applied to the father of a bastard child.

3. The putative father is bound to support his children, and is entitled to the guardianship and care of them in preference to all persons but the mother. 1 Ashm. R. 55; and vide 7 East, 11; 5 Esp. R. 131; 1 B. & A. 491; Bott, P. L. 499; 1 C. & P. 268; 1 B. & B. 1; 3 Moore, R. 211; Harr. Dig. Bastards, VII.; 3 C. & P. 36.

PUTATIVE MARRIAGE. This marriage is described by jurists as "matrimonium putativum, id est, quod bonâ fide et solemniter saltem, opinione conjugis unius justâ contractum inter personas vetitas jungi." Hertius, h. t. It is a marriage contracted in good faith, and in ignorance of the existence of those facts which constituted a legal impediment to the intermarriage.

2. Three circumstances must concur to constitute this species of marriage. 1st. There must be a bona fides. One of the parties, at least, must have been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during his or her life, because, if he became aware of it, he was bound to separate himself from his wife. 2d. The marriage must be duly solemnized. 3d. The marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the *bona fides*.

3. A marriage in which these three circumstances concur, although null and void, will have the effect of entitling the wife, if she be in good faith, to enforce the rights of property, which would have been competent to her if the marriage had been valid, and of rendering the children of such marriage legitimate.

4. This species of marriage was not recognized by the civil law; it was introduced by the canon law. It is unknown to the law of the United States, and in England and Ireland. In France it has been adopted by the Code Civil, art. 201, 202. In Scotland, the question has not been settled. Burge on the Conf. of Laws, 151, 2.

PUTTING IN FEAR. These words are used in the definition of a robbery from the person; the offence must have been committed by *putting in fear* the person robbed. 3 Inst. 68; 4 Bl. Com. 243.

2. This is the circumstance which distinguishes robbery from all other larcenies. But what force must be used, or what kind of fears excited, are questions very proper for discussion. The goods must be taken *against the will* (q. v.) of the possessor. For. 123.

3. There must either be a putting in fear or actual violence, though both need not be positively shown; for the former will be inferred from the latter, and the latter is sufficiently implied in the former. For example, when a man is suddenly knocked down, and robbed while he is senseless, there is no fear, yet in consequence of the violence, it is presumed. 2 East, P. C. 711; 4 Binn. Rep. 379; 3 Wash. C. C. Rep. 209; 2 Chit. Cr. Law, 808.

Q.

QUACK. One who, without sufficient knowledge, study or previous preparation, and without the diploma of some college or university, undertakes to practice medicine or surgery, under the pretence that he possesses secrets in those arts.

2. He is criminally answerable for his unskilful practice, and also, civilly to his patient in certain cases. Vide *Mala praxis*; *Physician*.

QUADRANS, civil law. The fourth-part of the whole. Hence the heir *exquadrante*; that is to say, the fourth-part of the whole.

QUADRANT. In angular measures, a quadrant is equal to ninety degrees. Vide *Measure*.

QUADRIENNIUM UTILE, Scotch law. The four years of a minor between his age of twenty-one and twenty-five years, are so called.

2. During this period he is permitted to impeach contracts made against his interest previous to his arriving at the age of twenty-one years. Ersk. Prin. B. 1, t. 7, n. 19; 1 Bell's Com. 135, 5th ed.; Ersk. Inst. B. 1, t. 7, s. 35.

QUADRIPARTITE. Having four parts, or divided into four parts; as, this indenture quadripartite made between A B, of the one part, C D, of the second part, E F, of the third part, and G H, of the fourth part.

QUADROON. A person who is descended from a white person, and another person who has an equal mixture of the European and African blood. 2 Bailey, 558. Vide *Mulatto*.

QUADRUPLICATION, pleading. Formerly this word was used instead of surbutter. 1 Bro. Civ. Law, 469, n.

QUÆ EST EADEM, pleading. Which is the same.

2. When the defendant in trespass justifies, that the trespass justified in the plea is the same as that complained of in the declaration; this clause is called *quæ est eadem*. Gould. Pl. c. 3, s. 79, 80.

3. The form is as follows: "which are the same assaulting, beating and ill-treating, the said John, in the said declaration

mentioned, and whereof the said John hath above thereof complained against the said James." Vide 1 Saund. 14, 208, n. 2; 2 Id. 5, a, n. 3; Archb. Civ. Pl. 217.

QUÆRE, practice. A word frequently used to denote that an inquiry ought to be made of a doubtful thing. 2 Lill. Ab. 406.

QUÆRENS NON INVENTIT PLEGIUM, practice. The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *si A facerit B securum de clamore suo prosequando*, when the plaintiff has neglected to find sufficient security. F. N. B. 38.

QUÆSTIO, Rom. civ. law. A sort of commission (*ad quærendum*) to inquire into some criminal matter given to a magistrate or citizen, who was called *quæstor* or *questor* who made report thereon to the senate or the people, as the one or the other appointed him. In progress, he was empowered (with the assistance of a counsel) to adjudge the case; and the tribunal thus constituted, was called *questio*. This special tribunal continued in use until the end of the Roman republic, although it was resorted to, during the last times of the republic, only in extraordinary cases.

2. The manner in which such commissions were constituted was this: If the matter to be inquired of, was within the jurisdiction of the comitia, the senate on the demand of the consul or of a tribune or of one of its members, declared by a decree that there was cause to prosecute a citizen. Then the consul *ex auctoritate senatus* asked the people in comitia, (*rogabat rogatio*) to enact this decree into a law. The comitia adopted it either simply, or with amendment, or they rejected it.

3. The increase of population and of crimes rendered this method, which was tardy at best, onerous and even impracticable. In the year A. U. C. 604 or 149 B. C., under the consulship of Censorinus and Manilius, the tribune Calpurnius Piso, procured the passage of a law establishing a *questio perpetua*, to take cognizance of the crime of extortion, committed by Roman

magistrates against strangers *de pecuniis repetundis*. Cic. Brut. 27. De Off. II., 21; In Verr. IV. 25.

4. Many such tribunals were afterwards established, such as *Questiones de majestate, de ambitu, de peculatu, de vi, de sodalitiis, &c.* Each was composed of a certain number of judges taken from the senators, and presided over by a prætor, although he might delegate his authority to a public officer, who was called *juxer questionis*. These tribunals continued a year only; for the meaning of the word *perpetuus* is (*non interruptus*,) not interrupted during the term of its appointed duration.

5. The establishment of these *questiones*, deprived the comitia of their criminal jurisdiction, except the crime of treason; they were in fact the depositories of the judicial power during the sixth and seventh centuries of the Roman republic, the last of which was remarkable for civil dissensions, and replete with great public transactions. Without some knowledge of the constitution of the *Questio perpetua*, it is impossible to understand the forensic speeches of Cicero, or even the political history of that age. But when Julius Cæsar, as dictator, sat for the trial of Ligarius, the ancient constitution of the republic was in fact destroyed, and the criminal tribunals, which had existed in more or less vigor and purity until then, existed no longer but in name. Under Augustus, the concentration of the triple power of the consuls, pro-consuls and tribunes, in his person transferred to him, as of course, all judicial powers and authorities.

QUÆSTOR. The name of a magistrate of ancient Rome.

QUAKERS. A sect of Christians.

2. Formerly they were much persecuted on account of their peaceable principles, which forbade them to bear arms, and they were denied many rights because they refused to make corporal oath. They are relieved in a great degree from the consequent penalties for refusing to bear arms; and their affirmations are everywhere in the United States, as is believed, taken instead of their oaths.

QUALIFICATION. Having the requisite qualities for a thing; as, to be president of the United States, the candidate must possess certain qualifications. See *President of the United States*.

QUALIFIED. This term is frequently used in law. A man has a qualified pro-

perty in animals *feræ naturæ*, while they remain in his power, but, as soon as they regain their liberty, his property in them is lost. A man has a qualified right to recover property of which he is not the owner, but which was unlawfully taken out of his possession. But this right may be defeated by the owner bringing a suit or claiming the property. Vide *Animals; Trover*.

QUALIFIED FEE, estates. One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father, affords an example of this species of estate. Litt. § 254; 2 Bouv. Inst. n. 1695.

QUALIFIED INDORSEMENT. A transfer of a bill of exchange or promissory note to an indorsee, without any liability to the indorser; the words usually employed for this purpose, are *sans recours*, without recourse. 1 Bouv. Inst. n. 1138.

QUALITY, persons. The state or condition of a person.

2. Two contrary qualities cannot be in the same person at the same time. Dig. 41, 10, 4.

3. Every one is presumed to know the quality of the person with whom he is contracting.

4. In the United States, the people happily are all upon an equality in their civil and political rights.

QUALITY, pleading. That which distinguishes one thing from another of the same kind.

2. It is in general necessary, when the declaration alleges an injury to the goods and chattels, or any contract relating to them, that the quality should be stated; and it is also essential, in an action for the recovery of real estate, that its quality should be shown; as, whether it consists of houses, lands, or other hereditaments, whether the lands are meadow, pasture or arable, &c. The same rule requires that, in an action for an injury to real property, the quality should be shown. Steph. Pl. 214, 215. Vide, as to the various qualities, Ayl. Pand. [60.]

QUAMDIU SE BENE GESSERIT. As long as he shall behave himself well. A clause inserted in commissions, when such instruments were written in Latin, to signify the tenure by which the officer held his office.

QUANDO ACCIDERINT, pleading,

practice. When they may happen. When a defendant, executor, or administrator pleads *plene administravit*, the plaintiff may pray to have judgment of assets *quando acciderint*. Bull. N. P. 169; Bac. Ab. Executor, M.

2. By taking a judgment in this form the plaintiff admits that the defendant has fully administered to that time. 1 Pet. C. C. R. 442, n. Vide 11 Vin. Ab. 379; Com. Dig. Pleader, 2 D 9.

QUANTI MINORIS. The name of a particular action in Louisiana. An action *quanti minoris* is one brought for the reduction of the price of a thing sold, in consequence of defects in the thing which is the object of the sale.

2. Such action must be commenced within twelve months from the date of the sale, or from the time within which the defect became known to the purchaser. 3 Mart. N. S. 287; 11 Mart. Lo. R. 11.

QUANTITY, pleading. That which is susceptible of measure.

2. It is a general rule that, when the declaration alleges an injury to goods and chattels, or any contract relating to them, their quantity should be stated. Gould on Pl. c. 4, § 35. And in actions for the recovery of real estate, the quantity of the land should be specified. Bract. 431, a; 11 Co. 25 b; 55 a; Doct. Pl. 85, 86; 1 East, R. 441; 8 East, R. 357; 13 East, R. 102; Steph. Pl. 314, 315.

QUANTUM DAMNIFICATUS, equity practice. An issue directed by a court of equity to be tried in a court of law, to ascertain by a trial before a jury, the amount of damages suffered by the non-performance of some collateral undertaking which a penalty has been given to secure. When such damages have thus been ascertained, the court will grant relief upon their payment. Jer. on Jur. 477; 4 Bouv. Inst. n. 3913.

QUANTUM MERUIT, pleading. As much as he has deserved. When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services, as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This

is called an *assumpsit* on a *quantum meruit*. 2 Bl. Com. 162, 8; 1 Vin. Ab. 346; 2 Phil. Ev. 82.

2. When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a quantum meruit on an implied assumpsit. 18 John. R. 169; 14 John. R. 326; 10 Serg. & Rawle, 236. Sed vide 7 Cranch, 299; Stark. R. 277; S. C. Holt's N. P. 236; 10 John. Rep. 36; 12 John. R. 374; 13 John. R. 56, 94, 359; 14 John. R. 326; 5 M. & W. 114; 4 C. & P. 93; 4 So. N. S. 374; 4 Taunt. 475; 1 Ad. & E. 333; Addis. on Contr. 214.

QUANTUM VALEBAT, pleading. As much as it was worth. When goods are sold, without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they were worth.

2. The plaintiff may, in such case, suggest in this declaration that the defendant promised to pay him as much as the said goods were worth, and then aver that they were worth so much, which the defendant has refused to pay. Vide the authorities cited under the article *Quantum meruit*.

QUARANTINE, commerce, crim. law. The space of forty days, or a less quantity of time, during which the crew of a ship or vessel coming from a port or place infected or supposed to be infected with disease, are required to remain on board after their arrival, before they can be permitted to land.

2. The object of the quarantine is to ascertain whether the crew are infected or not.

3. To break the quarantine without legal authority is a misdemeanor. 1 Russ. on Cr. 133.

4. In cases of insurance of ships, the insurer is responsible when the insurance extends to her being moored in port 24 hours in safety, although she may have arrived, if before the 24 hours are expired she is ordered to perform quarantine, if any accident contemplated by the policy occur 1 Marsh. on Ins. 264.

QUARANTINE, inheritances, rights. The space of forty days during which a widow has a right to remain in her late husband's principal mansion, immediately after his death. The right of the widow is also called her quarantine.

2. In some, perhaps all the states of the

United States, provision has been expressly made by statute securing to the widow this right for a greater or lesser space of time. In Massachusetts, Mass. Rev. St. 411, and New York, 4 Kent, Com. 62, the widow is entitled to the mansion house for forty days. In Ohio, for one year, Walk. Intr. 231, 324. In Alabama, Indiana, Illinois, Kentucky, Missouri, New Jersey, Rhode Island and Virginia, she may occupy till dower is assigned; in Indiana, Illinois, Kentucky, Missouri, New Jersey and Virginia, she may also occupy the plantation or messuage. In Pennsylvania the statute of 9 Hen. III., c. 7, is in force, Rob. Dig. 176, by which it is declared that "a widow shall tarry in the chief house of her husband forty days after his death, within which her dower shall be assigned her." In Massachusetts the widow is entitled to support for forty days; in North Carolina for one year.

3. Quarantine is a personal right, forfeited by implication of law, by a second marriage. Co. Litt. 32. See Ind. Rev. L. 209; 1 Virg. Rev. C. 170; Ala. L. 260; Misso. St. 229; Ill. Rev. L. 237; N. J. Rev. C. 397; 1 Ken. Rev. L. 573. See Bac. Ab. Dower, B; Co. Litt. 32, b; Id. 34, b; 2 Inst. 16, 17.

QUARE, pleadings. Wherefore.

2. This word is sometimes used in the writ in certain actions, but is inadmissible in a material averment in the pleadings, for it is merely interrogatory; and, therefore, when a declaration began with complaining of the defendant, "wherefore with force, &c. he broke and entered" the plaintiff's close, was considered ill. Bac. Ab. Pleas, B 5, 4; Gould on Pl. c. 3, § 34.

QUARE CLAUSUM FREGIT. Wherefore he broke the close. In actions of trespass to real estate the defendant is charged with breaking the close of the plaintiff. Formerly the original writ in such a case was a writ of trespass quare clausum fregit, now the charge of breaking the close is laid in the declaration. See *Close; Trespass*.

QUARE EJECIT INFRA TERMINUM. Wherefore did he eject within the term. The name of a writ which lies for a lessee, who has been turned out of his farm before the expiration of his term or lease, against the feoffee of the land, or the lessor who ejects him. This has given way to the action of ejectment. 3 Bl. Com. 207.

QUARE IMPEDIT, Eng. eccl. law. The name of a writ directed by the king to the sheriff, by which he is required to command

certain persons by name to permit him, the king, to present a fit person to a certain church, which is void, and which belongs to his gift, and of which the said defendants hinder the king, as it is said, and unless, &c. then to summon, &c. the defendants so that they be and appear, &c. F. N. B. 74.

QUARE OBSTRUXIT. The name of a writ formerly used in favor of one who having a right to pass through his neighbor's grounds, was prevented enjoying such right, because the owner of the grounds had obstructed the way. T. L.

QUARREL. A dispute; a difference. In law, particularly in releases, which are taken most strongly against the releasor, when a man releases all quarrels he is said to release all actions, real and personal. 8 Co. 153.

QUARRY. A place whence stones are dug for the purpose of being employed in building, making roads, and the like.

2. When a farm is let with an open quarry, the tenant may, when not restrained by his contract, take out the stone, but he has no right to open new quarries. Vide *Mines; Waste*.

QUART, measures. A quart is a liquid measure containing one-fourth part of a gallon.

QUARTER. A measure of length, equal to four inches. Vide *Measure*.

To QUARTER. A barbarous punishment formerly inflicted on criminals by tearing them to pieces by means of four horses, one attached to each limb.

QUARTER DAY. One of the four days of the year on which rent payable quarterly becomes due.

QUARTER DOLLAR, money. A silver coin of the United States of the value of twenty-five cents.

2. It weighs one hundred and three and one-eighth grains. Of one thousand parts, nine hundred are of pure silver and one hundred of alloy. Act of January 18, 1837, s. 8 and 9, 4 Sharsw. L. U. S. 2523, 4. Vide *Money*.

QUARTER EAGLE, money. A gold coin of the United States of the value of two dollars and a half.

2. It weighs sixty-four and one-half grains. Of one thousand parts, nine hundred are of pure gold, and one hundred of alloy. Act of January, 18, 1837, s. 8 and 10, 4 Sharsw. cont. of Story's L. U. S. 2523, 4. Vide *Money*.

QUARTER SEAL. The seal kept by the

director of the chancery in Scotland is so called. It is in the shape and impression of the fourth part of the great seal. Bell's Scotch Law Dict. h. t.

QUARTER SESSIONS. A court bearing this name, mostly invested with the trial of criminals. It takes its name from sitting quarterly or once in three months.

2. The English courts of quarter sessions were erected during the reign of Edward III. Vide Stat. 36 Edward III.; Crabb's Eng. L. 278.

QUARTER YEAR. In the computation of time, a quarter year consists of ninety-one days. Co. Litt. 135 b; 2 Roll. Ab. 521, l. 40; Rev. Stat. of N. Y. part 1, c. 19, t. 1, § 3.

QUARTERING OF SOLDIERS. The constitution of the United States, Amendm. art. 3, provides that "no soldier shall in time of peace be quartered, in any house, without the consent of the owner, nor in time of war but in a manner to be prescribed by law." By quartering is understood boarding and lodging or either. Encycl. Amer. h. t.

QUARTEROON. One who has had one of his grand parents of the black or African race.

QUARTO DIE POST. The fourth day inclusive after the return day of the writ is so called. This is the day of appearance given *ex gracia curie*.

TO QUASH, practice. To overthrow or annul.

2. When proceedings are clearly irregular and void the courts will quash them, both in civil and criminal cases: for example, when the array is clearly irregular, as if the jurors have been selected by persons not authorized by law, it will be quashed. 3 Bouv. Inst. n. 3342.

3. In criminal cases, when an indictment is so defective that no judgment can be given upon it, should the defendant be convicted, the court, upon application, will in general quash it; as if it have no jurisdiction of the offence charged, or when the matter charged is not indictable. 1 Burr. 516, 543; Andr. 226. When the application to quash is made on the part of the defendant, the court generally refuses to quash the indictment when it appears some enormous crime has been committed. Com. Dig. Indictment, H; Wils. 325; 1 Salk. 372; 3 T. R. 621; 6 Mod. 42; 3 Burr. 1841; 5 Mod. 13; Bac. Abr. Indictment, K. When the application is made on the

part of the prosecution, the indictment will be quashed whenever it is defective so that the defendant cannot be convicted, and the prosecution appears to be *bona fide*. If the prosecution be instituted by the attorney general, he may, in some states, enter a *nolle prosequi*, which has the same effect. 1 Dougl. 239, 240. The application should be made before plea pleaded; Leach, 11; 4 St. Tr. 232; 1 Hale, 35; Fost. 231; and before the defendant's recognizance has been forfeited. 1 Salk. 380. Vide *Cassettur Breve*.

QUASI. A Latin word in frequent use in the civil law, signifying *as if, almost*. It marks the resemblance, and supposes a little difference between two objects. Dig. b. 11, t. 7, l. 8, § 1. Civilians use the expressions quasi-contractus, quasi-delictum, quasi-possessio, quasi-traditio, &c.

QUASI-AFFINITY. A term used in the civil law to designate the affinity which exists between two persons, one of whom has been betrothed to the kindred of the other, but who have never been married. For example, my brother is betrothed to Maria, and, afterwards, before marriage he dies, there then exists between Maria and me a quasi-affinity.

2. The history of England furnishes an example of this kind. Catherine of Arragon was betrothed to the brother of Henry VIII. Afterwards Henry married her, and, under the pretence of this quasi affinity, he repudiated her, because the marriage was incestuous.

QUASI-CONTRACTUS. A term used in the civil law. A quasi-contract is the act of a person, permitted by law, by which he obligates himself towards another, or by which another binds himself to him, without any agreement between them.

2. By article 2272 of the Civil Code of Louisiana, which is translated from article 1371 of the Code Civil, quasi-contracts are defined to be "the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." In contracts, it is the consent of the contracting parties which produces the obligation; in quasi-contracts no consent is required, and the obligation arises from the law or natural equity, on the facts of the case. These acts are called quasi-contracts, because, without being contracts, they bind the parties as contracts do.

8. Quasi-contracts may be multiplied almost to infinity. They are, however, divided into five classes: such as relate to the voluntary and spontaneous management of the affairs of another, without authority; the administration of tutorship; the management of common property; the acquisition of an inheritance; and the payment of a sum of money or other thing by mistake, when nothing was due.

4.—1. *Negotiorum gestio*. When a man undertakes, of his own accord, to manage the affairs of another, the person assuming the agency contracts the tacit engagement to continue it, and complete it, until the owner shall be in a condition to attend to it himself. The obligation of such a person is, 1st. To act for the benefit of the absentee. 2d. He is commonly answerable for the slightest neglect. 3d. He is bound to render an account of his management. Equity obliges the proprietor, whose business has been well managed, 1st. To comply with the engagements contracted by the manager in his name. 2d. To indemnify the manager in all the engagements he has contracted. 3d. To reimburse him all useful and necessary expenses.

5.—2. Tutorship or guardianship, is the second kind of quasi-contracts, there being no agreement between the tutor and minor.

6.—3. When a person has the management of a common property owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum*.

7.—4. The fourth class is the *aditio hereditatis*, by which the heir is bound to pay the legatees, who cannot be said to have any contract with him or with the deceased.

8.—5. *Indebiti solutio*, or the payment to one of what is not due to him, if made through any mistake in fact, or even in law, entitles him who made the payment to an action against the receiver for repayment, *condictio indebiti*. This action does not lie, 1. If the sum paid was due *ex equitate*, or by a natural obligation. 2. If he who made the payment knew that nothing was due, for *qui consulto dat quod non debebat, præsumitur donare*.

9. Each of these quasi-contracts has an affinity with some contract; thus the management of the affairs of another without

authority, and tutorship, are compared to a mandate; the community of property, to a partnership; the acquisition of an inheritance, to a stipulation; and the payment of a thing which is not due, to a loan.

10. All persons, even infants and persons destitute of reason, who are consequently incapable of consent, may be obliged by the quasi-contract, which results from the act of another, and may also oblige others in their favor; for it is not consent which forms these obligations; they are contracted by the act of another, without any act on our part. The use of reason is indeed required in the person whose act forms the quasi-contract, but it is not required in the person by whom or in whose favor the obligations which result from it are contracted. For instance, if a person undertakes the business of an infant or a lunatic; this is a quasi-contract, which obliges the infant or the lunatic to the person undertaking his affairs, for what he has beneficially expended, and reciprocally obliges the person to give an account of his administration or management.

11. There is no term in the common law which answers to that of quasi-contract; many quasi-contracts may doubtless be classed among implied contracts; there is, however, a difference between them, which an example will make manifest. In case money should be paid by mistake to a minor, it may be recovered from him by the civil law, because his consent is not necessary to a quasi-contract; but by the common law, if it can be recovered, it must be upon an agreement to which the law presumes he has consented, and it is doubtful, upon principle, whether such recovery could be had.

See generally, Just. Inst. b. 3, t. 28; Dig. b. 3, tit. 5; Ayl. Pand. b. 4, tit. 31; 1 Bro. Civil Law, 386; Ersk. Pr. Laws of Scotl. b. 3, tit. 3, s. 16; Pardessus, Dr. Com. n. 192, et seq.; Poth. Ob. n. 113, et seq.; Merlin, Rép. mot Quasi-contract; Menestrier, Leçons Elem. du Droit Civil Romain, liv. 3, tit. 28; Civil Code of Louisiana, b. 3, tit. 5; Code Civil, liv. 3, tit. 4, c. 1.

QUASI CORPORATIONS. This term is applied to such bodies or municipal societies, which, though not vested with the general powers of corporations, are yet recognized by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges

which may be maintained by suits at law. They may be considered *qua* corporations, with limited powers, coëxtensive with the duties imposed upon them by statute or usage; but restrained from a general use of the authority, which belongs to those metaphysical persons by the common law.

2. Among quasi corporations may be ranked towns, townships, parishes, hundreds, and other political divisions of counties, which are established without an express charter of incorporation; commissioners of a county, supervisors of highways, overseers of the poor, loan officers of a county, and the like, who are invested with corporate powers *sub modo*, and for a few specified purposes only. But not such a body as the general assembly of the Presbyterian church, which has not the capacity to sue and be sued. 4 Whart. 531. See 2 Kent, Com. 224; Ang. on Corp. 16; 13 Mass. 192; 18 John. R. 422; 1 Cowen, R. 258, and the note; 2 Wend. R. 109; 7 Mass. R. 187; 2 Pick. R. 352; 9 Mass. Rep. 250; 1 Greenl. R. 363; 2 John. Ch. Rep. 325; 1 Cowen, 680; 4 Wharton, R. 531, 598.

QUASI DELICT, *civil law*. An act whereby a person, without malice, but by fault, negligence or imprudence not legally excusable, causes injury to another.

2. A *quasi delict* may be public or private; the neglect of the affairs of a community, when it is our duty to attend to them, may be a crime; the neglect of a private matter, under similar circumstances, may be the ground of a civil action. Bowy. Mod. C. L. c. 43, p. 265.

QUASI OFFENCES, *torts, civil law*. Those acts which, although not committed by the persons responsible for them, are by implication of law supposed to have been committed by their command, by other persons for whom they are answerable. They are also injuries which have been caused by one person to another, without any intention to hurt them.

2. Of the first class of quasi offences are the injuries occasioned by agents or servants in the exercise of their employments. A master is, therefore, liable to be sued for injuries occasioned by the neglect or unskillfulness of his servant while in the course of his employment, though the act was obviously tortious and against the master's consent; as, for fraud, deceit, or other wrongful act. 1 Salk. 280; Cro. Jac. 473; 1 Str. 653; Roll. Abr. 95, l. 15; 1 East, 106; 2 H. Bl. 442; 3 Wills. 313; 2 Bl. Rep. 845;

5 Binn. 540; sed vide, Com. Dig. tit. Action on the case for deceit, B. A master is liable for a servant's negligent driving of a carriage or navigating a ship; 1 East, 105; or for a libel inserted in a newspaper of which defendant was proprietor. 1 B. & P. 409. The master is also liable not only for the acts of those immediately employed about him, but even for the acts of a sub-agent, however remote, if committed in the course of his service; 1 Bos. & P. 404; 6 T. R. 411; and a corporate company are liable to be sued for the wrongful acts of their servants; 3 Camp. 403; when not, see 4 M. & S. 27.

3. But the wrongful or unlawful acts must be committed in the course of the servant's employment, and while the servant is acting as such; therefore a person who hires a post chaise is not liable for the negligence of the driver, but the action must be against the driver or owner of the chaise and horses. 5 Esp. Cas. 35; 4 Barn. & A. 409; sed vide 1 B. & P. 409.

4. A master is not in general liable for the criminal acts of his servant wilfully committed by him. 2 Str. 885. Neither is he liable if his servant wilfully commit an injury to another; as if a servant wilfully drive his master's carriage against another's, or ride or beat a distress damage feasant. 1 East. 106; Rep. T. Hard. 87; 3 Wils. 217; 1 Salk. 289; 2 Roll. Abr. 553; 4 B. & A. 590. In some cases, however, where it is the duty of the master to see that the servant acts correctly, he may be liable criminally for what the servant has done; as where a baker's servant introduced noxious materials in his bread. 3 M. & S. 11; Ld. Raymond, 264; 4 Camp. 12. And on principles of public policy, a sheriff is liable civilly for the trespass, extortion, or other wilful misconduct of his bailiff. 2 T. Rep. 154; 3 Wils. 317; 8 T. R. 431.

5. In Louisiana, the father, or after his decease, the mother is responsible for the damages occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons. Code art. 2297. The curators of insane persons are answerable for the damage occasioned by those under their care. Id. 2298. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which

they are employed; teachers and artisans, for the damage caused by their scholars and apprentices, while under their superintendence. In the above cases responsibility attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it. Id. 2299. The owner of an animal is answerable for the damage he has caused; but if the animal has been lost or strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal; for then he must pay all the harm done without being allowed to make the abandonment. Id. 2301.

QUASI PARTNERS. Partners of lands, goods, or chattels, who are not actual partners, are sometimes so called. Poth. De Société, App. n. 184. Vide *Part owners*.

QUASI POSTHUMOUS CHILD, civil law. One who, born during the life of his grandfather, or other male ascendant, was not his heir at the time he made his testament, but who by the death of his father became his heir in his lifetime. Inst. 2, 13, 2; Dig. 28, 3, 13.

QUASI PURCHASE. This term is used in the civil law to denote that a thing is to be considered as purchased from the presumed consent of the owner of the thing; as, if a man should consume a cheese, which is in his possession and belonging to another, with an intent to pay the price of it to the owner, the consent of the latter will be presumed, as the cheese would have been spoiled by keeping it longer. Wolff, Dr. de la Nat. § 691.

QUASI TRADITION, civil law. A term used to designate that a person is in the use of the property of another, which the latter suffers and does not oppose. Leç. Elem. § 396. It also signifies the act by which the right of property is ceded in a thing to a person who is in possession of it; as, if I loan a boat to Paul, and deliver it to him, and afterwards I sell him the boat, it is not requisite that he should deliver the boat to me, to be again delivered to him; there is a quasi tradition or delivery.

QUATUORVIRI. Among the Romans these were magistrates who had the care and inspection of roads. Dig. 1, 2, 3, 30.

QUAY, estates. A wharf at which to load or land goods, sometimes spelled *key*.

2. In its enlarged sense the word *quay*,

means the whole space between the first row of houses of a city, and the sea or river, 5 L. R. 152, 215. So much of the quay as is requisite for the public use of loading and unloading vessels, is public property, and cannot be appropriated to private use, but the rest may be private property. Id. 201.

QUE EST MESME. Which is the same. Vide *Quæ est eadem*.

QUE ESTATE. These words literally translated signify *quem statum*, or *which estate*. At common law, it is a plea by which a man prescribes in himself and those whose estate he holds. 2 Bl. Com. 270; 18 Vin. Ab. 133-140; 2 Tho. Co. Litt. 203; Co. Litt. 121 a; Hardress, 459; 2 Bouv. Inst. n. 499.

QUE AN. A worthless woman; a strumpet. The meaning of this word, which is now seldom used, is said not to be well ascertained. 2 Roll. Ab. 296: Bac. Ab. Slander, U 3.

QUEEN. There are several kinds of queens in some countries. 1. Queen regnant, is a woman who possesses in her own right the executive power of the country. 2. Queen consort, is the wife of a king. 3. Queen dowager is the widow of a king. In the United States there is no one with this title.

QUERELA. An action preferred in any court of justice, in which the plaintiff was called *querens* or complainant, and his brief, complaint, or declaration, was called *querela*. Jacob's Diet. h. t.

QUESTION, punishment, crim. law. A means sometimes employed, in some countries, by means of torture, to compel supposed great criminals to disclose their accomplices, or to acknowledge their crimes.

2. This torture is called *question*, because, as the unfortunate person accused is made to suffer pain, he is *asked questions* as to his supposed crime or accomplices. The same as torture. This is unknown in the United States. See Poth. Procédure Criminelle, sect. 5, art. 2, § 3.

QUESTION, evidence. An interrogation put to a witness, requesting him to declare the truth of certain facts as far as he knows them.

2. Questions are either *general* or *leading*. By a *general* question is meant such an one as requires the witness to state all he knows without any suggestion being made to him, as *who gave the blow?*

3. A *leading* question is one which

leads the mind of the witness to the answer, or suggests it to him, as *did A B give the blow?*

4. The Romans called a question by which the fact or supposed fact which the interrogator expected, or wished to find asserted, in and by the answer made to the proposed respondent, a *suggestive interrogation*, as, *is not your name A B?* Vide *Leading Question*.

QUESTION, *practice*. A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.

2. When the doubt or difference arises as to what the law is on a certain state of facts, this is said to be a *legal question*, and when the party demurs, this is to be decided by the court; when it arises as to the truth or falsehood of facts, this is a *question of fact*, and is to be decided by the jury.

QUESTOR or QUÆSTOR, *civil law*. A name which was given to two distinct classes of Roman officers. One of which was called *questores classici*, and the other *questores parricidii*.

2. The *questores classici* were officers entrusted with the care of the public money. Their duties consisted in making the necessary payments from the *ærarium*, and receiving the public revenues. Of both, they had to keep correct accounts in their *tabulæ publicæ*. Demands which any one might have on the *ærarium*, and outstanding debts were likewise registered by them. Fines to be paid to the public treasury were registered and exacted by them. They were likewise to provide proper accommodations for foreign ambassadors and such persons as were connected with the republic by ties of public hospitality. Lastly, they were charged with the care of the burials and monuments of distinguished men, the expenses for which had been decreed by the senate to be paid by the treasury. Their number at first was confined to two, but this was afterwards increased as the empire became extended. There were *questors* of cities, provinces, and *questors* of the army; the latter were in fact paymasters.

3. The *questores parricidii* were public accusers, two in number, who conducted the accusation of persons guilty of murder or any other capital offence, and carried the sentence into execution. They ceased to be appointed at an early period. Smith's *Dic. Gr. and Rom. Antiq.* h. v.

QUI TAM, *remedies*. Who as well. When a statute imposes a penalty, for the doing or not doing an act, and gives that penalty in part to whosoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action, such actions are called *qui tam* actions, the plaintiff describing himself as suing *as well* for the commonwealth, for example, as for himself. *Espin. on Pen. Act.* 5, 6; 1 *Vin. Ab.* 197; 1 *Salk.* 129 n.; *Bac. Ab.* h. t.

QUIA, *pleadings*. Because. This word is considered a term of affirmation. It is sufficiently direct and positive for introducing a material averment. 1 *Saund.* 117, n. 4; *Com. Dig. Pleader*, c. 77.

QUIA EMPTORES. A name sometimes given to the English Statute of Westminster, 3, 13 *Edw. I.*, c. 1, from its initial words. 2 *Bl. Com.* 91.

QUIA TIMET, *remedies*. Because he fears. According to Lord Coke, "there be six writs of law that may be maintained *quia timet*, before any molestation, distress, or impleading; as. 1. A man may have his writ or mesne, before he be distrained. 2. A *warrantia chartæ*, before he be impleaded. 3. A *monstraverunt*, before any distress or vexation. 4. An *audita querela*, before any execution sued. 5. A *curia claudenda*, before any default of inclosure. 6. A *ne injuste vexes*, before any distress or molestation. And these are called *brevia anticipantia*, writs of prevention." *Co. Litt.* 100; and see 7 *Bro. P. C.* 125.

2. These writs are generally obsolete. In chancery, when it is contemplated to prevent an expected injury, a *bill quia timet* (q. v.) is filed. Vide 1 *Fonb.* 41; 18 *Vin. Ab.* 141; 4 *Bouv. Inst.* n. 3801, et seq.; *Bill quia timet*.

QUIBBLE. A slight difficulty raised without necessity or propriety; a cavil.

2. No justly eminent member of the bar will resort to a quibble in his argument. It is contrary to his oath, which is to be true to the court as well as to the client; and bad policy, because by resorting to it, he will lose his character as a man of probity.

QUICK WITH CHILD, or QUICKENING, *med. jurispr.* The motion of the fœtus, when felt by the mother, is called *quickenings*, and the mother is then said to be *quick with child*. 1 *Beck's Med. Jurisp.* 172; 1 *Russ. on Cr.* 553.

2. This happens at different periods of pregnancy in different women, and in different circumstances, but most usually about the fifteenth or sixteenth week after conception. 3 Camp. Rep. 97.

3. It is at this time that in law, life (q. v.) is said to commence. By statute, a distinction is made between a woman quick with child, and one who, though pregnant, is not so, when she is said to be privement enceinte. (q. v.) 1 Bl. Com. 129.

4. Procuring the abortion (q. v.) of a woman quick with child, is a misdemeanor. When a woman is capitally convicted, if she be enceinte, it is said by Lord Hale, 2 P. C. 413, that unless she be quick with child, it is no cause for staying execution, but that if she be enceinte, and quick with child, she may allege that fact *in retardationem executionis*. The humanity of the law of the present day would scarcely sanction the execution of a woman whose pregnancy was undisputed, although she might not be quick with child; for physiologists, perhaps not without reason, think the child is a living being from the moment of conception. 1 Beck, Med. Jur. 291; Guy, Med. Jur. 86, 87.

QUID PRO QUO. This phrase signifies verbatim, *what for what*. It is applied to the consideration of a contract. See Co. Litt. 47, b; 7 Mann. & Gr. 998.

QUIDAM, French law. Some one; somebody. This Latin word is used to express an unknown person, or one who cannot be named.

2. A *quidam* is usually described by the features of his face, the color of his hair, his height, his clothing, and the like in any process which may be issued against him. Merl. Répert. h. t.; Encyclopédie, h. t.

3. A warrant directing the officer to arrest the "associates" of persons named, without naming them, is void. 3 Munf. 458.

QUIET ENJOYMENT. In leases there are frequently covenants by which the lessor agrees that the lessee shall peaceably enjoy the premises leased; this is called a covenant for quiet enjoyment. This covenant goes to the possession and not to the title. 3 John. 471; 5 John. 120; 2 Dev. R. 388; 3 Dev. R. 200. A covenant for quiet enjoyment, does not extend as far as a covenant of warranty. 1 Aik. 233.

2. The covenant for quiet enjoyment is

broken only by an entry, or lawful expulsion from, or some actual disturbance in, the possession. 3 John. 471; 15 John. 488; 8 John. 198; 7 Wend. 281; 2 Hill, 105; 2 App. R. 251; 9 Metc. 63; 4 Whart. 86; 4 Cowen, 340. But the tortious entry of the covenantor, without title, is a breach of the covenant for quiet enjoyment. 7 John. 376.

QUIETUS, Eng. law. A discharge; an acquittance.

2. It is an instrument by the clerk of the pipe, and auditors in the exchequer, as proof of their acquittance or discharge to accountants. Cow. Int. h. t.

QUINTAL. A weight of one hundred pounds

QUINTO EXACTUS, Eng. law. The fifth call or last requisition of a defendant sued to outlawry.

QUIT CLAIM, conveyancing. By the laws of Connecticut, it is the common practice there for the owner of land to execute a quit claim deed to a purchaser who has neither possession nor pretence of claim, and as by the laws of that state the delivery of the deed amounts to the delivery of possession, this operates as a conveyance without warranty. It is, however, essential that the land should not, at the time of the conveyance, be in the possession of a stranger, holding adversely to the title of the grantor. 1 Swift's Dig. 133; 2 N. H. R. 402; 1 Cowen, 613; and vide *Release*.

QUIT CLAIM, contracts. A release or acquittal of a man from all claims which the releasor has against him.

QUIT RENT. A rent paid by the tenant of the freehold, by which he goes quit and free; that is, discharged from any other rent. 2 Bl. Com. 42.

2. In England, quit rents were rents reserved to the king or a proprietor, on an absolute grant of waste land, for which a price in gross was at first paid, and a mere nominal rent reserved as a feudal acknowledgment of tenure. Inasmuch as no rent of this description can exist in the United States, when a quit rent is spoken of, some other interest must be intended. 5 Call, R. 364. A perpetual rent reserved on a conveyance in fee simple, is sometimes known by the name of quit rent in Massachusetts. 1 Hill. Ab. 150. See *Ground Rent*; *Rent*.

QUO ANIMO. The intent; the mind with which a thing has been done; as, the *quo animo* with which the words were spoken may be shown by the proof of con-

versions of the defendant relating to the original defamation. 19 Wend. 296.

QUO JURE, WRIT OF, *Engl. law.* The name of a writ commanding the defendant to show *by what right* he demands common of pasture in the land of the complainant who claims to have a fee in the same. F. N. B. 299.

QUO MINUS. The name of a writ. In England, when the king's debtor is sued in the court of the exchequer, he may sue out a writ of *quo minus*, in which he suggests that he is the king's debtor, and that the defendant has done him the injury or damage complained of, *quo minus* sufficiens existit, by which *he is less able* to pay the king's debt. This was originally requisite in order to give jurisdiction to the court of exchequer, but now this suggestion is a mere form. 3 Bl. Com. 46.

QUO WARRANTO, remedies. By what authority or warrant. The name of a writ issued in the name of a government against any person or corporation that usurps any franchise or office, commanding the sheriff of the county to summon the defendant to be and appear before the court whence the writ issued, at a time and place therein named, to show "*quo warranto*" he claims the franchise or office mentioned in the writ. Old Nat. Br. 149; 5 Wheat. 291; 15 Mass. 125; 5 Ham. 358; 1 Miss. 115.

2. This writ has become obsolete, having given way to informations in the nature of a *quo warranto* at the common law; Ang. on Corp. 469; it is authorized in Pennsylvania by legislative sanction. Act 14 June, 1836. Vide 1 Vern. 156; Yelv. 190; 7 Com. Dig. 189; 17 Vin. Ab. 177.

3. An information in the nature of a *quo warranto*, although a criminal proceeding in form, in substance, is a *civil* one. 1 Serg. & Rawle, 382.

QUOAD HOC. As to this; with respect to this. A term frequently used to signify, *as to the thing named*, the law is so and so.

QUOD COMPUTET. The name of an interlocutory judgment in an action of account render: also the name of a decree in the case of creditors' bills against executors or administrators. Such a decree directs the master to take the accounts between the deceased and all his creditors; to cause the creditors, upon due and public notice, to come before him to prove their debts, at a certain place, and within a limited period; and also directs the master

to take an account of all personal estate of the deceased in the hands of the executor or administrator. Story, Eq. Jur. § 548. See *Judgment quod computet*.

QUOD CUM, pleading. It is a general rule in pleading, regulating alike every form of action, that the plaintiff shall state his complaint in positive and direct terms, and not by way of recital. "For that," is a positive allegation; "for that whereas," in Latin "*quod cum*," is a recital.

2. Matter of inducement may with propriety be stated with a *quod cum*, by way of recital; being but introductory to the breach of the promise, and the supposed fraud or deceit in the defendant's non-performance of it. Therefore, where the plaintiff declared that *whereas* there was a communication and agreement concerning a horse race, and whereas, in consideration that the plaintiff promised to perform his part of the agreement, the defendant promised to perform his part thereof, and then alleged the performance in the usual way; it was held that the inducement and promise were alleged certainly enough, and that the word "*whereas*" was as direct an affirmation as the word "*although*," which undoubtedly makes a good averment; and it was observed that there were two precedents in the new book of entries, and seven in the old, where a *quod cum* was used in the very clause of the promise. *Ernly v. Doddington*, Hard. 1. So, where the plaintiff declared on a bill of exchange against the drawer, and on demurrer to the declaration, it was objected that it was with a *quod cum*, which was argumentative, and implied no direct averment; the objection was overruled, because *assumpsit* is an action on the case, although it might have been otherwise in trespass *vi et armis*. *March v. Southwell*, 2 Show. 180. The reason of this distinction is, that in *assumpsit* or other action on the case, the statement of the *gravamen*, or grievance, always follows some previous matter, which is introduced by the *quod cum*, and is dependent or consequent upon it; and the *quod cum* only refers to that introductory matter, which leads on to the subsequent statement, which statement is positively and directly alleged. For example, the breach in an action of *assumpsit* is always preceded by the allegation of the consideration or promise, or some inducement thereto, which leads on to the breach of it, which is stated positively and directly; and the previous allegations only, which

introduce it, are stated with a *quod cum*, by way of recital.

3. But in trespass *vi et armis*, the act of trespass complained of, is usually stated without any introductory matter having reference to it, or to which a *quod cum* can be referred; so that if a *quod cum* be used, there is no positive or direct allegation of that act. *Sherland v. Heaton*, 2 Bulst. 214. After verdict the *quod cum* may be considered as surplusage, the defect being cured by the verdict. *Horton v. Monk*, 1 Browne's R. 68; Com. Dig. Pleader, C 86.

QUOD EI DEFORCEAT, *Engl. law*. The name of a writ given by Stat. Westm. 2, 13 Edw. I. c. 4, to the owners of a particular estate, as for life, in dower, by the curtesy, or in fee tail, who are barred of the right of possession by a recovery had against them through their default or non-appearance in a possessory action; by which the right was restored to him, who had been thus unwarily deforced by his own default. 3 Bl. Com. 193.

QUOD PERMITTAT, *Engl. law*. That he permit. The name of a writ which lies for the heir of him who is disseised of his common of pasture, against the heir of the disseisor, he being dead. *Termes de la Ley*.

QUOD PERMITTAT PROSTERNERE, *Engl. law*. That he give leave to demolish. The name of a writ which commands the defendant to permit the plaintiff to abate the nuisance of which complaint is made, or otherwise to appear in court and to show cause why he will not. On proof of the facts the plaintiff is entitled to have judgment to abate the nuisance and to recover damages. This proceeding, on account of its tediousness and expense, has given way to a special action on the case.

QUOD PROSTRAVIT. The name of a judgment upon an indictment for a nuisance, that the defendant abate such nuisance.

QUOD RECUPERET. That he recover. The form of a judgment that the plaintiff do recover. See *Judgment quod recuperet*.

QUORUM. Used substantively, quorum signifies the number of persons belonging to a legislative assembly, a corporation, society, or other body, required to transact business; there is a difference between an act done by a definite number of persons, and one performed by an indefinite number: in the first case a majority is required to constitute a quorum, unless the law expressly directs

that another number may make one; in the latter case any number who may be present may act, the majority of those present having, as in other cases, the right to act. 7 Cowen, 402; 9 B. & C. 648; Ang. on Corp. 281.

2. Sometimes the law requires a greater number than a bare majority to form a quorum, in such case no quorum is present until such a number convene.

3. When an authority is confided to several persons for a private purpose, all must join in the act, unless otherwise authorized. 6 John. R. 38. *Vide Authority, Majority; Plurality*.

QUOT, *Scotch law*. The twentieth part of the movables, computed without computation of debts, was so called.

2. Formerly the bishop was entitled, in all confirmations, to the quot of the testament. Ersk. Prin. B. 3, t. 9, n. 11.

QUOTA. That part which each one is to bear of some expense; as, his quota of this debt; that is, his proportion of such debt.

QUOTATION, *practice*. The allegation of some authority or case, or passage of some law, in support of a position which it is desired to establish.

2. Quotations, when properly made, assist the reader, but, when misplaced, they are inconvenient. As to the manner of quoting or citing authorities, see *Abbreviations; Citations*.

QUOTATION, *rights*. The transcript of a part of a book or writing from a book or paper into another.

2. If the quotation is fair, and not so extensive as to extract the whole value or the most valuable part of an author, it will not be a violation of the copyright. It is mostly difficult to define what is a fair quotation. When the quotation is unfair, an injunction will lie to restrain the publication. See 17 Ves. 424; 1 Bell's Com. 121, 5th ed.

3. "That part of a work of one author found in another," observed Lord Ellenborough, "is not of itself piracy, or sufficient to support an action; a man may adopt part of the work of another; he may so make use of another's labors for the promotion of science, and the benefit of the public." 5 Esp. N. P. C. 170; 1 Campb. 94. See *Curt. on Copyr.* 242; 3 Myl. & Cr. 737, 738; 17 Ves. 422; 1 Campb. 94; 2 Story, R. 100; 2 Beav. 6, 7; *Abridgment; Copyright*.

QUOUSQUE. A Latin adverb, which signifies how long, how far, until.

2. In old conveyances it is used as a word of limitation. 10 Co. 41.

3. In practice it is the name of an execution which is to have force until the

defendant shall do a certain thing. Of this kind is the *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken into execution, and he is imprisoned until he shall satisfy the execution. 3 Bouv. Inst. n. 3371.

R

RACK, punishments. An engine with which to torture a supposed criminal, in order to extort a confession of his supposed crime, and the names of his supposed accomplices. Unknown in the United States.

2. This instrument, known by the nickname of the Duke of Exeter's daughter, was in use in England. Barr. on the Stat. 366; 12 S. & R. 227.

BACK RENT, Engl. law. The full extended value of land let by lease, payable by tenant for life or years. Wood's Inst. 192.

RADOUB, French law. This word designates the repairs made to a ship, and a fresh supply of furniture and victuals, munitions and other provisions required for the voyage. Pard. n. 602.

RAILWAY. A road made with iron rails or other suitable materials.

2. Railways are to be constructed and used as directed by the legislative acts creating them.

3. In general, a rail-road company may take lands for the purpose of making a road when authorized by the charter, by paying a just value for the same. 8 S. & M. 649.

4. For most purposes a rail-road is a public highway, but it may be the subject of private property, and it has been held that it may be sold as such, unless the sale be forbidden by the legislature; not the franchise, but the land constituting the road. 5 Iredell, 297. In general, however, the public can only have a right of way; for it is not essential that the public should enjoy the land itself, namely, its treasures, minerals, and the like, as these would add nothing to the convenience of the public.

5. Rail-road companies, like all other principals, are liable for the acts of their agents, while in their employ, but they can-

not be made responsible for accidents which could not be avoided. 2 Iredell, 234; 2 McMullan, 403.

RAIN WATER. The water which naturally falls from the clouds.

2. No one has a right to build his house so as to cause the rain water to fall over his neighbor's land; 1 Rolle's Ab. 107; 2 Leo. 94; 1 Str. 643; Fortesc. 212; Bac. Ab. Action on the case, F; 5 Co. 101; 2 Rolle, Ab. 565, l. 10; 1 Com. Dig. Action upon the case for a nuisance, A; unless he has acquired a right by a grant or prescription.

3. When the land remains in a state of nature, says a learned writer, and by the natural descent, the rain water would descend from the superior estate over the lower, the latter is necessarily subject to receive such water. 1 Lois des Bâtimens, 15, 16. Vide 2 Roll. 140; Dig. 39, 3; 2 Bouv. Inst. n. 1608.

RANGE. This word is used in the land laws of the United States to designate the order of the location of such lands, and in patents from the United States to individuals they are described as being within a certain range.

RANK. The order or place in which certain officers are placed in the army and navy, in relation to others, is called their rank.

2. It is a maxim, that officers of an inferior rank are bound to obey all the lawful commands of their superiors, and are justified for such obedience.

RANKING. In Scotland this term is used to signify the order in which the debts of a bankrupt ought to be paid.

RANSOM, contracts, war. An agreement made between the commander of a capturing vessel with the commander of a vanquished vessel, at sea, by which the former permits the latter to depart with his

vessel, and gives him a safe conduct, in consideration of a sum of money, which the commander of the vanquished vessel, in his own name, and in the name of the owners of his vessel and cargo, promises to pay at a future time named, to the other.

2. This contract is usually made in writing in duplicate, one of which is kept by the vanquished vessel which is its safe conduct; and the other by the conquering vessel, which is properly called *ransom bill*.

3. This contract, when made in good faith, and not locally prohibited, is valid, and may be enforced. Such contracts have never been prohibited in this country. 1 Kent, Com. 105. In England they are generally forbidden. Chit. Law of Nat. 90, 91; Poth. Tr. du Dr. de Propr. n. 127. Vide 2 Bro. Civ. Law, 260; Weak. 435; 7 Com. Dig. 201; Marsh. Ins. 431; 2 Dall. 15; 15 John. 6; 3 Burr. 1734. The money paid for the redemption of such property is also called the ransom.

RAPE, crim. law. The carnal knowledge of a woman by a man forcibly and unlawfully against her will. In order to ascertain precisely the nature of this offence, this definition will be analysed.

2. Much difficulty has arisen in defining the meaning of *carnal knowledge*, and different opinions have been entertained; some judges having supposed that penetration alone is sufficient, while others deemed emission as an essential ingredient in the crime. Hawk. b. 1, c. 41, s. 3; 12 Co. 37; 1 Hale, P. C. 628; 2 Chit. Cr. L. 810. But in modern times the better opinion seems to be that both penetration and emission are necessary. 1 East, P. C. 439; 2 Leach, 854. It is, however, to be remarked, that very slight evidence may be sufficient to induce a jury to believe there was emission. Addis. R. 143; 2 So. Car. C. R. 351; 1 Beck's Med. Jur. 140; 4 Chit. Bl. Com. 213, note 8. In Scotland, emission is not requisite. Allis. Prin. 209, 210. See *Emission; Penetration*.

3. By the term *man* in this definition is meant a male of the human species, of the age of fourteen years and upwards; for an infant, under fourteen years, is supposed by law incapable of committing this offence. 1 Hale, P. C. 631; 8 C. & P. 738. But not only can an infant under fourteen years, if of sufficient mischievous discretion, but even a woman may be guilty as principals in the second degree. And the husband of a woman may be a principal in

the second degree of a rape committed upon his wife, as where he held her while his servant committed the rape. 1 Harg. St. Tr. 388.

4. The knowledge of the woman's person must be *forcibly and against her will*; and if her consent has not been voluntarily and freely given, (when she has the power to consent,) the offence will be complete, nor will any subsequent acquiescence on her part do away the guilt of the ravisher. A consent obtained from a woman by actual violence, by duress or threats of murder, or by the administration of stupefying drugs, is not such a consent as will shield the offender, nor turn his crime into adultery or fornication.

5. The matrimonial consent of the wife cannot be retracted, and, therefore, her husband cannot be guilty of a rape on her, as his act is not *unlawful*. But, as already observed, he may be guilty as principal in the second degree.

6. As a child under ten years of age is incapable in law to give her consent, it follows, that the offence may be committed on such a child whether she consent or not. See Stat. 18 Eliz. c. 7, s. 4.

See, as to the possibility of committing a rape, and as to the signs which indicate it, 1 Beck's Med. Jur. ch. 12; Merlin, Rep. mot Viol.; 1 Briand, Méd. Leg. 1ere partie, c. 1, p. 66; Bissy, Manuel Médico-Légal, &c. p. 149; Parent Duchatlet, De la Prostitution dans la ville de Paris, c. 3, § 5; Barr. on the Stat. 123; 9 Car. & P. 752; 2 Pick. 380; 12 S. & R. 69; 7 Conn. 54; Const. R. 354; 2 Vir. Cas. 235.

RAPE, division of a country. In the English law, this is a district similar to that of a hundred; but oftentimes containing in it more hundreds than one.

RAPINE, crim. law. This is almost indistinguishable from *robbery*. (q. v.) It is the felonious taking of another man's personal property, openly and by violence, against his will. The civilians define rapine to be the taking with violence, the movable property of another, with the fraudulent intent to appropriate it to one's own use. Lec. El. Dr. Rom. § 1071.

RAPPORT A SUCCESSION. A French term used in Louisiana, which is somewhat similar in its meaning to our homely term *hotch-pot*. It is the reunion to the mass of the succession, of the things given by the deceased ancestor to his heir, in order that the whole may be divided among the co-heirs.

2. The obligation to make the rapport has a tripple foundation. 1. It is to be presumed that the deceased intended in making an advancement, to give only a portion of the inheritance. 2. It establishes the equality of a division, at least, with regard to the children of the same parent, who all have an equal right to the succession. 3. It preserves in families that harmony, which is always disturbed by unjust favors to one who has only an equal right. Dall. Dict. h. t. See *Advancement*; *Collation*; *Hotchpot*.

RASCAL. An opprobrious term, applied to persons of bad character. The law does not presume that a damage has arisen because the defendant has been called a rascal, and therefore no general damages can be recovered for it; if the party has received special damages in consequence of being so called, he can recover a recompense to indemnify him for his loss.

RASURE. The scratching or scraping a writing, so as to prevent some part of it from being read. The word writing here is intended to include printing. Vide *Addition*; *Erasure* and *Interlineation*. Also, 8 Vin. Ab. 169; 13 Vin. Ab. 37; Bac. Ab. Evidence, F.; 4 Com. Dig. 294; 7 Id. 202.

RATE. A public valuation or assessment of every man's estate; or the ascertaining how much tax every one shall pay. Vide *Pow. Mortg. Index*, h. t.; *Harr. Dig.* h. t.; 1 *Hopk. C. R.* 37.

RATE OF EXCHANGE. Among merchants, by rate of exchange is understood the price at which a bill drawn in one country upon another, may be sold in the former.

RATIFICATION, contracts. An agreement to adopt an act performed by another for us.

2. Ratifications are either express or implied. The former are made in express and direct terms of assent; the latter are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use. By ratifying a contract a man adopts the agency altogether, as well what is detrimental as that which is for his benefit. 2 *Str. R.* 859; 1 *Atk.* 128; 4 *T. R.* 211; 7 *East, R.* 164; 16 *M. R.* 105; 1 *Ves.* 509; *Smith on Mer. L.* 60; *Story, Ag.* § 250; 9 *B. & Cr.* 59.

3. As a general rule, the principal has the right to elect whether he will adopt the

unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act. *Story, Ag.* § 250; *Paley, Ag. by Lloyd*, 171; 3 *Chit. Com. Law*, 197.

4. The ratification of a lawful contract has a retrospective effect, and binds the principal from its date, and not only from the time of the ratification, for the ratification is equivalent to an original authority, according to the maxim, that *omnis rati-habitio mandate equiparatur*. *Poth. Ob. n.* 75; *Ld. Raym.* 980; *Comb.* 450; 5 *Burr.* 2727; 2 *H. Bl.* 623; 1 *B. & P.* 316; 13 *John. R.* 367; 2 *John. Cas.* 424; 2 *Mass. R.* 106.

5. Such ratification will, in general, relieve the agent from all responsibility on the contract, when he would otherwise have been liable. 2 *Brod. & Bing.* 452. See 16 *Mass. R.* 461; 8 *Wend. R.* 494; 10 *Wend. R.* 399; *Story, Ag.* § 251. Vide *Assent*, and *Ayl. Pand.* *386; 18 *Vin. Ab.* 156; 1 *Liv. on Ag. c.* 2, § 4, p. 44, 47; *Story on Ag.* § 239; 3 *Chit. Com. L.* 197; *Paley on Ag. by Lloyd*, 324; *Smith on Mer. L.* 47, 60; 2 *John. Cas.* 424; 13 *Mass. R.* 178; *Id.* 391; *Id.* 379; 6 *Pick. R.* 198; 1 *Bro. Ch. R.* 101, note; *S. C. Anbl. R.* 770; 1 *Pet. C. C. R.* 72; *Bouv. Inst. Index*, h. t.

6. An infant is not liable on his contracts; but if, after coming of age, he ratify the contract by an actual or express declaration, he will be bound to perform it, as if it had been made after he attained full age. The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it, he would not be bound. 11 *S. & R.* 305, 311; 3 *Penn. St. R.* 428. See 12 *Conn.* 551, 556; 10 *Mass.* 137, 140; 14 *Mass.* 457; 4 *Wend.* 403, 405. But a confirmation or ratification of a contract, may be implied from acts of the infant after he becomes of age; as by enjoying or claiming a benefit under a contract he might have wholly rescinded; 1 *Pick.* 221, 223; and an infant partner will be liable for the contracts of the firm, or at least such as were known to him, if he, after becoming of age, confirm the contract of partnership by transacting business of the firm, receiving profits, and the like. 2 *Hill. So. Car. Rep.* 479; 1 *B. Moore*, 289.

RATIFICATION OF TREATIES. The con-

stitution of the United States, art. 2, s. 2, declares that the president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.

2. No treaty is therefore of any validity to bind the nation unless it has been ratified by two-thirds of the members present in the senate at the time its expediency or propriety may have been discussed. Vide *Treaty*.

RATIFICATION, *contracts*. Confirmation; approbation of a contract; ratification. Vin. Ab. h. t.; *Assent*. (q. v.)

RATIONALIBUS DIVISIS, WRIT DE. The name of a writ which lies properly when two men have lands in several towns or hamlets, so that the one is seised of the land in one town or hamlet, and the other, of the other town or hamlet by himself; and they do not know the bounds of the town or hamlet, nor of their respective lands. This writ lies by one against the other, and the object of it is to fix the boundaries. F. N. B. 300.

RAVISHED, *pleadings*. In indictments for rape, this technical word must be introduced, for no other word, nor any circumlocution, will answer the purpose. The defendant should be charged with having "*feloniously ravished*" the prosecutrix, or woman mentioned in the indictment. Bac. Ab. Indictment, G 1; Com. Dig. Indictment, G 6; Hawk. B. 2, c. 25, s. 56; Cro. C. C. 37; 1 Hale, 628; 2 Hale, 184; Co. Litt. 184, n. p.; 2 Inst. 180; 1 East, P. C. 447. The words "*feloniously did ravish and carnally know*," imply that the act was done forcibly and against the will of the woman. 12 S. & R. 70. Vide 3 Chit. Cr. Law, 812.

RAVISHMENT, *crim. law*. This word has several meanings. 1. It is an unlawful taking of a woman, or an heir in ward. 2. It is sometimes used synonymously with rape.

RAVISHMENT OF WARD, *Eng. law*. The marriage of an infant ward, without the consent of the guardian, is called a ravishment of ward, and punishable by statute. Westminster 2, c. 35.

READING. The act of making known the contents of a writing or of a printed document.

2. In order to enable a party to a contract or a deviser to know what a paper contains it must be read, either by the party himself or by some other person to him. When a person signs or executes a

paper, it will be presumed that it has been read to him, but this presumption may be rebutted.

3. In the case of a blind testator, if it can be proved that the will was not read to him, it cannot be sustained. 3 Wash. C. C. R. 580. Vide 2 Bouv. Inst. n. 2012.

REAL. A term which is applied to land in its most enlarged signification. *Real security*, therefore, means the security of mortgages or other incumbrances affecting lands. 2 Atk. 806; S. C. 2 Ves. sen. 547.

2. In the civil law, real has not the same meaning as it has in the common law. There it signifies what relates to a *thing*, whether it be movable or immovable, lands or goods; thus, a real injury is one which is done to a thing, as a trespass to property, whether it be real or personal in the common law sense. A real statute is one which relates to a thing, in contradistinction to such as relate to a person.

REAL ACTIONS. Those which concern the realty only, being such by which the demandant claims title to have any lands or tenements, rents, or other hereditaments, in fee simple, fee tail, or for term of life. 3 Bl. Com. 117. Vide *Actions*.

2. In the civil law, by real actions are meant those which arise from a right in a thing, whether it be movable or immovable.

REAL CONTRACT, *com. law*. By this term are understood contracts in respect to real property. 3 Rawle, 225.

2. In the civil law real contracts are those which require the interposition of a thing (*rei*), as the subject of them; for instance, the loan for goods to be *specifically returned*.

3. By that law, contracts are divided into those which are formed by the mere consent of the parties, and therefore are called consensual; such as sale, hiring and mandate; and those in which it is necessary that there should be something more than mere consent, such as the loan of money, deposit or pledge, which, from their nature, require the delivery of the *thing*; whence they are called real. Poth. Obl. p. 1, c. 1, s. 1, art. 2.

REAL PROPERTY. That which consists of land, and of all rights and profits arising from and annexed to land, of a permanent, immovable nature. In order to make one's interest in land, real estate, it must be an interest not less than for the party's life, because a term of years, even for a thou-

sand years, perpetually renewable, is a mere personal estate. 3 Russ. R. 376. It is usually comprised under the words lands, tenements, and hereditaments. Real property is corporeal, or incorporeal.

2. *Corporeal* consists wholly of substantial, permanent objects, which may all be comprehended under the general denomination of land. There are some chattels which are so annexed to the inheritance; that they are deemed a part of it, and are called heir looms. (q. v.) Money agreed or directed to be laid out in land, is considered as real estate. Newl. on Contr. chap. 3; Fonb. Eq. B. 1, c. 6, § 9; 3 Wheat. Rep. 577.

3. *Incorporeal* property, consists of certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are by their own nature or by use, annexed to corporeal inheritances, and are rights issuing out of them, or which concern them. These distinctions agree with the civil law. Just. Inst. 2, 2; Poth. Traité de la Communauté, part 1, c. 2, art. 1. The incorporeal hereditaments which subsist by the laws of the several states are fewer than those recognized by the English law. In the United States, there are fortunately no advowsons, tithes, nor dignities, as inheritances.

4. The most common incorporeal hereditaments, are, 1. Commons. 2. Ways. 3. Offices. 4. Franchises. 5. Rents. For authorities of what is real or personal property, see 8 Com. Dig. 564; 1 Vern. Rep. by Raithby, 4, n.; 2 Kent, Comm. 277; 3 Id. 331; 4 Watts' R. 341; Bac. Ab. Executors, H 3; 1 Mass. Dig. 394; 5 Mass. R. 419, and the references under the article *Personal property*, (q. v.) and *Property*, (q. v.)

5. The principal distinctions between real and personal property, are the following: 1. Real property is of a permanent and immovable nature, and the owner has an estate therein at least for life. 2. It descends from the ancestor to the heir, instead of becoming the property of an executor or administrator, on the death of the owner, as in case of personality. 3. In case of alienation, it must in general be made by deed, 5 B. & C. 221, and *in presenti*, by the common law; whereas leases for years may commence *in futuro*, and personal chattels may be transferred by parol or delivery. 4. Real estate when devised, is subject to the widow's dower; personal

estate can be given away by will discharged of any claim of the widow.

6. There are some interests arising out of, or connected with real property, which, in some respects, partake of the qualities of personality; as, for example, heir looms, title deeds, which, though in themselves movable, yet relating to land descend from ancestor to heir, or from a vendor to a purchaser. 4 Bing. 106.

7. It is a maxim in equity, that things to be done will be considered as done, and vice versa. According to this doctrine money or goods will be considered as real property, and land will be treated as personal property. Money directed by a will to be laid out in land, is, in equity, considered as land, and will pass by the words "lands, tenements, and hereditaments whatsoever and wheresoever." 3 Bro. C. C. 99; 1 Tho. Co. Litt. 219, n. T.

REALITY OF LAWS. Those laws which govern property, whether real or personal, or things; the term is used in opposition to *Personality of laws*. (q. v.) Story, Conf. of L. 23.

REALM. A kingdom; a country. 1 Taunt. 270; 4 Campb. 289; Rose, R. 387.

REALTY. An abstract of real, as distinguished from personality. Realty relates to lands and tenements, rents or other hereditaments. Vide *Real Property*.

REASON. By reason is usually understood that power by which we distinguish truth from falsehood, and right from wrong; and by which we are enabled to combine means for the attainment of particular ends. Encyclopédie, h. t.; Shef. on Lun. Introd. xxvi. *Ratio in jure equitas integra*.

2. A man deprived of reason is not criminally responsible for his acts, nor can he enter into any contract.

3. Reason is called the *soul of the law*; for when the reason ceases, the law itself ceases. Co. Litt. 97, 183; 1 Bl. Com. 70; 7 Toull. n. 566.

4. In Pennsylvania, the judges are required in giving their opinions, to give the reasons upon which they are founded. A similar law exists in France, which Toullier says is one of profound wisdom, because, he says, les arrêts ne sont plus comme autre fois des oracles muets qui commandent une obéissance passive; leur autorité irréfragable pour ou contre ceux qui les ont obtenus, devient soumise à la censure de la raison, quand on prétend les eriger en règles à suivre en d'autres cas semblables,

vol. 6, n. 301; judgments are not as formerly silent oracles which require a passive obedience; their irrefragable authority, for or against those who have obtained them, is submitted to the censure of reason, when it is pretended to set them up as rules to be observed in other similar cases. But see what Duncan J. says in 14 S. & R. 240.

REASONABLE. Conformable or agreeable to reason; just; rational.

2. An award must be *reasonable*, for if it be of things nugatory in themselves, and offering no advantage to either of the parties, it cannot be enforced. 3 Bouv. Inst. n. 2096. Vide *Award*.

REASONABLE ACT. This term signifies such an act as the law requires. When an act is unnecessary, a party will not be required to perform it as a reasonable act. 9 Price's Rep. 43; Yelv. 44; Platt. on Cov. 342, 157.

REASONABLE TIME. The English law, which, in this respect, has been adopted by us, frequently requires things to be done within a reasonable time; but what a reasonable time is it does not define: *quam longum debet esse rationabile tempus, non definitur in lege, sed pendet ex discretione iudiciariorum*. Co. Litt. 50. This indefinite requisition is the source of much litigation. A bill of exchange, for example, must be presented within a reasonable time. Chitty, Bills, 197-202. An abandonment must be made within a reasonable time after advice received of the loss. Marsh. Insurance, 589.

2. The commercial code of France fixes a time in both these cases, which varies in proportion to the distance. See Code de Com. L. 1, t. 8, s. 1, § 10, art. 160; Id. L. 5, t. 10, s. 3, art. 373. Vide, generally, 6 East, 3; 7 East, 385; 3 B. & P. 599; Bayley on Bills, 239; 7 Taunt. 159, 397; 15 Pick. R. 92; 3 Watts. R. 339; 10 Wend. R. 304; 13 Wend. R. 549; 1 Hall's R. 56; 6 Wend. R. 369; Id. 443; 1 Leigh's N. P. 435; Co. Litt. 56 b.

REASSURANCE. When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from loss, for the insurance he has made; this is called reinsurance.

REBATE, mer. law. Discount; the abatement of interest in consequence of prompt payment. Merch. Dict. t. t.

REBEL. A citizen or subject who unjustly and unlawfully takes up arms against the constituted authorities of the nation, to

deprive them of the supreme power, either by resisting their lawful and constitutional orders, in some particular matter, or to impose on them conditions. Vattel, Droit des Gens, liv. 3, § 328. In another sense it signifies a refusal to obey a superior, or the commands of a court. Vide *Commission of Rebellion*.

REBELLION, crim. law. The taking up arms traitorously against the government; and, in another, and perhaps a more correct sense, rebellion signifies the forcible opposition and resistance to the laws and process lawfully issued.

2. If the rebellion amount to treason, it is punished by the laws of the United States with death. If it be a mere resistance of process, it is generally punished by fine and imprisonment. See Dalloz, Dict. h. t.; Code Penal, 209.

REBELLION, COMMISSION OF. A commission of rebellion is the name of a writ issuing out of chancery to compel the defendant to appear. Vide *Commission of Rebellion*.

REBOUTER. To repel or bar. The action of the heir by the warranty of his ancestor, is called to rebut or repel. 2 Tho. Co. Litt. 247, 303.

TO REBUT. To contradict; to do away; as, every homicide is presumed to be murder, unless the contrary appears from evidence which proves the death; and this presumption it lies on the defendant to *rebut*, by showing that it was justifiable or excusable. Allis. Prin. 48.

REBUTTER, pleadings. The name of the defendant's answer to the plaintiff's surrejoinder. It is governed by the same rules as the rejoinder. (q. v.) 6 Com. Dig. 185.

REBUTTING EVIDENCE. That which is given by a party in the cause to explain, repel, counteract or disprove facts given in evidence on the other side. The term rebutting evidence is more particularly applied to that evidence given by the plaintiff, to explain or repel the evidence given by the defendant.

2. It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side; 2 McCord, 161; and the proof of circumstances may be offered to rebut the most positive testimony. Pet. C. C. 285. See *Circumstances*.

3. But there are several rules which exclude all rebutting evidence. A party

cannot impeach the validity of a promissory note which he has made or endorsed; 3 John. Cas. 185; nor impeach his own witness, though he may disprove, by other witnesses, matters to which he has testified; 3 Litt. 465; nor can he rebut or contradict what a witness has sworn to, which is immaterial to the issue. 16 Pick. 153; 2 Bailey, 118.

4. Parties and privies are estopped from contradicting a written instrument by parol proof, but this rule does not apply to strangers. 10 John. 229. But the parties may prove that before breach the agreement was abandoned, or annulled by a subsequent agreement not in writing. 4 N. Hamp. Rep. 196. And when the writing was made by another, as, where the log-book stated a desertion, the party affected by it may prove that the entry was false or made by mistake. 4 Mason, R. 541.

TO RECALL, international law. To deprive a minister of his functions; to supersede him.

TO RECALL A JUDGMENT. To reverse a judgment on a matter of fact; the judgment is then said to be recalled or revoked, and when it is reversed for an error of law, it is said simply to be reversed, *quod judicium reversionetur*.

RECAPTURE, war. By this term is understood the recovery from the enemy, by a friendly force, of a prize by him captured. It differs from rescue. (q. v.)

2. It seems incumbent on fellow citizens, and it is of course equally the duty of allies, to rescue each other from the enemy when there is a reasonable prospect of success. 3 Rob. Rep. 224.

3. The recaptors are not entitled to the property captured, as if it were a new prize; the owner is entitled to it by the right of postliminium. (q. v.) Dall. Dict. mots Prises maritimes, art. 2, § 4.

RECAPTION, remedies. The act of a person who has been deprived of the custody of another, to which he is legally entitled, by which he regains the peaceable custody of such person; or of the owner of personal or real property who has been deprived of his possession, by which he retakes possession, peaceably. In each of these cases the law allows the recaption of the person or of the property, provided he can do so without occasioning a breach of the peace, or an injury to a third person who has not been a party to the wrong. 3 Inst. 134; 2 Rolle,

Rep. 55, 6; Id. 208; 2 Rolle, Abr. 565; 3 Bl. Comm. 5; 3 Bouv. Inst. n. 2440, et seq.

2. Recaption may be made of a person, of personal property, of real property; each of these will be separately examined.

3.—1. The right of recaption of a person is confined to a husband, in retaking his wife; a parent, his child, of whom he has the custody; a master, his apprentice; and, according to Blackstone, a master, his servant; but this must be limited to a servant who assents to the recaption; in these cases, the party injured may peaceably enter the house of the wrongdoer, without a demand being first made, the outer door being open, and take and carry away the person wrongfully detained. He may also enter peaceably into the house of a person harboring, who was not concerned in the original abduction. 8 Bing. R. 186; S. C. 21 Engl. C. L. Rep. 265.

4.—2. The same principles extend to the right of recaption of personal property. In this sort of recaption, too much care cannot be observed to avoid any personal injury or breach of the peace.

5.—3. In the recaption of real estate, the owner may, in the absence of the occupier, break open the outer door of a house and take possession; but if, in regaining his possession, the party be guilty of a forcible entry and breach of the peace, he may be indicted; but the wrongdoer, or person who had no right to the possession, cannot sustain any action for such forcible regaining possession merely. 1 Chit. Pr. 646.

RECEIPT, contracts. A receipt is an acknowledgment in writing, that the party giving the same has received from the person therein named, the money or other thing therein specified.

2. Although expressed to be in full of all demands, it is only prima facie evidence of what it purports to be, and upon satisfactory proof being made that it was obtained by fraud, or given either under a mistake of facts or an ignorance of law, it may be inquired into and corrected in a court of law as well as in equity. 1 Pet. C. C. R. 182; 3 Serg. & Rawle, 355; S. P. 7 Serg. & Rawle, 309; 3 Serg. & Rawle, 564, 589; 12 Serg. & Rawle, 131; 1 Sid. 44; 1 Lev. 43; 1 Saund. 285; 2 Lutw. 1173; Co. Lit. 373; 2 Stark. C. 382; 1 W. C. C. R. 328; 2 Mason's R. 541; 11 Mass. 27; 1 Johns. Cas. 145; 9 John. R. 310; 8 Johns. R. 389; 5 Johns. R. 68;

4 Har. & McH. 219; 3 Har. & McH. 433; 2 Johns. R. 378; 2 Johns. R. 319. A receipt in full, given with a full knowledge of all the circumstances, and in the absence of fraud, seems to be conclusive. 1 Esp. C. 172; Benson v. Bennet, 1 Camp. 394, n.

3. A receipt sometimes contains an acknowledgment of having received a thing, and also an agreement to do another. It is only *prima facie* evidence as far as the receipt goes, but it cannot be contradicted by parol evidence in any part by which the party engages to perform a contract. A bill of lading, for example, partakes of both these characters; it may be contradicted or explained as to the facts stated in the recital, as that the goods were in good order and well conditioned; but, in other respects, it cannot be contradicted in any other manner than a common written contract. 7 Mass. R. 297; 1 Bailey, R. 174; 4 Ohio, R. 334; 3 Hawks, R. 580; 1 Phil. & Am. on Ev. 388; Greenl. Ev. § 305. Vide, generally, 1 B. & C. 704; S. C. 8 E. C. L. R. 193; 2 Taunt. R. 141; 2 T. R. 366; 5 B. & A. 607; 7 E. C. L. R. 206; 3 B. & C. 421; 1 East, R. 460.

4. If a man by his receipt acknowledges that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt is, it seems, conclusive as to the payment by the agent. For example, the usual acknowledgment in a policy of insurance of the receipt of premium from the assured, is conclusive of the fact as between the underwriter and the assured; Dalzell v. Mair, 1 Camp. 532; although such receipt would not be so between the underwriter and the broker. And if an agent empowered to contract for sale, sell and convey land, enter into articles of agreement by which it is stipulated that the vendee shall clear, make improvements, pay the purchase-money by instalments, &c., and on the completion of the covenants to be performed by him, receive from the vendor or his legal representatives, a good and sufficient warranty deed in fee for the premises, the receipt of the agent for such parts of the purchase-money as may be paid before the execution of the deed, is binding on the principal. 6 Serg. & Rawle, 146. See 11 Johns. R. 70.

5. A receipt on the back of a bill of exchange is *prima facie* evidence of payment by the acceptor. Peake's C. 25. The giving of a receipt does not exclude parol

evidence of payment. 4 Esp. N. P. C. 214.

6. In Pennsylvania it has been holden that a receipt, not under seal, to one of several joint debtors, for his proportion of the debt, discharges the rest. 1 Rawle, 391. But in New York a contrary rule has been adopted. 7 John. 207. See Coxe, 81; 1 Root, 72. See *Evidence*.

RECEIPTOR. In Massachusetts this name is given to the person who, on a trustee process being issued and goods attached, becomes surety to the sheriff to have them forthcoming on demand, or in time to respond the judgment, when the execution shall be issued. Upon which the goods are bailed to him. Story, Bailm. § 124, and see *Attachment; Remedies*.

RECEPTUS, civil law. The name sometimes given to an arbitrator, because he had been received or chosen to settle the differences between the parties. Dig. 4, 8; Code, 2, 56.

TO RECEIVE. Voluntarily to take from another what is offered.

2. A landlord, for example, could not be said to receive the key from his tenant, when the latter left it at his house without his knowledge, unless by his acts afterwards, he should be presumed to have given his consent.

RECEIVER, chancery practice. A person appointed by a court possessing chancery jurisdiction to receive the rents and profits of land, or the profits or produce of other property in dispute.

2. The power of appointing a receiver is a discretionary power exercised by the court. The appointment is provisional, for the more speedy getting in of the estate in dispute, and securing it for the benefit of such person as may be entitled to it, and does not affect the right. 3 Atk. 564.

3. It is not within the compass of this work to state in what cases a receiver will be appointed; on this subject, see 2 Madd. Ch. 233.

4. The receiver is an officer of the court, and, as such, responsible for good faith and reasonable diligence. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages; but he is not, as of course, responsible because there has been an embezzlement or theft. He is bound to such ordinary diligence, as belongs to a prudent and honest discharge of his duties, and such as is required of all persons who re-

ceive compensation for their services. Story, Bailm. § 620, 621; and the cases there cited. Vide, generally, 2 Madd. Ch. 232; Newl. Ch. Pr. 88; 8 Com. Dig. 890; 18 Vin. Ab. 160; 1 Supp. to Ves. jr. 455; 2 Id. 57, 58, 74, 75, 442, 455; Bouv. Inst. Index, h. t.

RECEIVER OF STOLEN GOODS, crim. law. By statutory provision the receiver of stolen goods knowing them to have been stolen may be punished as the principal, in perhaps all the United States.

2. To make this offence complete, the goods received must have been stolen, and the receiver must know that fact.

3. It is almost always difficult to prove guilty knowledge; and that must in general be collected from circumstances. If such circumstances are proved which to a person of common understanding and prudence, and situated as the prisoner was, must have satisfied him that they were stolen, this is sufficient. For example, the receipt of watches, jewelry, large quantities of money, bundles of clothes of various kinds, or personal property of any sort, to a considerable value, from boys or persons destitute of property, and without any lawful means of acquiring them; and specially if bought at untimely hours, the mind can arrive at no other conclusion than that they were stolen. This is further confirmed if they have been bought at an undervalue, concealed, the marks defaced, and falsehood resorted to in accounting for the possession of them. Alison's Cr. Law, 330; 2 Russ. Cr. 253; 2 Chit. Cr. Law, 951; Roscoe, Cr. Ev. h. t.; 1 Wheel. C. C. 202.

4. At common law receiving stolen goods, knowing them to have been stolen, is a misdemeanor. 2 Russ. Cr. 253.

RECESSION. A re-grant; the act of returning the title of a country to a government which formerly held it, by one which has it at the time; as the recession of Louisiana, which took place by the treaty between France and Spain, of October 1, 1800. See 2 White's Coll. 516.

RECIDIVE, French law. The state of an individual who commits a crime or misdemeanor, after having once been condemned for a crime or misdemeanor; a relapse.

2. Many states provide, that for a second offence, the punishment shall be increased; in those cases the indictment should set forth the crime or misdemeanor as a second offence.

3. The second offence must have been

committed after the conviction for the first; a defendant could not be convicted of a second offence, as such, until after he had suffered a punishment for the first. Dall. Dict. h. t.

RECIPROCAL CONTRACT, civil law. One in which the parties enter into mutual engagements.

2. They are divided into perfect and imperfect. When they are perfectly reciprocal, the obligation of each of the parties is equally a principal part of the contract, such as sale, partnership, &c. Contracts imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract; as, mandate, deposit, loan for use, and the like. In all reciprocal contracts the consent of the parties must be expressed. Poth. Obl. n. 9; Civil Code of Louis. art. 1758, 1759.

RECIPROCITY. Mutuality; state, quality or character of that which is reciprocal.

2. The states of the Union are bound to many acts of reciprocity. The constitution requires that they shall deliver to each other fugitives from justice; that the records of one state, properly authenticated, shall have full credit in the other states; that the citizens of one state shall be citizens of any state into which they may remove. In some of the states, as in Pennsylvania, the rule with regard to the effect of a discharge under the insolvent laws of another state, are reciprocated; the discharges of those courts which respect the discharges of the courts of Pennsylvania, are respected in that state.

RECITAL, contracts, pleading. The repetition of some former writing, or the statement of something which has been done. Touchst. 76.

2. Recitals are used to explain those matters of fact which are necessary to make the transaction intelligible. 2 Bl. Com. 298. It is said that when a deed of defeasance recites the deed which it is meant to defeat, it must recite it truly. Cruise, Dig. tit. 32, c 7, s. 28. In other cases it need not be so particular. 3 Penna. Rep. 324; 3 Chan. Cas. 101; Co. Litt. 352 b; Com. Dig. Fait, E 1.

3. A party who executes a deed reciting a particular fact is estopped from denying such fact; as, when it was recited in the condition of a bond that the obligor had received divers sums of money for the

obligee which he had not brought to account, and acknowledged that a balance was due to the obligee, it was holden that the obligor was estopped to say that he had not received any money for the use of the obligee. Willes, 9, 25; Rolle's Ab. 872, 8.

4. In pleading, when public statutes are recited, a small variance will not be fatal, where by the recital the party is not "tied up to the statute;" that is, if the conclusion be *contra formam statuti præditi*. Sav. 42; 1 Chit. Crim. Law, 276; Esp. on Penal Stat. 106. Private statutes must be recited in pleading, and proved by an exemplified copy, unless the opposite party, by his pleading admit them.

5. By the plea of *nul tiel record*, the party relying on a private statute is put to prove it as recited, and a variance will be fatal. See 4 Co. 76; March, Rep. 117, pl. 193; 3 Harr. & MoHen. 388. Vide, generally, 12 Vin. Ab. 129; 13 Vin. Ab. 417; 18 Vin. Ab. 162; 8 Com. Dig. 584; Com. Dig. Testemoigne—Evid. B 5; 4 Binn. R. 231; 1 Dall. R. 67; 3 Binn. R. 175; 3 Yeates, R. 287; 4 Yeates, R. 362, 577; 9 Cowen, R. 86; 4 Mason, R. 268; Yelv. R. 127 a, note 1; Cruise, Dig. tit. 32, c. 20, s. 23; 5 Johns. Ch. Rep. 23; 7 Halst. R. 22; 2 Bailey's R. 101; 6 Harr. & Johns. 336; 9 Cowen's R. 271; 1 Dana's R. 327; 15 Pick. R. 68; 5 N. H. Rep. 467; 12 Pick. R. 157; Toullier in his *Droit Civil Français*, liv. 3, t. 3, c. 6, n. 157 et seq. has examined this subject with his usual ability. 2 Hill. Ab. c. 29, s. 30; 2 Bail. R. 430; 2 B. & A. 625; 2 Y. & J. 407; 5 Harr. & John. 164; Cov. on Conv. Ev. 298, 315; Hurl. on Bonds, 33; 6 Watts & Serg. 469.

6. Formerly, in equity, the decree contained *recitals* of the pleadings in the cause, which became a great grievance. Some of the English chancellors endeavored to restrain this prolixity. By the rules of practice for the courts in equity of the United States, it is provided, that in drawing up decrees and orders, neither the bill, nor the answer, nor other pleading nor any part thereof, nor the report of any master, nor any other prior proceedings, shall be stated or recited in the decree or order. Rule 86; 4 Bonv. Inst. n. 4443.

RECLAIM. To demand again, to insist upon a right; as, when a defendant for a consideration received from the plaintiff, has covenanted to do an act, and fails to do it,

the plaintiff may bring covenant for the breach, or assumpsit to *reclaim* the consideration. 1 Caines, 47.

RECOGNITION, contracts. An acknowledgment that something which has been done by one man in the name of another, was done by authority of the latter.

2. A recognition by the principal of the agency of another in the particular instance, or in similar instances, is evidence of the authority of the agent, so that the recognition may be either express or implied. As an instance of an implied recognition may be mentioned the case of one who subscribes policies in the name of another, and, upon a loss happening, the latter pays the amount. 1 Camp. R. 43, n. a; 1 Esp. Cas. 61; 4 Camp. R. 88.

RECOGNITORS, Eng. law. The name by which the jurors impaneled on an assize are known. *Barnet v. Ihrie*, 17 S. & R. 174.

RECOGNIZANCE, contracts. An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified. 2 Bl. Com. 341; Bro. Ab. h. t.; Dick. Just. h. t.; 1 Chit. Cr. Law, 90.

2. Recognizances relate either to criminal or civil matters. 1. Recognizances in criminal cases, are either that the party shall appear before the proper court to answer to such charges as are or shall be made against him, that he shall keep the peace or be of good behaviour. Witnesses are also required to be bound in a recognizance to testify.

3.—2. In civil cases, recognizances are entered into by bail, conditioned that they will pay the debt, interest and costs recovered by the plaintiff under certain contingencies. There are also cases where recognizances are entered into under the authority and requirements of statutes.

4. As to the form. The party need not sign it; the court, judge or magistrate having authority to take the same, makes a short memorandum on the record, which is sufficient. 2 Binn. R. 431; 1 Chit. Cr. Law, 90; 2 Wash. C. C. R. 422; 9 Mass. 520; 1 Dana, 523; 1 Tyler, 291; 4 Verm. 488; 1 Stew. & Port. 465; 7 Verm. 529; 2 A. R. Marsh. 131; 5 S. & R. 147; Vide generally, Com. Dig. Forcible Entry, D 27; Id. Obligation, K; Whart. Dig. h. t.; Vin. Ab. h. t.; Rolle's Ab. h. t.; 2 Wash. C. C. R. 422; Id. 29; 2 Yeates, R. 437;

1 Binn. R. 98, note; 1 Serg. & Rawle, 328; 3 Yeates, R. 93; Burn. Just. h. t.; Vin. Ab. h. t.; 2 Sell. Pract. 45.

RECOGNIZEE. He for whose use a recognizance has been taken.

RECOGNISOR, contracts. He who enters into a recognizance.

RECOLEMENT, French law. The reading and reexamination by a witness of a deposition, and his persistence in the same, or his making such alteration, as his better recollection may enable him to do, after having read his deposition. Without such reexamination the deposition is void. Poth. Procéd. Cr. s. 4, art. 4.

RECOMMENDATION. The giving to a person a favorable character of another.

2. When the party giving the character has acted in good faith, he is not responsible for the injury which a third person, to whom such recommendation was given, may have sustained in consequence of it, although he was mistaken.

3. But when the recommendation is knowingly untrue, and an injury is sustained, the party recommending is civilly responsible for damages; 3 T. R. 51; 7 Cranch, 69; 14 Wend. 126; 7 Wend. 1; 6 Penn. St. R. 310; whether it was done merely for the purpose of benefitting the party recommended, or the party who gives the recommendation.

4. And in case the party recommended was a debtor to the one recommending, and it was agreed, prior to the transaction, that the former should, out of the property to be obtained by the recommendation, be paid; or in case of any other species of collusion, to cheat the person to whom the credit is given, they may both be criminally prosecuted for the conspiracy. Vide *Character*, and Fell on Guar. ch. 8; 6 Johns. R. 181; 1 Day's Ca. Er. 22; 13 Johns. R. 224; 5 N. S. 443.

RECOMPENSATION, Scotch law. When a party sues for a debt, and the defendant pleads compensation, or set-off, the plaintiff may allege a compensation on his part, and this is called a recompensation. Bell's Dict. h. t.

RECOMPENSE. A reward for services; remuneration for goods or other property.

2. In maritime law there is a distinction between *recompense* and *restitution*. (q. v.) When goods have been lost by jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, the owner

of the goods lost by jettison cannot claim restitution from the owners of the other goods; but in the case of expenses incurred with a view to the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port or the ship owner himself.

RECOMPENSE OF RECOVERY IN VALUE. This phrase is applied to the matter recovered in a common recovery, after the vouchee has disappeared, and judgment is given for the demandant. 2 Bouv. Inst. n. 2093.

RECONCILIATION, contract. The act of bringing persons to agree together, who before, had had some difference.

2. A renewal of cohabitation between husband and wife is proof of reconciliation, and such reconciliation destroys the effect of a deed of separation. 4 Eccl. R. 238.

RECONDUCTION, civ. law. A renewing of a former lease; relocation. (q. v.) Dig. 19, 2, 13, 11; Code Nap. art. 1737-1740.

RECONVENTION, civ. law. An action brought by a party who is defendant against the plaintiff before the same judge. *Reconventio est petitio quæ reus vicissim, quid ab actore petit, ex eadem, vel diversa causa.* Voet, in tit. de Judiciis, n. 78; 4 N. S. 439. To entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it and incidental to the same. Code of Pr. Lo. art. 375; 11 Lo. R. 309; 7 N. S. 282; 8 N. S. 516.

2. The reconvention of the civil law was a species of cross-bill. Story, Eq. Pl. § 402. See *Conventio*; *Bill in chancery*. Vide *Demand in reconvention*.

RECORD, evidence. A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. 6 Call, 78; 1 Dana, 595.

2. Records may be divided into those which relate to the proceedings of congress and the state legislatures—the courts of common law—the courts of chancery—and those which are made so by statutory provisions.

3.—1. Legislative acts. The acts of congress and of the several legislatures, are the highest kind of records. The printed journals of congress have been so

considered. 1 Whart. Dig. tit. Evidence, pl. 112; and see Dougl. 593; Cowp. 17.

4.—2. The proceedings of the courts of common law are records. But every minute made by a clerk of a court for his own future guidance in making up his record, is not a record. 4 Wash. C. C. Rep. 698.

5.—3. Proceedings in courts of chancery are said not to be, strictly speaking, records; but they are so considered. Gresley on Ev. 101.

6.—4. The legislatures of the several states have made the enrollment of certain deeds and other documents necessary in order to perpetuate the memory of the facts they contain, and declared that the copies thus made should have the effect of records.

7. By the constitution of the United States, art. 4. s. 1, it is declared that "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." In pursuance of this power, congress have passed several acts directing the manner of authenticating public records, which will be found under the article *Authentication*.

8. Numerous decisions have been made under these acts, some of which are here referred to. 7 Cranch, 471; 3 Wheat. 234; 4 Cowen, 292; 1 N. H. Rep. 242; 1 Ohio Reports, 264; 2 Verm. R. 263; 5 John. R. 37; 4 Conn. R. 380; 9 Mass. 462; 10 Serg. & Rawle, 240; 1 Hall's N. York Rep. 155; 4 Dall. 412; 5 Serg. & Rawle, 523; 1 Pet. S. C. Rep. 352.

Vide, generally, 18 Vin. Ab. 170; 1 Phil. Ev. 288; Bac. Ab. Amendment, &c., H; 1 Kent, Com. 260; Archb. Civ. Pl. 395; Gresley on Ev. 99; Stark. Ev. Index, h. t.; Dane's Ab. Index, h. t.; Co. Litt. 260; 10 Pick. R. 72; Bouv. Inst. Index, h. t.

TO RECORD, the act of making a record.

2. Sometimes questions arise as to when the act of recording is complete, as in the following case. A deed of real estate was acknowledged before the register of deeds and handed to him to be recorded, and at the same instant a creditor of the grantor attached the real estate; in this case it was held the act of recording was incomplete without a certificate of the acknowledgment, and wanting that, the attaching creditor had the preference. 10 Pick. Rep. 72.

3. The fact of an instrument being recorded is held to operate as a constructive notice upon all subsequent purchasers of any estate, legal or equitable, in the same property. 1 John. Ch. R. 394.

4. But all conveyances and deeds which may be *de facto* recorded, are not to be considered as giving notice; in order to have this effect the instruments must be such as are authorized to be recorded, and the registry must have been made in compliance with the law, otherwise the registry is to be treated as a mere nullity, and it will not affect a subsequent purchaser or encumbrancer unless he has such actual notice as would amount to a fraud. 2 Sch. & Lef. 68; 1 Sch. & Lef. 157; 4 Wheat. R. 466; 1 Binn. R. 40; 1 John. Ch. R. 300; 1 Story, Eq. Jur. § 403, 404; 5 Greenl. 272.

RECORD OF NISI PRIUS, *Eng. law*. A transcript from the issue roll; it contains a copy of the pleadings and issue. Steph. Pl. 105.

RECORDARI FACIAS LOQUELAM, *English practice*. A writ commanding the sheriff, that he cause the plaintiff to be recorded which is in his county, without writ, between the parties there named, of the cattle, goods, and chattels of the complainant taken and unjustly distrained as it is said, and that he have the said record before the court on a day therein named, and that he prefix the same day to the parties, that then they may be there ready to proceed in the same plaintiff, 2 Sell. Pr. 166. See *Refalo*.

RECORDATUR. An order or allowance that the verdict returned on the *nisi prius* roll, be recorded. Bac. Ab. Arbitr. &c., D.

RECORDER. 1. A judicial officer of some cities, possessing generally the powers and authority of a judge. 3 Yeates' R. 300; 4 Dall. Rep. 299; but see 1 Rep. Const. Ct. 45. Anciently, *recorder* signified to recite or testify on recollection as occasion might require what had previously passed in court, and this was the duty of the judges, thence called *recordeurs*. Steph. Plead. note 11. 2. An officer appointed to make record or enrollment of deeds and other legal instruments, authorized by law to be recorded.

TO RECOUPE. This word is derived from the French *recouper*, to cut again. In law it signifies the right and the act of making a set-off, defalcation, or discount, by the defendant, to the claim of the plain-

tiff. 21 Wend. R. 342. In another sense it signifies to recompense. 19 Ves. 123.

RECOVERER. The demandant in a common recovery, after judgment has been given in his favor, assumes the name of recoverer.

RECOVERY. A recovery, in its most extensive sense, is the restoration of a former right, by the solemn judgment of a court of justice. 3 Murph. 169.

2. A recovery is either *true* or *actual*, or it is *feigned* or *common*. A true recovery, usually known by the name of recovery simply, is the procuring a former right by the judgment of a court of competent jurisdiction; as, for example, when judgment is given in favor of the plaintiff when he seeks to recover a thing or a right.

3. A common recovery is a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit. Bac. Tracts, 148.

4. Common recoveries are considered as mere forms of conveyance or common assurances; although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued, and all the forms strictly adhered to, which are necessary to be observed in an adversary suit. The first thing therefore necessary to be done in suffering a common recovery is, that the person who is to be the demandant, and to whom the lands are to be adjudged, would sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *præcipe*. In obedience to this writ the tenant appears in court, either in person or by his attorney; but, instead of defending the title to the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those he shall lose by the defect of his warranty. This is called the voucher *vocatus*, or calling to warranty. The person thus called to warrant, who is usually called the vouchee, appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The defendant then desires leave of the court to imparl, or confer with the vouchee in private, which is granted of course. Soon after the demand-

ant returns into court, but the vouchee disappears or makes default, in consequence of which it is presumed by the court, that he has no title to the lands demanded in the writ, and therefore cannot defend them; whereupon judgment is given for the demandant, now called the recoverer, to recover the lands in question against the tenant, and for the tenant to recover against the vouchee, lands of equal value in recompense for those so warranted by him, and now lost by his default. This is called the recompense of recovery in value; but as it is customary for the crier of the court to act, who is hence called the common vouchee, the tenant can only have a nominal, and not a real recompense, for the land thus recovered against him by the demandant. A writ of *habere facias* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated; and, on the execution and return of the writ, the recovery is completed. The recovery here described is with single voucher; but a recovery may, and is frequently suffered with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchees.

5. Common recoveries were invented by the ecclesiastics in order to evade the statute of mortmain, by which they were prohibited from purchasing, or receiving under the pretence of a free gift, any land or tenements whatever. They have been used in some states for the purpose of breaking the entail of estates. Vide, generally, Cruise, Digest, tit. 36; 2 Saund. 42, n. 7; 4 Kent, Com. 487; Pigot on Common Recoveries, *passim*.

6. All the learning in relation to common recoveries is nearly obsolete, as they are out of use. Rey, a French writer, in his work, Des Institutions Judicaires de l'Angleterre, tom. ii. p. 221, points out what appears to him the absurdity of a common recovery. As to common recoveries, see 9 S. & R. 330; 3 S. & R. 435; 1 Yeates, 244; 4 Yeates, 413; 1 Whart. 139, 151; 2 Rawle, 168; 2 Halst. 47; 5 Mass. 438; 6 Mass. 328; 8 Mass. 34; 3 Harr. & John. 292; 6 P. S. R. 45.

RECREANT. A Coward; a poltroon. 3 Bl. Com. 340.

RECRIMINATION, *crim. law*. An accusation made by a person accused against his accuser, either of having committed the same offence, or another.

2. In general recrimination does not ex-

cuse the person accused, nor diminish his punishment, because the guilt of another can never excuse him. But in applications for divorce on the ground of adultery, if the party, defendant, can prove that the plaintiff or complainant has been guilty of the same offence, the divorce will not be granted. 1 Hagg. C. Rep. 144; S. C. 4 Eccl. Rep. 360. The laws of Pennsylvania contain a provision to the same effect. Vide 1 Hagg. Eccl. R. 790; 3 Hagg. Eccl. R. 77; 1 Hagg. Cons. R. 147; 2 Hagg. Cons. R. 297; Shelf. on Mar. and Div. 440; Dig. 24, 3, 89; Dig. 48, 5, 13, 5; 1 Addams, R. 411; *Compensation*; *Condonation*; *Divorce*.

RECRUIT. A newly made soldier.

RECTO. Right. (q. v.) *Breve de recto*, writ of right. (q. v.)

RECTOR, Eccl. law. One who rules or governs; a name given to certain officers of the Roman church. Dict. Canonique, h. v.

RECTORY, Engl. law. Corporeal real property, consisting of a church, glebe lands and tithes. 1 Chit. Pr. 168.

RECTUS IN CURIA. Right in court. One who stands at the bar, and no one objects any offence, or prefers any charge against him.

2. When a person outlawed has reversed his outlawry, so that he can have the benefit of the law, he is said to be *rectus in curia*. Jacob, L. D. h. t.

RECUPERATORES, Roman civil law. A species of judges originally established, it is supposed, to decide controversies between Roman citizens and strangers, concerning the right to the possession of property requiring speedy remedy; but gradually extended to questions which might be brought before ordinary judges. After this enlargement of their powers, the difference between them and judges, it is supposed, was simply this: If the prætor named three judges he called them *recuperatores*; if one, he called him *judex*. But opinions on this subject are very various. (Colman *De Romano judicio recuperatorio*.) Cicero's oration *pro Coecin*, 1, 3, was addressed to Recuperators.

RECUSANTS, or POPISH RECUSANTS, Engl. law. Persons who refuse to make the declarations against popery, and such as promote, encourage, or profess the popish religion.

2. These are by law liable to restraints, forfeitures and inconveniences, which are imposed upon them by various acts of par-

liament. Happily in this country no religious sect has the ascendancy, and all persons are free to profess what religion they conscientiously believe to be the right one.

RECUSATION, civ. law. A plea or exception by which the defendant requires that the judge having jurisdiction of the cause, should abstain from deciding upon the ground of interest, or for a legal objection to his prejudice.

2. A recusation is not a plea to the jurisdiction of the court, but simply to the person of the judge. It may, however, extend to all the judges, as when the party has a suit against the whole court. Poth. Procéd. Civ. Iere part., ch. 2, s. 5. It is a personal challenge of the judge for cause.

3. It is a maxim of every good system of law, that a man shall not be judge in his own cause. 2 L. R. 390; 6 L. R. 134; Ayl. Parerg. 451; Dict. de Jur. h. t.; Merl. Répert. h. t.; vide Jacob's Intr. to the Com. Civ. and Can. L. 11; 8 Co. 118; Dyer, 65. Dall. Dict. h. t.

4. By recusation is also understood the challenge of jurors. Code of Practice of Louis. art. 499, 500. Recusation is also an act, of what nature soever it may be, by which a strange heir, by deeds or words, declares he will not be heir. Dig. 29, 2, 95. See, generally, 1 Hopk. Ch. R. 1; 5 Mart. Lo. R. 292; and *Challenge*.

REDDENDO SINGULA SINGULIS, construction. By rendering each his own; for example, when two descriptions of property are given together in one mass, both the next of kin and the heir cannot take, unless in cases where a construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate and the heir at law the real estate. 14 Ves. 490. Vide 11 East, 513, n.; Bac. Ab. Conditions, L.

REDDENDUM, contracts. A word used substantively, and is that clause in a deed by which the grantor reserves something new to himself out of that which he granted before, and thus usually follows the *tenendum*, and is generally in these words "yielding and paying."

2. In every good *reddendum* or reservation these things must concur; namely, 1. It must be apt words. 2. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing. 3. It must be of such thing

on which the grantor may resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed. Vide 2 Bl. Com. 299; Co. Litt. 47; Touchs. 80; Cruise, Dig. tit. 32, c. 24, s. 1; Dane's Ab. Index, h. t.

REDEMPTION, contracts. The act of taking back by the seller from the buyer, a thing which had been sold subject to the right of repurchase.

2. The right of redemption then is an agreement by which the seller reserves to himself the power of taking back the thing sold by returning the price paid for it. As to the fund out of which a mortgaged estate is to be redeemed, see *Payment*. Vide *Equity of redemption*.

REDEMPTIONES. Heavy fines, contradistinguished from misericordias, (q. v.)

REDHIBITION, civil law, and in Louisiana. The avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice. Civ. Code of Lo. 2496. Redhibition is also the name of an action which the purchaser of a defective movable thing may bring to cause the sale to be annulled, and to recover the price he has paid for it. Vide Dig. 21, 1.

2. The rule of *caveat emptor*, (q. v.) in the common law, places a purchaser in a different position from his situation under the like circumstances under the civil law; unless there is an express warranty, he can seldom annul a sale or recover damages on account of a defect in the thing sold. Chitty, Contr. 183, et seq.; Sugd. Vend. 222; 2 Kent, Com. 374; Co. Litt. 102, a; 2 Bl. Com. 452; Bac. Ab. Action on the case, E; 2 Com. Cont. 263.

REDIDIT SE, Eng. practice. He surrendered himself. This is endorsed on the bail piece when a certificate has been made by the proper officer that the defendant is in custody. Pr. Reg. 64; Com. Dig. Bail Q 4.

REDITUS ALBI. A rent payable in money; sometimes called white rent or blanche farm. Vide *Alba firma*.

REDITUS NIGRI. A rent payable in grain, work, and the like; it was also called black mail. This name was given to it to distinguish it from *reditus albi*, which was payable in money. Vide *Alba firma*.

RE-DRAFT, comm. law. A bill of exchange drawn at the place where another

bill was made payable, and where it was protested, upon the place where the first bill was drawn, or when there is no regular commercial intercourse rendering that practicable, then in the next best or most direct practicable course. 1 Bell's Com. 406, 5th ed. Vide *Reëxchange*.

REDRESS. The act of receiving satisfaction for an injury sustained. For the mode of obtaining redress, vide *Remedies*; 1 Chit. Pr. Annal. Table.

REDUBBERS, crim law. Those who bought stolen cloth, and dyed it of another color to prevent its being identified, were anciently so called. 3 Inst. 134.

REDUNDANCY. Matter introduced in an answer, or pleading, which is foreign to the bill or articles.

2. In the case of *Dysart v. Dysart*, 3 Curt. Ecc. R. 543, in giving the judgment of the court, Dr. Lushington says: "It may not, perhaps, be easy to define the meaning of this term, [redundant,] in a short sentence, but the true meaning I take to be this: the respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in a plea; but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but in this latter instance, if such matter be introduced into the answer, and not afterwards put in the plea, or proved, the court will give no weight or credence to such part of the answer."

3. A material distinction is to be observed between redundancy in the allegation and redundancy in the proof. In the former case, a variance between the allegation and the proof will be fatal if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate, because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation. 1 Greenl. Ev. § 67; 1 Stark. Ev. 401.

RE-ENTRY, estates. The resuming or retaking possession of land which the party lately had.

2. Ground rent deeds and leases frequently contain a clause authorizing the landlord to reënter on the non-payment of rent, or the breach of some covenant, when

the estate is forfeited. Story, Eq. Jur. § 1315; 1 Fonb. Eq. B. 1, c. 6, § 4, note h. Forfeitures for the non-payment of rent being the most common, will here alone be considered. When such a forfeiture has taken place, the lessor or his assigns have a right to repossess themselves of the demised premises.

3. Great niceties must be observed in making such reëntry. Unless they have been dispensed with by the agreement of the parties, several things are required by law to be previously done by the landlord or reversioner to entitle him to reënter. 3 Call, 424; 8 Watts, 51; 9 Watts, 258; 18 John. 450; 4 N. H. Rep. 254; 13 Wend. 524; 6 Halst. 270; 2 N. H. Rep. 164; 1 Saund. 287, n. 16.

4.—1. There must be a demand of rent. Com. Dig. Rent, D 3 a; 18 Vin. Ab. 482; Bac. Ab. Rent, H.

5.—2. The demand must be of the precise rent due, for the demand of a penny more or less will avoid the entry. Com. Dig. Rent, D 5. If a part of the rent be paid, a reëntry may be made for the part unpaid. Bac. Ab. Conditions, O 4; Co. Litt. 203; Cro. Jac. 511.

6.—3. It must be made precisely on the day when the rent is due and payable by the lease, to save the forfeiture. 7 T. R. 117. As where the lease contains a proviso that if the rent shall be behind and unpaid, for the space of thirty, or any other number of days, it must be made on the thirtieth or last day. Com. Dig. Rent, D 7; Bac. Ab. Rent, I.

7.—4. It must be made a convenient time before sunset, that the money may be counted and a receipt given, while there is light enough reasonably to do so; therefore proof of a demand in the afternoon of the last day, without showing in what part of the afternoon it was made, and that it was towards sunset or late in the afternoon, is not sufficient. Jackson v. Harrison, 17 Johns. 66; Com. Dig. Rent, D 7; Bac. Ab. Rent, I.

8.—5. It must be made upon the land, and at the most notorious place of it. 6 Bac. Abr. 31; 2 Roll. Abr. 428; see 16 Johns. 222. Therefore, if there be a dwelling-house upon the land, the demand must be made at the front door, though it is not necessary to enter the house, notwithstanding the door be open; if woodland be the subject of the lease, a demand ought to be made at the gate, or some high-

way leading through the woods as the most notorious. Co. Litt. 202; Com. Dig. Rent, D. 6.

9.—6. Unless a place is appointed where the rent is payable, in which case a demand must be made at such place; Com. Dig. Rent, D. 6; for the presumption is the tenant was there to pay it. Bac. Abr. Rent, I.

10.—7. A demand of the rent must be made in fact, although there should be no person on the land ready to pay it. Bac. Ab. Rent, I.

11.—8. If after these requisites have been performed by the lessor or reversioner, the tenant neglects or refuses to pay the rent, and no sufficient distress can be found on the premises, then the lessor or reversioner is to reënter. 6 Serg. & Rawle, 151; 8 Watts, R. 51; 1 Saund. 287, n. 16. He should then openly declare, before the witnesses he may have provided for the purpose, that for the want of a sufficient distress, and because of the non-payment of the rent demanded, mentioning the amount, he reënters and re-possesses himself of the premises.

12. A tender of the rent by the tenant to the lessor, made on the last day, either on or off the premises, will save the forfeiture.

13. It follows as a necessary inference from what has been premised, that a demand made *before or after* the last day which the lessee has to pay the rent, in order to prevent the forfeiture, or *off* the land, will not be sufficient to defeat the estate. 7 T. R. 117.

14. The forfeiture may be waived by the lessor, in the case of a lease for years, by his acceptance of rent, accruing since the forfeiture, provided he knew of the cause. 3 Rep. 64.

15. A reëntry cannot be made for non-payment of rent if there is any distrainable property on the premises, which may be taken in satisfaction of the rent, and every part of the premises must be searched. 2 Phil. Ev. 180.

16. The entry may be made by the lessor or reversioner himself, or by attorney; Cro. Eliz. 601; 7 T. R. 117; the entry of one joint tenant or tenant in common, enures to the benefit of the whole. Hob 120.

17. After the entry has been made, evidence of it ought to be perpetuated.

18. Courts of chancery will generally make the lessor account to the lessee for

the profits of the estate, during the time of his being in possession; and will compel him, after he has satisfied the rent in arrear, and the costs attending his entry, and detention of the lands, to give up the possession to the lessee, and to pay him the surplus profits of the estate. 1 Co. Litt. 203 a, n. 3; 1 Lev. 170; T. Raym. 135, 158; 3 Cruise, 299, 300. See also 6 Binn. 420; 18 Ves. 60; Bac. Ab. Rent, K; 3 Call, 491; 18 Ves. 58; 2 Story, Eq. Jur. § 1315; 4 Bing. R. 178; 33 Eng. C. L. R. 312; 1 How. S. C. R. 211.

REEVE. The name of an ancient English officer of justice, inferior in rank to an alderman.

2. He was a ministerial officer, appointed to execute process, keep the king's peace, and put the laws in execution. He witnessed all contracts and bargains; brought offenders to justice, and delivered them to punishment; took bail for such as were to appear at the county court, and presided at the court or foleMOTE. He was also called *gerefa*.

3. There were several kinds of reeves; as the *shire-gerefa*, shire-reeve or sheriff; the *heli-gerefa*, or high-sheriff, tithing-reeve, burgh or borough-reeve.

RE-EXAMINATION. A second examination of a thing. A witness may be reexamined, in a trial at law, in the discretion of the court, and this is seldom refused. In equity, it is a general rule that there can be no reexamination of a witness, after he has once signed his name to the deposition, and turned his back upon the commissioner or examiner; the reason of this is that he may be tampered with, or induced to retract or qualify what he has sworn to. 1 Meriv. 130.

RE-EXCHANGE, contracts, commerce. The expense incurred by a bill's being dishonored in a foreign country where it is made payable, and returned to that country in which it was made or indorsed, and there taken up; the amount of this depends upon the course of exchange between the two countries, through which the bill has been negotiated. In other words, reexchange is the difference between the draft and redraft.

2. The drawer of a bill is liable for the whole amount of reexchange occasioned by the circuitous mode of returning the bill through the various countries in which it has been negotiated, as much as for that occasioned by a direct return. Maxw. L. D. h. t.; 5 Com. Dig. 150.

3. In some states, legislative enactments have been made which regulate damages on reexchange. These damages are different in the several states, and this want of uniformity, if it does not create injustice, must be admitted to be a serious evil. 2 Amer. Jur. 79. See Chit. on Bills. (ed. of 1836,) 666. See *Damages on Bills of Exchange*.

REFALO. A word composed of the three initial syllables re. fa. lo., for *recordari facias loquelam*. (q. v.) 2 Sell. Pr. 160; 8 Dowl. R. 514.

REFECTION, civil law. Reparation, reestablishment of a building. Dig. 19, 1, 6, 1.

REFEREE. A person to whom has been referred a matter in dispute, in order that he may settle it. His judgment is called an award. Vide *Arbitrator; Reference*.

REFERENCE, contracts. An agreement to submit to certain arbitrators, matters in dispute between two or more parties, for their decision and judgment. The persons to whom such matters are referred are sometimes called referees.

REFERENCE, mercantile law. A direction or request by a party who asks a credit to the person from whom he expects it, to call on some other person named in order to ascertain the character or mercantile standing of the former.

REFERENCE, practice. The act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. By reference is also understood that part of an instrument of writing where it points to another for the matters therein contained. For the effect of such reference, see 1 Pick. R. 27; 17 Mass. R. 443; 15 Pick. R. 66; 7 Halst. R. 25; 14 Wend. R. 619; 10 Conn. R. 422; 4 Greenl. R. 14, 471; 3 Greenl. R. 393; 6 Pick. R. 460; the thing referred to, is also called a reference.

REFERENDUM, international law. When an ambassador receives propositions touching an object over which he has no sufficient power and he is without instruction, he accepts it *ad referendum*, that is, under the condition that it shall be acted upon by his government, to which it is referred. The note addressed in that case to his government to submit the question to its consideration is called a *referendum*.

REFORM. To reorganize; to rearrange; as, the jury "shall be reformed by putting

to and taking out of the persons so impaneled." Stat. 3 H. VIII. c. 12; Bac. Ab. Juries, A.

2. To reform an instrument in equity, is to make a decree that a deed or other agreement shall be made or construed as it was originally intended by the parties, when an error or mistake, as to a fact, has been committed. A contract has been reformed, although the party applying to the court was in the legal profession, and he, himself, drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties. 1 Sim. & Stu. 210; 3 Russ. R. 424. But a contract will not be reformed in consequence of an error of law. 1 Russ. & M. 418; 1 Chit. Pr. 124.

REFORMATION, criminal law. The act of bringing back a criminal to such a sense of justice, so that he may live in society without any detriment to it.

2. The object of the criminal law ought to be to reform the criminal, while it protects society by his punishment. One of the best attempts at reformation is the plan of solitary confinement in a penitentiary. While the convict has time to reflect, he cannot be injured by evil example or corrupt communication.

TO REFRESH. To reexamine a subject by having a reference to something connected with it.

2. A witness has a right to examine a memorandum or paper which he made in relation to certain facts, when the same occurred, in order to refresh his memory, but the paper or memorandum itself is not evidence. 5 Wend. 301; 12 S. & R. 328; 6 Pick. 222; 1 A. K. Marsh. 188; 2 Conn. 213. See 1 Rep. Const. Ct. 336, 373, 423.

TO REFUND. To pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.

2. On a deficiency of assets, executors and administrators cum testamento annexo, are entitled to have refunded to them legacies which they may have paid, or so much as may be necessary to pay the debts of the testator; and in order to insure this, they are generally authorized to require a refunding bond. Vide 8 Vin. Ab. 418; 18 Vin. Ab. 273; Bac. Ab. Legacies, H.

REFUSAL. The act of declining to receive or to do something.

2. A grantee may refuse a title, vide *Assent*; one appointed executor may refuse

to act as such. In some cases, a neglect to perform a duty which the party is required by law or his agreement to do, will amount to a refusal.

REGENCY. The authority of the person in monarchical countries invested with the right of governing the state in the name of the monarch, during his minority, absence, sickness or other inability.

REGENT. 1. A ruler, a governor. The term is usually applied to one who governs a regency, or rules in the place of another. 2. In the canon law, it signifies a master or professor of a college. Dict. du Dr. Can. h. t. 3. It sometimes means simply a ruler, director, or superintendent; as, in New York, where the board who have the superintendence of all the colleges, academies and schools, are called the regents of the University of the state of New York.

REGIAM MAJESTATEM. The name of an ancient law book, ascribed to David I. of Scotland. It is, according to Dr. Robertson, a servile copy of Glanville. Robertson's Hist. of Charles V., vol. 1, note 25, p. 262; Ersk. Prin. B. 1, t. 1, n. 13.

REGICIDE. The killing of a king, and, by extension, of a queen. Théorie des Lois Criminelles, vol. 1, p. 300.

REGIDOR. *Laws of the Spanish empire of the Indies.* One of a body, never exceeding twelve, who formed a part of the *ayuntamiento* or municipal council in every capital of a jurisdiction. The office of regidor was held for life; that is to say, during the pleasure of the supreme authority. In most places the office was purchased; in some cities, however, they were elected by persons of the district, called *capitulares*. 12 Pet. R. 442, note.

REGIMIENTO. *Laws of the Spanish empire of the Indies.* The body of regidores, who never exceeded twelve, forming a part of the municipal council or *ayuntamiento*, in every capital of a jurisdiction. 12 Pet. Rep. 442, note.

REGISTER, evidence. A book containing a record of facts as they occur, kept by public authority; a register of births, marriages and burials.

2. Although not originally intended for the purposes of evidence, public registers are in general admissible to prove the facts to which they relate.

3. In Pennsylvania, the registry of births, &c. made by any religious society in the state, is evidence by act of assembly, but it must be proved as at common law.

6 Binn. R. 416. A copy of the register of births and deaths of the Society of Friends in England, proved before the lord mayor of London by an *ex parte* affidavit, was allowed to be given in evidence to prove the death of a person; 1 Dall. 2; and a copy of a parish register in Barbadoes, certified to be a true copy by the rector, proved by the oath of a witness, taken before the deputy secretary of the island and notary public, under his hand and seal, was held admissible to prove pedigree; the handwriting and office of the secretary being proved. 10 Serg. & Rawle, 383.

4. In North Carolina, a parish register of births, marriages and deaths, kept pursuant to the statute of that state, is evidence of pedigree. 2 Murphey's R. 47.

5. In Connecticut, a parish register has been received in evidence. 2 Root, R. 99. See 15 John. R. 226. Vide 1 Phil. Ev. 305; 1 Curt. R. 755; 6 Eng. Eccl. R. 452; Cov. on Conv. Ev. 304.

REGISTER, commer. law. The certificate of registry granted to the person or persons entitled thereto, by the collector of the district, comprehending the port to which any ship or vessel shall belong; more properly, the registry itself. For the form, requisites, &c. of certificate of registry, see Act of Con. Dec. 31, 1792; Story's Laws U. S. 269; 3 Kent, Com. 4th ed. 141.

REGISTER or REGISTRAR. An officer authorized by law to keep a record called a register or registry; as the register for the probate of wills.

REGISTER FOR THE PROBATE OF WILLS. An officer in Pennsylvania, who has generally the same powers that judges of probates and surrogates have in other states, and the ordinary has in England, in admitting the wills of deceased persons to probate.

REGISTER OF WRITS. This is a book preserved in the English court of chancery, in which were entered, from time to time, all forms of writs once issued.

2. It was first printed and published in the reign of Henry VIII. This book is still in authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice.

3. It seems, however, that a variation from the register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. Steph. Pl. 7, 8.

REGISTRARIUS. An ancient name given to a notary. In England this name is confined to designate the officer of some court, the records or archives of which are in his custody.

REGISTRUM BREVIUM. The name of an ancient book which was a collection of writs. See *Register of Writs*.

REGISTRY. A book authorized by law, in which writings are registered or recorded. Vide *To Record*; *Register*.

REGNANT. One having authority as a king; one in the exercise of royal authority.

REGRATING, crim. law. Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise, is so denominated. 3 Inst. 196; 1 Russ. on Cr. 169.

2. In the Roman law, persons who monopolized grain, and other produce of the earth, were called *dardanarii*, and were variously punished. Dig. 47, 11, 6.

REGRESS. Returning; going back; opposed to *ingress*. (q. v.)

REGULAR DEPOSIT. One where the thing deposited must be returned. It is distinguished from an irregular deposit.

REGULAR AND IRREGULAR PROCESS. Regular process is that which has been lawfully issued by a court or magistrate, having competent jurisdiction. Irregular process is that which has been illegally issued.

2. When the process is *regular*, and the defendant has been damnified, as in the case of a malicious arrest, his remedy is by an action on the case, and not trespass; when it is *irregular*, the remedy is by action of trespass.

3. If the process be *wholly* illegal or *misapplied* as to the *person* intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest and imprisonment, and may escape, be rescued, or even break prison; but if the process and imprisonment were in form legal, each of these acts would be punishable, however innocent the defendant might be, for he ought to submit to legal process, and obtain his release by due course of law. 1 Chit. Pr. 637; 5 East, R. 304, 308; S. C. 1 Smith's Rep. 555; 6 T. R. 234; Foster, C. L. 312; 2 Wils. 47; 1 East, P. C. 310; Hawk. B. 2, c. 19, s. 1, 2.

4. When a party has been arrested on process which has afterwards been set aside for irregularity, he may bring an action of trespass and recover damages as well against the attorney who issued it, as the party, though such process will justify the officer who executed it. 8 Adolph. & Ell. 449; S. C. 35 E. C. L. R. 433; 15 East, R. 615, note c; 1 Stra. 509; 2 W. Bl. Rep. 845; 2 Conn. R. 700; 9 Conn. 141; 11 Mass. 500; 6 Greenl. 421; 3 Gill & John. 377; 1 Bailey, R. 441; 2 Litt. 234; 3 S. & R. 139; 12 John. 257; 3 Wils. 376; and vide *Malicious Prosecution*.

REHABILITATION. The act by which a man is restored to his former ability, of which he had been deprived by a conviction, sentence or judgment of a competent tribunal.

REHEARING. A second consideration which the court gives to a cause, on a second argument.

2. A rehearing takes place principally when the court has doubts on the subject to be decided; but it cannot be granted by the supreme court after the cause has been remitted to the court below to carry into effect the decree of the supreme court. 7 Wheat. 58.

REI INTERVENTUS. When a party is imperfectly bound in an obligation, he may, in general, annul such imperfect obligation; but when he has permitted the opposite party to act as if his obligation or agreement were complete, such *things have intervened* as to deprive him of the right to rescind such obligation; these circumstances are the *rei interventus*. 1 Bell's Com. 328, 329, 5th ed.; Burt. Man. P. R. 128.

RE-INSURANCE, mar. contr. An insurance made by a former insurer, his executors, administrators, or assigns, to protect himself and his estate from a risk to which they were liable by the first insurance.

2. It differs from a double insurance (q. v.) in this, that in the latter cases, the insured makes two insurances on the same risk and the same interest.

3. The insurer on a re-insurance is answerable only to the party whom he has insured, and not to the original insured, who can have no remedy against him in case of loss, even though the original insurer become insolvent, because there is no privity of contract between them and the original insured. 3 Kent, Com. 227; Park.

on Ins. c. 15, p. 276; Marsh. Ins. B. 1, c. 4, s. 4.

REISSUABLE NOTES. Bank notes, which after having been once paid, may again be put into circulation, are so called.

2. They cannot properly be called valuable securities, while in the hands of the maker; but, in an indiotment, may properly be called goods and chattels. Ry. & Mood. C. C. 218; vide 5 Mason's R. 537; 2 Russ. on Cr. 147. And such notes would fall within the description of *promissory notes*. 2 Leach, 1090, 1093; Russ. & Ry. 232. Vide *Bank note; Note; Promissory note*.

REJOINDER, pleadings. The name of the defendant's answer to the plaintiff's replication.

2. The general requisites of a rejoinder, are, 1. It must be triable. 2. It must not be double, nor will several rejoinders be allowed to the same declaration. 3. It must be certain. 4. It must be direct and positive, and not merely by way of recital or argumentative. 5. It must not be repugnant or insensible. 6. It must be conformable to, and not depart from the plea. Co. Litt. 304; 6 Com. Dig. 185; Archb. Civ. Pl. 278; U. S. Dig. Pleading, XIII.

RELAPSE. The condition of one who, after having abandoned a course of vice, returns to it again. Vide *Recidive*.

RELATION, civil law. The report which the judges made of the proceedings in certain suits to the prince were so called.

2. These relations took place when the judge had no law to direct him, or when the laws were susceptible of difficulties; it was then referred to the prince, who was the author of the law, to give the interpretation. These reports were made in writing and contained the pleadings of the parties, and all the proceedings, together with the judge's opinion, and prayed the emperor to order what should be done. The ordinance of the prince thus required was called a *rescript*. (q. v.) The use of these relations was abolished by Justinian, Nov. 125.

RELATION, contracts, construction. When an act is done at one time, and it operates upon the thing as if done at another time, it is said to do so by relation; as, if a man deliver a deed as an escrow, to be delivered by the party holding it, to the grantor, on the performance of some act, the delivery to the latter will have relation back to the first delivery. *Termes de la Ley*. Again, if a partner be adjudged a bankrupt, the partnership is dissolved, and such dissolution

relates back to the time when the commission issued. 3 Kent, Com. 33. Vide 18 Vin. Ab. 285; 4 Com. Dig. 245; 5 Id. 339; Litt. S. C. 462-466; 2 John. 510; 4 John. 230; 15 John. 309; 2 Har. & John. 151; and the article *Fiction*.

RELATIONS, kindred. In its most extensive signification, this term includes all the kindred of the person spoken of. In a more limited sense, it signifies those persons who are entitled as next of kin under the statute of distribution.

2. A legacy to "relations" generally, or to "relations by blood or marriage," without enumerating any of them, will, therefore, entitle to a share, such of the testator's relatives as would be entitled under the statute of distributions in the event of intestacy. 1 Madd. Ch. R. 45; 1 Bro. C. C. 33. See the cases referred to under the word *Relations*, article *Construction*.

3. Relations to either of the parties, even beyond the ninth degree, have been holden incapable to serve on juries. 3 Chit. Pr. 795, note c.

4. Relationship or affinity is no objection to a witness, unless in the case of husband and wife. See *Witness*.

RELATOR. A rehearser or teller; one who, by leave of court, brings an information in the nature of a *quo warranto*.

2. At common law, strictly speaking, no such person as a relator to an information is known; he being a creature of the statute 9 Anne, c. 20.

3. In this country, even where no statute similar to that of Anne prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney general, and these are commonly called relators; though no judgment for costs can be rendered for or against them. 2 Dall. 112; 5 Mass. 231; 15 Serg. & Rawle, 127; 3 Serg. & Rawle, 52; Ang. on Corp. 470. In chancery the relator is responsible for costs. 4 Bouv. Inst. n. 4022.

RELATIVE. One connected with another by blood or affinity; a relation, a kinsman or kinswoman. In an adjective sense, having relation or connexion with some other person or thing; as relative rights, relative powers.

RELATIVE POWERS. Those which relate to land, so called to distinguish them from those which are collateral to it.

2. These powers are *appendant*, as

where a tenant for life has a power of making leases in possession. They are *in gross* when a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but, notwithstanding, is annexed in privity to it, and takes effect in the appointee out of an interest appointed in the appointer. 2 Bouv. Inst. n. 1930.

RELATIVE RIGHTS. Those to which a person is entitled in consequence of his relation with others: such as the rights of a husband in relation to his wife; of a father, as to his children; of a master, as to his servant; of a guardian, as to his ward.

2. In general, the superior may maintain an action for an injury committed against his relative rights. See 2 Bouv. Inst. n. 2277 to 2296; 3 Bouv. Inst. n. 3491; 4 Bouv. Inst. n. 3615 to 3618.

RELEASE. Releases are of two kinds.

1. Such as give up, discharge, or abandon a right of action. 2. Such as convey a man's interest or right to another, who has possession of it, or some estate in the same. Touch. 320; Litt. sec. 444; Nels. Ab. h. t.; Bac. Ab. h. t.; Vin. Ab. h. t.; Rolle's Ab. h. t.; Com. Dig. h. t.

RELEASE, contracts. A release is the giving or discharging of a right of action which a man has or may claim against another, or that which is his. Touches. 320; Bac. Ab. h. t.; Co. Litt. 264 a.

2. This kind of a release is different from that which is used for the purpose of conveying real estate. Here a mere right is surrendered; in the other case not only a right is given up, but an interest in the estate is conveyed, and becomes vested in the release.

3. Releases may be considered, as to their form, their different kinds, and their effect. § 1. The operative words of a release are remise, release, quitclaim, discharge and acquit; but other words will answer the purpose. Sid. 265; Cro. Jac. 696; 9 Co. 52; Show. 331.

4.—§ 2. Releases are either express, or releases in deed; or those arising by operation of law. An express release is one which is distinctly made in the deed; a release by operation of law, is one which though not expressly made, the law presumes in consequence of some act of the releasor; for instance, when one of several joint obligors is expressly released, the others are also released by operation of law

3 Salk. 298; Hob. 10; Id. 66; Noy, 62; 4 Mod. 380; 7 Johns. Rep. 207.

5. A release may also be implied; as, if a creditor voluntarily deliver to his debtor the bond, note, or other evidence of his claim. And when the debtor is in possession of such security, it will be presumed that it has been delivered to him. Poth. Obl. n. 608, 609.

6.—§ 3. As to their effect, releases 1st, acquit the releasee: and 2dly, enable him to be examined as a witness.

7.—1st. Littleton says a release of all demands is the best and strongest release. Sect. 508. Lord Coke, on the contrary, says *claims* is a stronger word. Co. Lit. 291 b.

8. In general the words of a release will be restrained by the particular occasion of giving it. 3 Lev. 278; 1 Show. 151; 2 Mod. 108, n.; 2 Show. 47; T. Raym. 399; 3 Mod. 277; Palm. 218; 1 Lev. 235.

9. The reader is referred to the following cases where a construction has been given to the expressions mentioned. A release of "all actions, suits and demands," 3 Mod. 277: "all actions, debts, duties, and demands," Ibid. 1 and 64; 3 Mod. 185; 8 Co. 150 b; 2 Saund. 6 a; "all demands," 5 Co. 70, b; 2 Mod. 281; 3 Mod. 278; 1 Lev. 99; Salk. 578; 2 Rolle's Rep. 20; 12 Mod. 465; 2 Conn. Rep. 120; "all actions, quarrels, trespasses," Dy. 2171 pl. 2; Cro. Jac. 487; "all errors, and all actions, suits, and writs of error whatsoever," T. Ray. 399; "all suits," 8 Co. 150; "of covenants," 5 Co. 70 b.

10.—2d. A release by a witness where he has an interest in the matter which is the subject of the suit; or release by the party on whose side he is interested, renders him competent. 1 Phil. Ev. 102, and the cases cited in n. a. Vide 2 Chitt. R. 329; 1 D. & R. 361; Harr. Dig. h. t.; Bouv. Inst. Index, h. t.

RELEASE, estates. The "conveyance of a man's interest or right, which he hath unto a thing, to another that hath the possession thereof, or some estate therein." Touch. 320.

2. The words generally used in such conveyance, are, "remised, released, and forever quit claimed." Litt. sec. 445.

3. Releases of land are, in respect of their operation, divided into four sorts. 1. Releases that enure by way of passing the estate, or *mitter l'estate*. (q. v.) 2. Releases that enure by way of passing the

right, or *mitter le droit*. 3. Releases that enure by enlargement of the estate; and 4. Releases that enure by way of extinguishment. Vide 4 Cruise, 71; Co. Lit. 264; 3 Marsh. Decis. 185; Gilb. Ten. 82; 2 Sumn. R. 487; 10 Pick. R. 195; 10 John. R. 456; 7 Mass. R. 381; 8 Pick. R. 143; 5 Har. & John. 158; 2 N. H. Rep. 402; 5 Paige's R. 299.

RELEASEE. A person to whom a release is made.

RELEASOR. He who makes a release.

RELEGATION, civil law. Among the Romans relegation was a banishment to a certain place, and consequently was an interdiction of all places except the one designated.

2. It differed from deportation. (q. v.) Relegation and deportation agree in these particulars: 1. Neither could be in a Roman city or province. 2. Neither caused the party punished to lose his liberty. Inst. 1, 16, 2; Digest, 48, 22, 4; Code, 9, 47, 26.

3. Relegation and deportation differed in this. 1. Because deportation deprived of the right of citizenship, which was preserved notwithstanding the relegation. 2. Because deportation was always perpetual, and relegation was generally for a limited time. 3. Because deportation was always attended with confiscation of property, although not mentioned in the sentence; while a loss of property was not a consequence of relegation unless it was perpetual, or made a part of the sentence. Inst. 1, 12, 1 & 2; Dig. 48, 20, 7, 5; Id. 48, 22, 1 to 7; Code, 9, 47, 8.

RELEVANCY. By this term is understood the evidence which is applicable to the issue joined; it is *relevant* when it is applicable to the issue, and ought to be admitted; it is *irrelevant*, when it does not apply; and it ought then to be excluded. 3 Hawks, 122; 4 Litt. Rep. 272; 7 Mart. Lo. R. N. S. 198. See Greenl. Ev. § 49, et seq.; 1 Phil. Ev. 169; 11 S. & R. 134; 7 Wend. R. 359; 1 Rawle, R. 311; 3 Pet. R. 336; 5 Harr. & Johns. 51, 56; 1 Watts. & Serg. 362; 6 Watts. R. 266; 1 S. & R. 298.

RELEVANT EVIDENCE. That which is applicable to the issue and which ought to be received; the phrase is used in opposition to irrelevant evidence, which is that which is not so applicable, and which must be rejected. Vide *Relevancy*.

RELICT. A widow; as A B, relict of C D.

RELICTA VERIFICATIONE. When a judgment is confessed by *cognovit actionem* after plea pleaded, and then the plea is withdrawn, it is called a confession or *cognovit actionem relictæ verificatione*. He acknowledges the action having abandoned his plea. See 5 Halst. 332.

RELICTION. An increase of the land by the sudden retreat of the sea or a river.

2. Relicted lands arising from the sea and in *navigable* rivers, (q. v.) generally belong to the state; and all relicted lands of *unnavigable* rivers generally belong to the proprietor of the estate to which such rivers act as boundaries. Schultes on Aqu. Rights, 138; Ang. on Tide Wat. 75. But this reliction must be from the sea in its usual state; for if it should inundate the land, and then recede, this would be no reliction. Harg. Tr. 15. Vide Ang. on Wat. Co. 220.

3. Reliction differs from avulsion, (q. v.) and from alluvion. (q. v.)

RELIEF, Engl. law. A relief was an incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant. At one time the amount was arbitrary; but afterwards the relief of a knight's fee became fixed at one hundred shillings. 2 Bl. Com. 65.

RELIEF, practice. That assistance which a court of chancery will lend to a party, to annul a contract tainted with fraud, or where there has been a mistake or accident; courts of equity grant relief to all parties in cases where they have rights, *ex æquo et bono*, and modify and fashion that relief according to circumstances.

RELIGION. Real piety in practice, consisting in the performance of all known duties to God and our fellow men.

2. There are many actions which cannot be regulated by human laws, and many duties are imposed by religion calculated to promote the happiness of society. Besides, there is an infinite number of actions, which though punishable by society, may be concealed from men, and which the magistrate cannot punish. In these cases men are restrained by the knowledge that nothing can be hidden from the eyes of a sovereign intelligent Being; that the soul never dies, that there is a state of future rewards and punishments; in fact that the most secret crimes will be punished. True religion then offers succors to the feeble, consola-

tions to the unfortunate, and fills the wicked with dread.

3. What Montesquieu says of a prince, applies equally to an individual. "A prince," says he, "who loves religion, is a lion, which yields to the hand that caresses him, or to the voice which renders him tame. He who fears religion and hates it, is like a wild beast, which gnaws the chain which restrains it from falling on those within its reach. He who has no religion is like a terrible animal which feels no liberty except when it devours its victims or tears them in pieces." Esp. des Lois, liv. 24, c. 1.

4. But religion can be useful to man only when it is pure. The constitution of the United States has, therefore, wisely provided that it should never be united with the state. Art. 6, 3.

Vide *Christianity; Religious test; Theocracy*.

RELIGIOUS TEST. The constitution of the United States, art. 6, s. 3, declares that "no religious test shall ever be required as a qualification to any office, or public trust under the United States."

2. This clause was introduced for the double purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test or affirmation, and to cut off forever every pretence of any alliance between church and state in the national government. Story on the Const. § 1841.

RELINQUISHMENT, practice. A forsaking, abandoning, or giving over a right; for example, a plaintiff may relinquish a bad count in a declaration, and proceed on the good: a man may relinquish a part of his claim in order to give a court jurisdiction.

RELOCATION, Scotch law, contracts. To let again; to renew a lease, is called a relocation.

2. When a tenant holds over after the expiration of his lease, with the consent of his landlord, this will amount to a relocation.

REMAINDER, estates. The remnant of an estate in lands or tenements expectant on a particular estate, created together with the same, at one time. Co. Litt. 143 a.

2. Remainders are either vested or contingent. A vested remainder is one by which a present interest passes to the party, though to be enjoyed in future; and by which the estate is invariably fixed to re-

main to a determinate person, after the particular estate has been spent. Vide 2 Johns. R. 288; 1 Yeates, R. 340.

3. A contingent remainder is one which is limited to take effect on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder never can take effect.

4. According to Mr. Fearn, contingent remainders may properly be distinguished into four sorts: 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself. 2. Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate. 3. Where the condition upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it. 4. Where the person, to whom the remainder is limited, is not yet ascertained, or not yet in being. Fearn, 5.

5. The pupillary substitutions of the civil law somewhat resembled contingent remainders. 1 Brown's Civ. Law, 214, n.; Burr. 1623. Vide, generally, Viner's Ab. h. t.; Bac. Ab. h. t.; Com. Dig. h. t.; 4 Kent, Com. 189; Yelv. 1, n.; Cruise, Dig. tit. 16; 1 Supp. to Ves. jr. 184; Bouv. Inst. Index, h. t.

REMAINDER-MAN. One who is entitled to the remainder of the estate after a particular estate carved out of it has expired.

TO REMAND. To send back or recommit. When a prisoner is brought before a judge on a *habeas corpus*, for the purpose of obtaining his liberty, the judge hears the case, and either discharges him or not; when there is cause for his detention, he remands him.

REMANDING A CAUSE, practice. The sending it back to the same court out of which it came, for the purpose of having some action on it there. March, R. 100.

REMANENT PRO DEFECTU EMP-TORUM, practice. The return made by the sheriff to a writ of execution when he has not been able to sell the property seized, that the same *remains unsold for want of buyers*: in that case the plaintiff is entitled to a *venditioni exponas*. Com. Dig. Execution, C. 8.

REMANET, practice. The causes which are entered for trial, and which cannot be tried during the term, are *remanets*. Lee's

Dict. Trial, vii.; 1 Sell. Pr. 434; 1 Phil. Ev. 4.

REMEDIAL. That which affords a remedy; as, a remedial statute, or one which is made to supply some defects or abridge some superfluities of the common law. 1 Bl. Com. 86. The term remedial statute is also applied to those acts which give a new remedy. Esp. Pen. Act. 1.

REMEDY. The means employed to enforce a right or redress an injury.

2. The importance of selecting a proper remedy is made strikingly evident by the following statement. "Recently a *common law barrister*, very eminent for his legal attainments, sound opinions, and great practice, advised that there was *no remedy whatever* against a married woman, who, having a considerable separate estate, had joined with her husband in a promissory note for £2500, for a debt of her husband, because he was of opinion that the contract of a married woman is absolutely void, and referred to a decision to that effect, viz. *Marshall v. Rutton*, 8 T. R. 545, he not knowing, or forgetting, that in *equity*, under such circumstances, payment might have been enforced out of the separate estate. And afterwards, a very eminent *equity counsel*, equally erroneously advised, in the same case, that the remedy was *only in equity*, although it appeared upon the face of the case, *as then stated*, that, after the death of her husband, the wife had *promised* to pay, in consideration of forbearance, and upon which promise she might have been *arrested and sued at law*. If the common law counsel had properly advised proceedings in equity, or if the equity counsel had advised proceedings by arrest *at law*, upon the promise, after the death of the husband, the whole debt would have been paid. But, upon this latter opinion, a bill in chancery was filed, and so much time elapsed before decree, that a great part of the property was dissipated, and the wife escaped, with the residue, into France, and the creditor thus wholly *lost his debt*, which would have been recovered, if the proper proceedings had been adopted in the first or even second instance. This is one of the *very numerous* cases almost daily occurring, illustrative of the consequences of the want of, at least, a *general knowledge of every branch of law*."

3. Remedies may be considered in relation to 1. The enforcement of contracts. 2. The redress of torts or injuries.

4.—§ 1. The remedies for the enforcement of contracts are generally by action. The form of these depend upon the nature of the contract. They will be briefly considered, each separately.

5.—1. The breach of parol or simple contracts, whether verbal or written—express or implied—for the payment of money, or for the performance or omission of any other act, is remediable by action of *assumpsit*. (q. v.) This is the proper remedy, therefore, to recover money lent, paid, and had and received to the use of the plaintiff; and in some cases though the money have been received tortiously or by duress of the person or goods, it may be recovered in this form of action, as, in that case, the law implies a contract. 2 *Ld. Raym.* 1216; 2 *Bl. R.* 827; 3 *Wils. R.* 804; 2 *T. R.* 144; 3 *Johns. R.* 183. This action is also the proper remedy upon wagers, feigned issues, and awards when the submission is not by deed, and to recover money due on foreign judgments; 4 *T. R.* 493; 3 *East, R.* 221; 11 *East, R.* 124; and on by-laws. 1 *B. & P.* 98.

6.—2. To recover money due and unpaid upon legal liabilities, *Hob.* 206; or upon simple contracts either express or implied, whether verbal or written, and upon contracts under seal or of record; *Bull. N. P.* 167; *Com. Dig. Debt, A 9*; and on statutes by a party grieved, or by a common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty; 7 *Mass. R.* 202; 3 *Mass. R.* 309, 310; the remedy is by action of debt. *Vide Debt.*

7.—3. When a covenantee has sustained damages in consequence of the non-performance of a *promise under seal*, whether such promise be contained in a deed poll, indenture, or whether it be express or implied by law from the terms of the deed; or whether the damages be liquidated or unliquidated, the proper remedy is by action of covenant. *Vide Covenant.*

8.—4. For the detention of a chattel, which the party obtained by virtue of a contract, as a bailment, or by some other lawful means, as by finding, the owner may in general support an action of detinue, (q. v.) and replevin; (q. v.) or when he has converted the property to his own use, trover and conversion. (q. v.)

9.—§ 2. Remedies for the redress of injuries. These remedies are either public,

by indictment, when the injury to the individual or to his property affects the public; or private, when the tort is only injurious to the individual.

10. There are three kinds of remedies, namely, 1. The *preventive*. 2. That which seeks for a *compensation*. 3. That which has for its object *punishment*.

11.—1. The preventive, or removing, or abating remedies, are those which may be by acts of the party aggrieved, or by the intervention of legal proceedings; as, in the case of injuries to the person, or to personal or real property, defence, resistance, recaption, abatement of nuisance, and surety of the peace, or injunction in equity and perhaps some others.

12.—2. Remedies for compensation are those which may be either by the acts of the party aggrieved, or summarily before justices, or by arbitration, or action, or suit at law or in equity.

13.—3. Remedies which have for their object punishments, or compensation and punishments, are either summary proceedings before magistrates, or indictment, &c. The party injured in many cases of private injuries, which are also a public offence, as, batteries and libels, may have both remedies, a public indictment for the criminal offence, and a civil action for the private wrong. When the law gives several remedies, the party entitled to them may select that best calculated to answer his ends. *Vide* 2 *Atk.* 344; 4 *Johns. Ch. R.* 140; 6 *Johns. Ch. Rep.* 78; 2 *Conn. R.* 353; 10 *Johns. R.* 481; 9 *Serg. & Rawle*, 302. In felony and some other cases, the private injury is so far merged in the public crime that no action can be maintained for it, at least until after the public prosecution shall have been ended. *Vide Civil remedy.*

14. It will be proper to consider, 1. The private remedies, as they seek the prevention of offences, compensation for committing them, and the punishment of their authors. 2. The public remedies, which have for their object protection and punishment.

15.—1. *Private remedies.* When the right invaded and the injury committed are merely private, no one has a right to interfere or seek a remedy except the party immediately injured and his professional advisers. But when the remedy is even nominally public, and prosecuted in the name of the commonwealth, any one may institute the proceedings, although not

privately injured. 1 Salk. 174; 1 Atk. 221; 3 M. & S. 71.

16. Private remedies are, 1. By the act of the party, or by legal proceedings to prevent the commission or repetition of an injury, or to remove it; or, 2. They are to recover compensation for the injury which has been committed.

17.—1. The *preventive* and *removing* remedies are principally of two descriptions, namely, 1st. Those by the act of the party himself, or of certain relations or third persons permitted by law to interfere, as with respect to the *person*, by self-defence, resistance, escape, rescue, and even prison breaking, when the imprisonment is clearly illegal; or in case of *personal property*, by resistance or recaption; or in case of *real property*, by resistance or turning a trespasser out of his house or off his land, even with force; 1 Saund. 81, 140, note 4; or by apprehending a wrong-doer, or by reëntury and regaining possession, taking care not to commit a forcible entry, or a breach of the peace; or, in case of nuisances, public or private, by abatement; vide *Abatement of nuisances*; or remedies by distress, (q. v.) or by set off or retainer. See, as to remedies by act of the parties, 1 Dane's Ab. c. 2, p. 180.

18.—2. When the injury is complete or continuing, the remedies to obtain *compensation* are either specific or in damages. These are summary before justices of the peace or others; or formal, either by action or suit in courts of law or equity, or in the admiralty courts. As an example of *summary* proceedings may be mentioned the manner of regaining possession by applying to magistrates against forcible entry and detainer, where the statutes authorize the proceedings. *Formal* proceedings are instituted when certain rights have been invaded. If the injury affect a *legal* right, then the remedy is in general by action in a court of law; but if an equitable right, or if it can be better investigated in a court of equity, then the remedy is by bill. *Vide Chancery*.

19.—2. *Public remedies*. These may be divided into such as are intended to *prevent* crimes, and those where the object is to *punish* them. 1. The preventive remedies may be exercised without any warrant either by a constable, (q. v.) or other officer, or even by a private citizen. Persons in the act of committing a felony or a breach of the peace may be arrested by any one.

Vide Arrest. A public nuisance may be abated, without any other warrant or authority than that given by the law. *Vide Nuisance*. 2. The proceedings intended as a punishment for offences, are either *summary*, vide *Conviction*; or by indictment. (q. v.)

20. Remedies are *specific* and *cumulative*; the former are those which can alone be applied to restore a right or punish a crime; for example, where a statute makes unlawful what was lawful before, and gives a particular remedy, that is specific and must be pursued, and no other. Cro. Jac. 644; 1 Salk. 45; 2 Burr. 808. But when an offence was antecedently punishable by a common law proceeding, as by indictment, and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had at common law or under the statute. 1 Saund. 134, n. 4. *Vide* Bac. Ab. Actions in general, B; Bouv. Inst. Index, h. t.; *Actions*; *Arrest*; *Civil remedy*; *Election of Actions*.

REMEMBRANCERS, *Eng. law*. Officers of the exchequer, whose duty it is to remind the lord treasurer and the justices of that court of such things as are to be called and attended to for the benefit of the crown.

REMISE. A French word, which literally means a surrendering or returning a debt or duty.

2. It is frequently used in this sense in releases; as, "*remise*, release and forever quit-claim." In the French law the word *remise* is synonymous with our word *release*. Poth. Du Contr. de Change, n. 176; Dalloz, Dict. h. t.; Merl. Rép. h. t.

REMISSION, *civil law*. A release.

2. The remission of the debt is either conventional, when it is expressly granted to the debtor by a creditor having a capacity to alienate; or tacit, when the creditor voluntarily surrenders to his debtor the original title under private signature constituting the obligation. Civ. Code of Lo. art. 2195.

3. By remission is also understood a forgiveness or pardon of an offence. It has the effect of putting back the offender into the same situation he was before the commission of the offence. Remission is generally granted in cases where the offence was involuntary, or committed in self-defence. Poth. Pr. Civ. sect. 7, art. 2, § 2.

4. Remission is also used by common lawyers to express the act by which a forfeiture or penalty is forgiven. 10 Wheat. 246.

TO REMIT. To annul a fine or forfeiture.

2. This is generally done by the courts where they have a discretion by law: as, for example, when a juror is fined for non-attendance in court, after being duly summoned, and, on appearing, he produces evidence to the court that he was sick and unable to attend, the fine will be remitted by the court.

3. In commercial law, to remit is to send money, bills, or something which will answer the purpose of money.

REMITTANCE, comm. law. Money sent by one merchant to another, either in specie, bill of exchange, draft or otherwise.

REMITTEE, contracts. A person to whom a remittance is made. Story on Bailm. § 75.

REMITTER, estates. To be placed back in possession.

2. When one having a right to lands is out of possession, and afterwards the freehold is cast upon him by some defective title, and he enters by virtue of that title, the law *remit*s him to his ancient and more certain right, and, by an equitable fiction, supposes him to have gained possession under it. 3 Bl. Com. 190; 18 Vin. Ab. 431; 7 Com. Dig. 234.

REMITTIT DAMNA. An entry on the record, by which the plaintiff declares that he remits the damages or a part of the damages which have been awarded him by the jury, is so called.

2. In some cases a misjoinder of actions may be cured by the entry of a *remittit damna*. 1 Chit. Pl. *207.

REMITTOR, contracts. A person who makes a remittance to another.

REMITTITUR DAMNUM, or DAMNA, practice. The act of the plaintiff upon the record, whereby he abates or remits the excess of damages found by the jury beyond the sum laid in the declaration. See 1 Saund. 285, n. 6; 4 Conn. 109; Bouv. Inst. Index, h. t.

REMITTITUR OF RECORD. After a record has been removed to the supreme court, and a judgment has been rendered, it is to be remitted or sent back to the court below, for the purpose of re-trying the cause, when the judgment has been reversed, or of issuing an execution when it has been affirmed. The act of so returning the record, and the writ issued for that purpose, bear the name of remittitur.

REMONSTRANCE. A petition to a

court, or deliberative or legislative body, in which those who have signed it request that something which it is in contemplation to perform shall not be done.

REMOTE. At a distance; afar off; not immediate. A remote cause is not in general sufficient to charge a man with the commission of a crime, nor with being the author of a tort.

2. When a man suffers an injury in consequence of the violation of a contract, he is in general entitled to damages for the violation of such contract, but not for remote consequences, unconnected with the contract, to which he may be subjected; as, for example, if the maker of a promissory note should not pay it at maturity; the holder will be entitled to damages arising from the breach of the contract, namely, the principal and interest; but should the holder, in consequence of the non-payment of such note, be compelled to stop payment, and lose his credit and his business, the maker will not be responsible for such losses, on account of the great remoteness of the cause; so if an agent who is bound to account should neglect to do so, and a similar failure should take place, the agent would not be responsible for the damages thus caused. 1 Brock. Cir. C. R. 103; see 3 Pet. 69, 84, 89; 5 Mason's R. 161; 3 Wheat. 560; 1 Story, R. 157; 3 Sumn. R. 27, 270; 2 Sm. & Marsh. 340; 7 Hill, 61. Vide *Cause*.

REMOVAL FROM OFFICE. The act of a competent officer or of the legislature which deprives an officer of his office. It may be express, that is, by a notification that the officer has been removed, or implied, by the appointment of another person to the same office. Wallace's C. C. R. 118. See 13 Pet. 180; 1 Cranch, 187.

REMOVER, practice. When a suit or cause is removed out of one court into another, which is effected by writ of error, certiorari, and the like. 11 Co. 41.

REMUNERATION. Reward; recompense; salary. Dig. 17, 1, 7.

RENDER. To yield; to return; to give again; it is the reverse of *prender*.

RENDEZVOUS. A place appointed for meeting.

2. Among seamen it is usual when vessels sail under convoy, to have a rendezvous, in case of dispersion by storm, an enemy, or other accident.

3. The place where military men meet and lodge, is also called a rendezvous.

RENEWAL. A change of something old for for something new; as, the renewal of a note; the renewal of a lease. See *Novation*, and 1 Bouv. Inst. n. 800.

TO RENOUNCE. To give up a right; for example, an executor may renounce the right of administering the estate of the testator; a widow the right to administer to her intestate husband's estate.

2. There are some rights which a person cannot renounce; as, for example, to plead the act of limitation. Before a person can become a citizen of the United States, he must renounce all titles of nobility. Vide *Naturalization; To Repudiate*.

RENT, estates, contracts. A certain profit in money, provisions, chattels, or labor, issuing out of lands and tenements in retribution for the use. 2 Bl. Com. 41; 14 Pet. Rep. 526; Gilb. on Rents, 9; Co. Litt. 142 a; Civ. Code of Lo. art. 2750; Com. on L. & T. 95; 1 Kent, Com. 367; Bradb. on Distr. 24; Bac. Ab. h. t.; Crabb, R. P. §§ 149-258.

2. A rent somewhat resembles an annuity, (q. v.) their difference consists in the fact that the former issues out of lands, and the latter is a mere personal charge.

3. At common law there were three kinds of rents; namely, rent-service, rent-charge, and rent-seek. When the tenant held his land by fealty or other corporeal service, and a certain rent, this was called *rent-service*; a right of distress was inseparably incident to this rent.

4. A *rent-charge*, is when the rent is created by deed and the fee granted; and as there is no fealty annexed to such a grant of rent, the right of distress is not an incident; and it requires an express power of distress to be annexed to the grant, which gives it the name of a rent-charge, because the lands are, by the deed, charged with a distress. Co. Litt. 143 b.

5: *Rent-seek*, or a dry or barren rent, was rent reserved by deed, without a clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land, he was driven for a remedy to a writ of annuity or writ of assize.

6. But the statute of 4 Geo. II. c. 28, abolished all distinction in the several kinds of rent, so far as to give the remedy by distress in cases of rents-seek, rents of assize, and chief rents, as in the case of rents reserved upon a lease. In Pennsylvania, a distress is inseparably incident to every

species of rent that may be reduced to a certainty. 2 Rawle's Rep. 13. In New York, it seems the remedy by distress exists for all kinds of rent. 3 Kent, Com. 368. Vide *Distress*; 18 Viner's Abr. 472; Woodf, L. & T. 184; Gilb. on Rents; Com. Dig. h. t. Dane's Ab. Index, h. t.

7. As to the time when the rent becomes due, it is proper to observe, that there is a distinction to be made. It becomes due for the purpose of making a demand to take advantage of a condition of reëntry, or to tender it to save a forfeiture, at sunset of the day on which it is due; but it is not actually due till midnight, for any other purpose. An action could not be supported which had been commenced on the day it became due, although commenced after sunset; and if the owner of the fee died between sunset and midnight of that day, the heir and not the executor would be entitled to the rent. 1 Saund. 287; 10 Co. 127 b; 2 Madd. Ch. R. 268; 1 P. Wms. 177; S. C. 1 Salk. 578.

See, generally, Bac. Ab. h. t.; Bouv. Inst. Index, h. t.; and *Distress; Reëntry*.

RENT-ROLL. A roll of the rents due to a particular person, or public body. See *Rental*.

RENTAL. A roll or list of the rents of an estate containing the description of the lands let, the names of the tenants, and other particulars connected with such estate. This is the same as *rent roll*, from which it is said to be corrupted.

RENTE. In the French funds this word is nearly synonymous with our word annuity.

RENTE FONCIERE. This is a technical phrase used in Louisiana. It is a rent which issues out of land, and it is of its essence that it be perpetual, for if it be made but for a limited time, it is a lease. It may, however, be extinguished. Civ. Code of Lo. art. 2750, 2759; Poth. h. t. Vide *Ground-rent*.

RENTE VIAGERE, French law. This term, which is used in Louisiana, signifies an annuity for life. Civ. Code of Lo. art. 2764; Poth. Du Contract de Constitution de Rente, n. 215.

RENUNCIATION. The act of giving up a right.

2. It is a rule of law that any one may renounce a right which the law has established in his favor. To this maxim there are many limitations. A party may always renounce an acquired right; as, for example, to take lands by descent; but one cannot

always give up a future right, before it has accrued, nor to the benefit conferred by law, although such advantage may be introduced only for the benefit of individuals.

3. For example, the power of making a will; the right of annulling a future contract, on the ground of fraud; and the right of pleading the act of limitations, cannot be renounced. The first, because the party must be left free to make a will or not; and the latter two, because the right has not yet accrued.

4. This term is usually employed to signify the abdication or giving up of one's country at the time of choosing another. The act of congress requires from a foreigner who applies to become naturalized a renunciation of all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, whereof such alien may, at the time, be a citizen or subject. See *Citizen; Expatriation; Naturalization; To renounce*.

REPAIRS. That work which is done to an estate to keep it in good order.

2. What a party is bound to do, when the law imposes upon him the duty to make necessary repairs, does not appear to be very accurately defined. Natural and unavoidable decay in the buildings must always be allowed for, when there is no express covenant to the contrary; and it seems, the lessee will satisfy the obligation the law imposes on him, by delivering the premises at the expiration of his tenancy, in a habitable state. Questions in relation to repairs most frequently arise between the landlord and tenant.

3. When there is no express agreement between the parties, the tenant is always required to do the necessary repairs. Woodf. L. & T. 244; Arch. L. & T. 188. He is therefore bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises, but he is not required to put a new roof on an old worn-out house. 2 Esp. N. P. C. 590.

4. An express covenant on the part of the lessee to keep a house in repair, and leave it in as good a plight as it was when the lease was made, does not bind him to repair the ordinary and natural decay. Woodf. L. & T. 256. And it has been held that such a covenant does not bind him to rebuild a house which had been destroyed by a public enemy. 1 Dall. 210.

5. As to the time when the repairs are to be made, it would seem reasonable that

when the lessor is bound to make them he should have the right to enter and make them, when a delay until after the expiration of the lease would be injurious to the estate; but when no such damage exists, the landlord should have no right to enter without the consent of the tenant. See 18 Toull. n. 297. When a house has been destroyed by accidental fire, neither the tenant nor the landlord is bound to rebuild unless obliged by some agreement so to do. 4 Paige R. 355; 1 T. R. 708; Fonbl. Eq. B. 1, c. 5, s. 8. Vide 6 T. R. 650; 4 Camp. R. 275; Harr. Dig. Covenant VII.

Vide Com. Rep. 627; 6 T. R. 650; 2 Show. 401; 3 Ves. Jr. 34; Co. Litt. 27 a, note 1; 3 John. R. 44; 6 Mass. R. 63; Platt on Cov. 266; Com. L. & T. 200; Com. Dig. Condition, L 12; Civil Code of Louis. 2070; 1 Saund. 322, n. 1; Id. 323, n. 7; 2 Saund. 158 b, n. 7 & 10; Bouv. Inst. Index. h. t.

REPARATION. The redress of an injury; amends for a tort inflicted. Vide *Remedy; Redress*.

REPARATIONE FACIENDA, WRIT DE. The name of an ancient writ, which lies by one or more joint tenants against the other joint tenants, or by a person owning a house or building against the owner of the adjoining building, to compel the reparation of such joint property. F. N. B. 295.

REPEAL, legislation. The abrogation or destruction of a law by a legislative act.

2. A repeal is express; as when it is literally declared by a subsequent law; or implied, when the new law contains provisions contrary to, or irreconcilable with those of the former law.

3. A law may be repealed by implication, by an affirmative as well as by a negative statute, if the substance is inconsistent with the old statute. 1 Ham. 10; 2 Bibb, 96; Harper, 101; 4 W. C. C. R. 691.

4. It is a general rule that when a penal statute punishes an offence by a certain penalty, and a new statute is passed imposing a greater or a lesser penalty, for the same offence, the former statute is repealed by implication. 5 Pick. 168; 3 Halst. 48; 1 Stew. 506; 3 A. K. Marsh. 70; 21 Pick. 373. See 1 Binn. 601; Bac. Ab. Statute D; 7 Mass. 140.

5. By the common law when a statute repeals another, and afterwards the repealing statute is itself repealed, the first is

revived. 2 Blackf. 32. In some states this rule has been changed, as in Ohio and Louisiana. Civ. Code of Louis. art. 23.

6. When a law is repealed, it leaves all the civil rights of the parties acquired under the law unaffected. 3 L. R. 337; 4 L. R. 191; 2 South. 689; Breese, App. 29; 2 Stew. 160.

7. When a penal statute is repealed or so modified as to exempt a class from its operation, violations committed before the repeal are also exempted, unless specifically reserved, or unless there have been some private right divested by it. 2 Dana, 330; 4 Yeates, 392; 1 Stew. 347; 5 Rand. 657; 1 W. C. C. R. 84; 2 Virg. Cas. 382. Vide *Abrogation*; 18 Vin. Ab. 118.

REPÉTOIRE. This word is nearly synonymous with inventory, and is so called because its contents are arranged in such order as to be easily found. *Clef des Lois Rom.* h. t.; *Merl. Répertoire*, h. t.

2. In the French law, this word is used to denote the inventory or minutes which notaries are required to make of all contracts which take place before them. *Dict. de Jur.* h. t.

REPETITION, construction of wills. A repetition takes place when the same testator, by the same testamentary instrument, gives to the same legatee legacies of equal amount and of the same kind; in such case the latter is considered a repetition of the former, and the legatee is entitled to one only. For example, a testator gives to a legatee "£30 a year during his life;" and in another part of the will he gives to the same legatee "an annuity of £30 for his life payable quarterly," he is entitled to only one annuity of thirty pounds a year. 4 Ves. 79, 90; 1 Bro. C. C. 30, note.

REPETITION, civil law. The act by which a person demands and seeks to recover what he has paid by mistake, or delivered on a condition which has not been performed. Dig. 12, 4, 5. The name of an action which lies to recover the payment which has been made by mistake, when nothing was due.

2. Repetition is never admitted in relation to natural obligations which have been voluntarily acquitted, if the debtor had capacity to give his consent. 6 Toull. n. 386. The same rule obtains in our law. A person who has voluntarily acquitted a natural or even a moral obligation, cannot recover back the money by an action for money had and received, or any other form

of action. D. & R. N. P. C. 254; 2 T. R. 763; 7 T. R. 269; 4 Ad. & Ell. 858; 1 P. & D. 253; 2 L. R. 431; Cowp. 290; 3 B. & P. 249, note; 2 East, R. 506; 3 Taunt. R. 311; 5 Taunt. R. 36; Yelv. 41, b, note; 3 Pick. R. 207; 13 John. R. 259.

3. In order to entitle the payer to recover back money paid by mistake, it must have been paid by him to a person to whom he did not owe it, for otherwise he cannot recover it back, the creditor having in such case the just right to retain the money. *Repetitio nulla est ab eo qui suam recepit.*

4. How far money paid under a mistake of law is liable to repetition, has been discussed by civilians, and opinions on this subject are divided. 2 Poth. Ob. by Evans, 369, 408 to 437; 1 Story, Eq. Pl. § 111, note 2.

REPETITION, Scotch law. The act of reading over a witness' deposition, in order that he may adhere to it or correct it at his choice. The same as *Recolement*, (q. v.) in the French law. 2 Benth. on Ev. B. 3, c. 12, p. 239.

REPLEADER, practice. When an immaterial issue has been formed, the court will order the parties to plead de novo, for the purpose of obtaining a better issue; this is called a replader.

2. In such case, they must begin to replead at the first fault. If the declaration, plea and replication be all bad, the parties must begin de novo; if the plea and replication be both bad, and a replader is awarded, it must be as to both; but if the declaration and plea be good, and the replication only bad, the parties replead from the replication only.

3. In order to elucidate this point, it may be proper to give an instance, where the court awarded a replader, for a fault in the plea, which is the most ordinary cause of a replader. An action was brought against husband and wife, for a wrong done by the wife alone, before the marriage, and both pleaded that they were not guilty of the wrong imputed to them, which was held to be bad, because there was no wrong alleged to have been committed by the husband, and therefore a replader was awarded, and the plea made that the wife only was not guilty. Cro. Jac. 5. See other instances in Hob. 113; 5 Taunt. 386.

4. The following rules as to repladers, were laid down in the case of *Staples v. Haydon*, 2 Salk. 579. *First.* That at com-

mon law, a repleader was allowed before trial, because a verdict did not cure an immaterial issue, but now a repleader ought not to be allowed till after trial, in any case when the fault of the issue might be helped by the verdict, or by the statute of jeofails. *Second.* That if a repleader be allowed where it ought not to be granted, or vice versa, it is error. *Third.* That the judgment of repleader is general, *quod partes replacitent*, and the parties must begin at the first fault, which occasioned the immaterial issue. *Fourth.* No costs are allowed on either side. *Fifth.* That a repleader cannot be awarded after a default at *nisi prius*; to which may be added, that in general a repleader cannot be awarded after a demurrer or writ of error, without the consent of the parties, but only after issue joined; where, however, there is a bad bar, and a bad replication, it is said that a repleader may be awarded upon a demurrer; a repleader will not be awarded, where the court can give judgment on the whole record, and it is not grantable in favor of the person who made the first fault in pleading. See Com. Dig. Pleader, R 18; Bac. Abr. Pleas, M; 2 Saund. 319 b, n 6; 2 Vent. 196; 2 Str. 847; 5 Taunt. 386; 8 Taunt. 413; 2 Saund. 20; 1 Chit. Pl. 632; Steph. pl. 119; Lawes, Civ. Pl. 175.

5. The difference between a repleader and a judgment *non obstante veredicto*, is this, that when a plea is good in form, though not in fact, or in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, upon the defendant's own showing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court for the sake of the plaintiff will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there for their own sake they will award a repleader; a judgment, therefore, *non obstante veredicto*, is always upon the merits, and never granted but in a very clear case; a repleader is upon the form and manner of pleading. Tidd's Pr. 813, 814; Com. Dig. Pleader, R 18; Bac. Abr. Pleas, M; 18 Vin. Ab. 567; 2 Saund. 20; Doct. Plac. h. t.; Arch. Civ. Pl. 358; 1 Chit. Pl. 632; U. S. Dig. XII.

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REPLEGIARE. To redeem a thing detained or taken by another, by putting in legal sureties. See *Replevin*.

REPLEVIN, *remedies*. The name of an action for the recovery of goods and chattels.

2. It will be proper to consider, 1. For what property this action will lie. 2. What interest the plaintiff must have in the same. 3. For what injury. 4. The pleadings. 5. The judgment.

3.—1. To support replevin, the property affected must be a *personal* chattel, and not an injury to the freehold, or to any matter which is annexed to it; 4 T. R. 504; nor for anything which has been turned into a chattel by having been separated from it by the defendant, and carried away at one and the same time; 2 Watts, R. 126; 3 S. & R. 509; 6 S. & R. 476; 10 S. & R. 114; 6 Greenl. R. 427; nor for writings which concern the realty. 1 Brownl. 168.

4. The chattel also must possess *indicia* or ear-marks, by which it may be distinguished from all others of the same description; otherwise the plaintiff would be demanding of the law what it has not in its power to bestow; replevin for loose money cannot, therefore, be maintained; but it may be supported for money tied up in a bag, and taken in that state from the plaintiff. 2 Mod. R. 61. Vide 1 Dall. 157; 6 Binn. 2; 3 Serg. & Rawle, 562; 2 P. A. Browne's R. 160; Addis. R. 134; 10 Serg. & Rawle, 114; 4 Dall. Appx. i.; 2 Watt's R. 126; 2 Rawle's R. 423.

5.—2. The plaintiff, at the time of the caption, must have been possessed, or, which amounts to the same thing, have had an absolute property in and be entitled to the possession of the chattel, or it could not have been taken from him. He must, in other words, have had a general property, or a special property, as the bailee of the goods. His right to the possession must also be continued down to the time of judgment pronounced, otherwise he has no claim to the restoration of the property. Co. Litt. 145, b. It has however, been doubted whether on a mere naked bailment for safe keeping, the bailee can maintain replevin. 1 John. R. 380; 3 Serg. & Rawle, 20.

6.—3. This action lies to recover any goods which have been illegally taken. 7 John R. 140; 5 Mass. R. 283; 14 John. R. 87; 1 Dall. R. 157; 6 Binn. R. 2; 3 Serg. & Rawle, 562; Addis. R. 134; 1 Mason, 819; 2 Fairf. 28. The primary

object of this action, is to recover back the chattel itself, and damages for taking and detaining it, are consequent on the recovery. 1 W. & S. 513; 20 Wend. 172; 3 Shepl. 20. When the property has been restored, this action cannot, therefore, be maintained. But the chattel is considered as detained, notwithstanding the defendant may have destroyed it before the suit was commenced; for he cannot take advantage of his own wrong.

7.—4. This being a local action, the declaration requires certainty in the description of the place where the distress was taken. 2 Chit. Pl. 411, 412; 10 John. R. 53. But it has been held in Pennsylvania, that the declaration is sufficient, if the taking is laid to be in the county. 1 P. A. Browne's Rep. 60. The strictness which formerly prevailed on this subject, has been relaxed. 2 Saund. 74, b. When the distress has been taken for rent, the defendant usually avows or makes cognizance, in order to obtain a return of the goods, to which avowry or cognizance the plaintiff pleads in bar, or the defendant may, in proper cases, plead *non cepit*, *cepit in alio loco*, or *not guilty*. 1 Chit. Pl. 490, 491.

8.—5. As to the judgment, vide article *Judgment in Replevin*.

Vide, generally, Bac. Ab. h. t.; 1 Saund. 847, n. 1; 2 Sell. Pr. 153; Doot. Pl. 414; Com. Dig. h. t.; Dane's Ab. h. t.; Petersd. Ab. h. t.; 18 Vin. Ab. 576; Yelv. 146, a; 1 Chit. Pl. 157; Ham. N. P. ch. 3, p. 372 to 498; Amer. Dig. h. t.; Harr. Dig. h. t.; Bouv. Inst. Index, h. t. As to the evidence required in replevin, see Roscoe's Civ. Ev. 853. Vide, also, article *Detinuit*.

REPLEVY. To re-deliver goods which have been distrained to the original possessor of them, on his giving pledges in an action of replevin. It signifies also the bailing or liberating a man from prison, on his finding bail to answer. See *Replevin*.

REPLIANT. One who makes a replication.

REPLICATION, pleading. The plaintiff's answer to the defendant's plea.

2. Replications will be considered, 1. With regard to their several kinds. 2. To their form. 3. To their qualities.

3.—§ 1. They are to pleas in abatement and to pleas in bar.

4.—1. When the defendant pleads to the jurisdiction of the court, the plaintiff may reply, and in this case the replication commences with a statement, that the writ

ought not to be quashed, or that the court ought not to be ousted of their jurisdiction, because, &c., and concludes to the country, if the replication merely deny the subject-matter of the plea. Rast. Entr. 101; Thomps. Entr. 2; Clift's Entr. 17; 1 Chit. Pl. 434. As a general rule, when the plea is to the misnomer of the plaintiff or defendant, or when the plea consists of matter of fact which the plaintiff denies, the replication may begin without any allegation that the writ or bill ought not to be quashed. 1 Bos. & Pull. 61.

5.—2. The replication is, in general, governed by the plea, and most frequently denies it. When the plea concludes to the country, the plaintiff must, in general, reply by adding a similiter; but when the plea concludes with a verification, the replication must either, 1. Conclude the defendant by matter of estoppel; or, 2. May deny the truth of the matter alleged in the plea, either in whole or in part; or, 3. May confess and avoid the plea; or, 4. In the case of an evasive plea, may new assign the cause of action. For the several kinds of replication as they relate to the different forms of action, see 1 Chit. Pl. 551, et seq.; Arch. Civ. Pl. 258.

6.—§ 2. The form of the replication will be considered with regard to, 1. The title. 2. The commencement. 3. The body. 4. The conclusion.

7.—1. The replication is usually entitled in the court and of the term of which it is pleaded, and the names of the plaintiff and defendant are stated in the margin, thus: "A B against C D." 2 Chit. Pl. 641.

8.—2. The commencement is that part of the replication which immediately follows the statement of the title of the court and term, and the names of the parties. It varies in form when it replies to matter of estoppel from what it does when it denies, or confesses and avoids the plea; in the latter case it commences with an allegation technically termed the *precludi non*. (q. v.) It generally commences with the words, "And the said plaintiff saith that the said defendant," &c. 1 Chit. Pl. 573.

9.—3. The body of the replication ought to contain either, 1. Matter of estoppel. 2. Denial of the plea. 3. A confession and avoidance of it; or, 4. In case of an evasive plea, a new assignment. 1st. When the matter of estoppel does not appear from the anterior pleading, the replication should set it forth; as, if the matter has been tried

upon a particular issue in trespass, and found by the jury, such finding may be replied as an estoppel. 3 East, R. 346; vide 4 Mass. R. 443. 2d. The second kind of replication is that which denies or traverses the truth of the plea, either in part or in whole. Vide *Traverse*, and 1 Chit. Pl. 576, note a. 3d. The third kind of replication admits, either in words or in effect, the fact alleged in the plea, and avoids the effect of it by stating new matter. If, for example, infancy be pleaded, the plaintiff may reply that the goods were necessities; or that the defendant, after he came of full age, ratified and confirmed the promise. Vide *Confession and Avoidance*. 4th. When the plea is such as merely to evade the allegation in the declaration, the plaintiff in his replication may reassign it. Vide *New Assignment*, and 1 Chit. Pl. 601.

10.—4. With regard to the conclusion, it is a general rule, that when the replication denies the whole of the defendant's plea, containing matter of fact, it should conclude to the country. There are other conclusions in particular cases, which the reader will find fully stated in 1 Chit. Pl. 615, et seq.; Com. Dig. Pleader, F 5; vide 1 Saund. 103, n.; 2 Caines' R. 60; 2 John. R. 428; 1 John. R. 516; Arch. Civ. Pl. 258; 19 Vin. Ab. 29; Bac. Ab. Trespass, I 4; Doct. Pl. 428; Beames' Pl. in Eq. 247, 325, 326.

11.—§ 3. The qualities of a replication are, 1. That it must answer so much of the defendant's plea as it professes to answer, and that if it be bad in part, it is bad for the whole. Com. Dig. Pleader, F 4, W 2; 1 Saund. 338; 7 Cranch's Rep. 156. 2. It must not depart from the allegations in the declaration in any material matter. Vide *Departure*, and 2 Saund. 84 a, note 1; Co. Lit. 304 a. See also 3 John. Rep. 367; 10 John. R. 259; 14 John. R. 132; 2 Caines' R. 320. 3. It must be certain. Vide *Certainty*. 4. It must be single. Vide U. S. Dig. Pleading, XI.; Bouv. Inst. Index, h. t.; *Duplicity; Pleadings*.

REPORT, legislation. A statement made by a committee to a legislative assembly, of facts of which they were charged to inquire.

REPORT, practice. A certificate to the court made by a master in chancery, commissioner or other person appointed by the court, of the facts or matters to be ascertained by him, or of something of which it is his duty to inform the court.

2. If the parties in the case accede to the report, and no exceptions are filed, it is in due time confirmed; if exceptions are filed to the report, they will, agreeably to the rules of the court, be heard, and the report will either be confirmed, set aside, or referred back for the correction of some error. 2 Madd. Ch. 505; Blake's Ch. Pr. 230; Vin. Ab. h. t.

REPORTER. A person employed in making out and publishing the history of cases decided by the court.

2. The act of congress of August 26, 1842, sect. 2, enacts, that in the supreme court of the United States, one reporter shall be appointed by the court, with the salary of twelve hundred and fifty dollars; provided, that he deliver to the secretary of state, for distribution, one hundred and fifty copies of each volume of reports that he shall hereafter prepare and publish, immediately after the publication thereof, which publication shall be made annually, within four months after the adjournment of the court at which the decisions are made.

3. In some of the states the reporters are appointed by authority of law; in others, they are volunteers.

REPORTS. Law books, containing a statement of the facts and law of each case which has been decided by the courts; they are generally the most certain proof of the judicial decisions of the courts, and contain the most satisfactory evidence, and the most authoritative and precise application of the rules of the common law. Lit. s. 514; Co. Lit. 293 a; 4 Co. Pref.; 1 Bl. Com. 71; Ram. on Judgm. ch. 13.

2. The number of reports has increased to an inconvenient extent, and should they multiply in the same ratio which of late they have done, they will so soon crowd our libraries as to become a serious evil. The indiscriminate report of cases of every description is deserving of censure. Cases where first principles are declared to be the law, are reported with as much care as those where the most abstruse questions are decided. But this is not all; sometimes two reporters, with the true spirit of book-making, report the same set of cases, and thereby not only unnecessarily increase the lawyer's already encumbered library, but create confusion by the discrepancies which occasionally appear in the report of the same case.

3. The modern reports are too often very diffuse and inaccurate. They seem too

frequently made up for the purpose of profit and sale, much of the matter they contain being either useless or a mere repetition, while they are deficient in stating what is really important.

4. A report ought to contain, 1. The name of the case. 2. The court in which it originated; and, when it has been taken to another by appeal, certiorari, or writ of error, it ought to mention by whom it was so taken, and by what proceeding. 3. The state of the facts, including the pleadings, as far as requisite. 4. The true point before the court. 5. The manner in which that point has been determined, and by whom. 6. The date.

5. The following is believed to be a correct list of the American and English Reports; the former arranged under the heads of the respective states; and the latter in chronological order. It is hoped this list will be useful to the student.

AMERICAN REPORTS.

UNITED STATES.

1. *Supreme Court.*

Dallas' Reports. From August term, 1790, to August term, 1800. 4 vols.

Cranch's Reports. From 1800 to February term, 1815. 9 vols.

Wheaton's Reports. From February term, 1816, to January term, 1827, inclusive. 12 vols.

Peters' Reports. 16 vols.

Peters' Condensed Reports of Cases in the Supreme Court of the United States. These volumes contain condensed reports of all the cases in second, third, and fourth Dallas, the nine volumes of Cranch, and the twelve volumes of Wheaton.

Howard's Reports. From 1843 to 1852. 11 vols.

2. *Circuit Courts—First Circuit.*

Garrison's Reports. From 1812 to 1815, inclusive. 2 vols.

Mason's Reports. From 1816 to 1830, inclusive. 5 vols.

Sumner's Reports. From 1830 to 1837. 2 vols.

Story's Reports. From 1839 to 1845. 3 vols.

Woodbury and Minot's Reports. From 1845 to 1847. 2 vols.

Second Circuit.

Paine's Reports. From 1810 to 1826. 1 vol.

Third Circuit.

Dallas' Reports. The second, third and fourth volumes contain cases decided in this court. From April term, 1792, to October term, 1806, inclusive.

Washington's C. C. Reports. From 1803 to 1827. 4 vols.

Peters' C. C. Reports. From 1803 to 1818. 1 vol.

Baldwin's Reports. From October term, 1829, to April term, 1833, inclusive. 1 vol.

Wallace's Reports. Include the cases of May Sessions, 1801. 1 vol.

Wallace, Jr.'s Reports. 1 vol.

Fourth Circuit.

Marshall's Decisions. From 1802 to 1832, published since the death of Chief Justice Marshall, from his manuscripts, by John M. Brockenbrough. 2 vols.

Seventh Circuit.

McLean's Reports. From 1829 to 1845. 3 vols.

8. *District Courts—District of New York.*

Van Ness' Reports. 1 vol.

District of Pennsylvania.

Peters' Admiralty Decisions. From 1792 to 1807. 2 vols.

Eastern District of Pennsylvania.

Gilpin's Reports. From November term, 1828, to February term, 1836, inclusive. 1 vol.

District of South Carolina.

Bee's Admiralty Reports. From 1792 to 1805. 1 vol.

District of Maine.

Reports of cases argued and determined in the District Court of the United States, for the District of Maine, from 1822 to 1839. 1 vol. Cited Ware's Reports.

STATE REPORTS.

Alabama.

Alabama Reports. By Henry Minor. From 1820 to 1826. 1 vol.

Stewart's Reports. From 1827 to 1831. 3 vols.

Stewart & Porter's Reports. From 1831 to 1833. 5 vols.

Porter's Reports. From 1834 to 1839. 9 vols.

Alabama Reports. From 1840 to 1849. 14 vols.

Arkansas.

Pike's Reports. From 1837 to 1842. 5 vols.

English's Reports. From 1845 to 1849. 4 vols.

Connecticut.

Kirby's Reports. From 1785 to 1788. 1 vol.
Root's Reports. From 1789 to 1793. 2 vols.
Day's Reports. From 1802 to 1813. 5 vols.
Connecticut Reports. By Thomas Day. From June, 1814 to 1847. 18 vols.

Delaware.

Harrington's Reports. From 1832 to 1847. 4 vols.

Florida.

Florida Reports. From 1846 to 1847. 2 vols.

Georgia.

T. U. P. Charlton's Reports. Cases decided previous to 1810. 1 vol.
Dudley's Reports. From 1831 to 1833. 1 vol.
R. M. Charlton's Reports. From 1811 to 1837. 1 vol.
Kelly's Reports, 3 vols.
Georgia Reports. From 1846 to 1849. 6 vols.

Illinois.

Breese's Reports. From 1819 to 1830. 1 vol.
Scammond's Reports. From 1832 to 1843. 4 vols.
Gilman's Reports. From 1844 to 1847. 4 vols.

Indiana.

Blackford's Reports. From May, 1817, to May, 1838, inclusive. 7 vols.

Iowa.

Green's Reports. 1 vol.

Kentucky.

Hughes' Reports. From 1785 to 1801. 1 vol.
Kentucky Decisions. From 1801 to 1806. 1 vol.
Hardin's Reports. From 1805 to 1808. 1 vol.
Bibb's Reports. From 1808 to 1817. 4 vols.
A. K. Marshall's Reports. From 1817 to 1821. 3 vols.
Littel's Reports. From 1822 to 1824. 6 vols.
Littel's Select Cases. From 1795 to 1821. 1 vol.
Munro's Reports. From 1824 to 1828. 7 vols.
J. S. Marshall's Reports. From 1829 to 1832. 7 vols.
Dana's Reports. From 1833 to 1840. 9 vols.
B. Monroe's Reports. From 1840 to 1848. 8 vols.

Louisiana.

Orleans Term Reports. By Martin. From 1809 to 1812. 2 vols in 1.

Louisiana Term Reports. By Martin. From 1812 to 1823. 10 vols.

Martin's Reports, N. S. (sometimes cited simply New Series,) 1823 to 1830. 8 vols.

☞ The whole of Martin's Reports amount to twenty volumes; the first twelve, namely, the Orleans and the Louisiana Term Reports, are cited as Martin's Reports; from the twelfth, they are sometimes cited as first, second, &c., Martin's New Series, and sometimes simply New Series.

Louisiana Reports. 19 vols. The first five volumes, from 1830 to August term, 1834, and the first part of the sixth volume, are the work of Branch W. Miller. The remainder were reported by Mr. Currey, and are continued to June term, 1839. The whole of the 19 volumes are cited Louisiana Reports.

Robinson's Reports. From 1841 to 1843. 12 vols.

Maine.

☞ By a resolve of the legislature, passed in 1836, each volume subsequent to the third volume of Fairfield's Reports, shall be entitled and lettered upon the back thereof, "Maine Reports;" and the first volume subsequent to the third volume of Fairfield's, shall be numbered the thirteenth volume of Maine Reports.

Maine Reports. 26 vols.

☞ These reports consist of Greenleaf's Reports. From 1820 to 1832. The first 9 vols.

Fairfield's Reports. From 1833 to 1835. The 10th, 11th, and 12th vols.

Shepley's Reports. From 1836 to 1840. The 13th to 18th vols., inclusive. 6 vols.

Appleton's Reports. The 19th vol. } 2 vols.

Appleton, part of vol. 20. }

Shepley's Reports, part of vol. 20 and vol. 21 to 28, inclusive. From 1841 to 1846. 8 vols.

Maryland.

Harris & McHenry's Reports. From 1700 to 1799. 4 vols. Sometimes cited Maryland Reports.

Harris & Johnson. From 1800 to 1826. 7 vols.

Harris & Gill. From 1826 to 1829. 2 vols.

Gill & Johnson. From 1829 to 1840. 12 vols.

Bland's Chancery Reports. From 1811 to 1832. 3 vols.

Gill's Reports. From 1843 to 1849. 5 vols.

Massachusetts.

Massachusetts Reports.

☞ The first volume is reported by Ephraim Williams. His reports commenced with September term, 1804, in Berkshire, and terminate with June term, 1805, in Hancock. The 16 volumes, from the second to the seventeenth, inclusive, are reported by Dudley Alkins Tyng, and embrace from March term, 1806, in Suffolk, to March term, 1822, in Suffolk. The reports of Williams and Tyng are cited Massachusetts Reports.

Pickering's Reports. From 1832 to March 1840. 24 vols.

Metcalf's Reports. From 1840 to 1848. 12 vols.

Michigan.

Harrington's Reports. 1 vol.
Walker's Chancery Cases. From 1842 to 1845. 1 vol.
Douglass' Reports. From 1843 to 1847. 2 vols.

Mississippi.

Walker's Reports. From 1818 to 1832. 1 vol.
Howard's Reports. From 1834 to 1843. 7 vols.
Smedes & Marshall's Reports. From 1843 to 1849. 12 vols.
Freeman's Chancery Reports. From 1839 to 1843. 1 vol.
Smedes & Marshall's Chancery Reports. From 1840 to 1843. 1 vol.

Missouri.

Missouri Reports. From 1821 to 1846. 9 vols.

New Hampshire.

New Hampshire Reports. From 1816 to 1842. 13 vols.

☞ Nathaniel Adams reported cases from 1816 to 1819, which makes the first volume of N. H. Rep. Levi Woodbury and William Richardson reported the cases from 1819 to 1823; and William Richardson from 1823 to 1832, making the third fourth and fifth volumes of N. H. Rep. They are continued under the direction of the supreme court, and already make thirteen volumes.

New Jersey.

Coxe's Reports. From 1790 to 1795. 1 vol.
Pennington's Reports. From 1806 to 1813. 2 vols.
Southard's Reports. From 1816 to 1820. 2 vols.
Halstead's Reports. From 1821 to 1831. 7 vols.
Green's Reports. From 1831 to 1836. 3 vols.
Harrison's Reports. From 1837 to 1842. 4 vols.
Saxton's Chancery Reports. From 1830 to 1832. 1 vol.
Green's Chancery Reports, 1838 to 1846. 3 vols.
Spencer's Reports. From 1842 to 1845. 1 vol.
Halsted's Chancery Reports. From 1845 to 1846. 1 vol.

New York.

Coleman & Caine's Cases. From 1794 to 1805. 1 vol.
Caine's Reports. From 1803 to 1805. 3 vols.
Caine's Cases. For 1804 and 1805. 2 vols.

Anthony's Nisi Prius Cases. From 1808 to 1818. 1 vol.

Roger's New York City Hall Recorder. From 1816 to 1821. 6 vols.

Wheeler's Criminal Cases. 3 vols.

Hall's Reports. For 1828 and 1829. 2 vols.

Hoffman's Vice Chancery Reports. From 1839 to 1840. 1 vol.

Edwards' Vice Chancery Reports. From 1831 to 1842. 3 vols.

Clarke's Vice Chancery Reports. From 1839 to 1841. 1 vol.

Johnson's Cases. From 1799 to 1803. 3 vols.

Johnson's Reports. From 1806 to 1823. 20 vols.

Cowen's Reports. From 1823 to 1828. 9 vols.

Wendell's Reports. From 1828 to 1841. 26 vols.

Hill's Reports. From 1841 to 1845. 7 vols.

Johnson's Chancery Reports. From 1814 to 1823. 7 vols.

Howard's Practice Reports. For 1844 and 1845. 3 vols.

Denio's Reports. From 1845 to 1847. 5 vols.

Hopkin's Chancery Reports. From 1823 to 1826. 1 vol.

Paige's Chancery Reports. From 1828 to 1845. 11 vols.

Sandford's Vice Chancery Reports. From 1843 to 1846. 3 vols.

Barbour's Chancery Reports. From 1845 to 1849. 3 vols.

Barbour's Superior Court. For 1847 and 1848. 4 vols.

Sandford's Superior Court. For 1847 and 1848. 1 vol.

Lockwood's Reversed Cases. From 1799 to 1847. 1 vol.

Comstock's Supreme Court. For 1847 and 1848. 1 vol.

North Carolina.

Martin's Reports. 1 vol.

Heywood's Reports. From 1789 to 1806. 2 vols.

Taylor's Reports. From 1789 to 1802. 1 vol.

North Carolina Term Reports, (sometimes bound and lettered and cited as the third Law Repository.) It is a second volume of Reports by John Louis Taylor; it contains cases from 1816 to 1818. 1 vol.

Conference Reports. By Cameron & Norwood. From 1800 to 1804. 1 vol.

Murphy's Reports. From 1804 to 1819. 3 vols.

Carolina Law Repository. From 1813 to 1816. 2 vols.

Hawks' Reports. From 1820 to 1826. 4 vols.

Ruffin's Reports, (bound with Hawks' Reports.)

Devereux's Reports. From 1826 to 1834. 4 vols.

Devereux's Equity Reports. From 1826 to 1834. 2 vols.

Devereux & Battle's Reports. From 1834 to 1840. 4 vols.

Devereux & Battle's Equity Reports. From 1834 to 1840. 2 vols.

Iredell's Reports, Law. From 1840 to 1849. 9 vols.
Iredell's Reports, Chancery. From 1840 to 1848. 5 vols.

Ohio.

Ohio Reports. 15 vols.
[S] These reports are composed of
Hammond's Reports. From 1821 to 1839. 9 vols.
Wright's Reports. From 1831 to 1834. 1 vol.
Wileox's Reports. From 1840 to 1841. 1 vol.
Stanton's Reports. From 1841 to 1843. 3 vols.
Griswold's Reports. From 1844 to 1846. 2 vols.

Pennsylvania.

Dallas' Reports. From 1754 to 1806. 4 vols.
Vide Supra.
Yeates' Reports. From 1791 to 1808. 4 vols.
Binney's Reports. From 1799 to 1814. 6 vols.
Sergeant & Rawle's Reports. From 1818 to 1829. 17 vols.
Rawle's Reports. From 1828 to 1835. 5 vols.
Wharton's Reports. From 1835 to 1841. 6 vols.
Pennsylvania Reports, reported by William Rawle, Charles B. Penrose, and Frederick Watts. From 1829 to 1832. 3 vols.
Watts' Reports. From 1832 to 1840. 10 vols.
Watts & Sergeant's Reports. 9 vols.
Browne's Reports. From 1806 to 1814. 2 vols.
Miles' Reports. For 1836 and 1841. 2 vols.
Addison's Reports. From 1791 to 1799. 1 vol.
Ashmead's Reports. From 1808 to 1841. 2 vols.
Pennsylvania State Reports. By Robert M. Barr. From 1844 to 1849. 10 vols. 1849 to 1850. 2 vols. By J. Pringle Jones. 1850 to 1852. 4 vols. By Geo. W. Harris.

South Carolina.

Bay's Reports. From 1783 to 1804. 2 vols.
Dessaussure's Equity Reports. From the Revolution to 1813. 4 vols.
Brevard's Reports. From 1793 to 1816. 3 vols.
South Carolina Reports. From 1812 to 1816. 2 vols.
Nott & M'Cord's Reports. From 1817 to 1820. 2 vols.
Mills' Constitutional Reports, N. S. For 1817 and 1818. 2 vols.
Harper's Reports. For 1823 and 1824. 1 vol.
Harper's Equity Reports. For 1824. 1 vol.
M'Cord's Reports. From 1820 to 1828. 4 vols.
M'Cord's Chancery Reports. From 1825 to 1827. 2 vols.
Bailey's Reports. From 1828 to 1832. 2 vols.
Bailey's Chancery. From 1830 to 1831. 1 vol.
Hill's Reports. From 1833 to 1837. 3 vols.
Hill's Chancery Reports. For 1838. 2 vols.
Riley's Chancery Cases. From 1836 to 1837. 1 vol.
Riley's Law Cases. From 1836 to 1837. 1 vol.
Dudley's Law Reports. From 1837 to 1838. 1 vol.
Dudley's Equity Reports. From 1837 to 1838. 2 vols.

Rice's Reports. From 1838 to 1839. 1 vol.
Rice's Chancery Reports. From 1838 to 1839. 1 vol.
Cheves' Reports. From 1839 to 1840. 2 vols.
McMullan's Chancery. From 1840 to 1842. 1 vol.
McMullan's Law. From 1835 to 1842. 2 vols.
Spear's Equity. From 1842 to 1844. 1 vol.
Spear's Law. For 1843. 2 vols.
Richardson's Law Reports. From 1844 to 1847. 3 vols.
Richardson's Equity Reports. From 1844 to 1846. 2 vols.
Strobhart's Law Reports. From 1846 to 1848. 3 vols.
Strobhart's Equity Reports. From 1846 to 1848. 2 vols.
Statutes at Large. For 1838. 9 vols.

Tennessee.

Tennessee Reports. From 1791 to 1815. 2 vols. These cases were reported by John Overton. They are cited Tenn. Rep.
Cooke's Reports. From 1811 to 1814. 1 vol.
Heywood's Reports. From 1816 to 1818. 3 vols. These volumes are numbered three, four, and five, in a series with Judge Heywood's North Carolina Reports, volumes one and two.
Peck's Reports. From 1822 to 1824. 1 vol.
Martin & Yerger's Reports. From 1825 to 1828. 1 vol.
Yerger's Reports. From 1832 to 1837. 10 vols.
Meigs' Reports. From 1838 to 1839. 1 vol.
Humphrey's Reports. From 1839 to 1846. 8 vols.

Vermont.

N. Chipman's Reports. From 1789 to 1791. 1 vol.
Tyler's Reports. From 1801 to 1803. 2 vols.
Brayton's Reports. From 1815 to 1819. 1 vol.
D. Chipman's Reports. Containing Select Cases from N. Chipman's Reports, and cases down to 1825. 2 vols.
Aiken's Reports. For 1826 and 1827. 2 vols.
Vermont Reports. From 1826 to 1846. 18 vols. These reports are composed of Judges' Reports, the first 9 vols.
Shaw's Reports. The 10th and part of the 11th vol.
Watson's Reports. Part of 11th, the whole of 12th, 13th, and 14th vols.
Slade's Reports. The 15th vol.
Washburne's Reports. The 16th, 17th, and 18th vols.

Virginia.

Wythe's Chancery Reports. From 1790 to 1795. 1 vol.
Washington's Reports. From 1790 to 1796. 2 vols.
Call's Reports. From 1790 to 1818. 6 vols.

Henning and Munford's Reports. From 1806 to 1809. 4 vols.

Munford's Reports. From 1810 to 1820. 6 vols.

Gilmer's Reports, (sometimes cited Virginia Reports.) During 1820 and 1821. 1 vol.

Randolph's Reports. From 1821 to 1828. 6 vols.

Leigh's Reports. From 1829 to 1841. 12 vols.

Jefferson's Reports. From 1730 to 1772. 1 vol.

Virginia cases. From 1789 to 1826. 2 vols. The first of these volumes is by Judges Brockenbrough and Holmes, and contains cases decided from 1789 to 1814; the second volume is by Judge Brockenbrough, and contains cases decided from 1815 to 1826.

Robinson's Reports. From 1842 to 1844. 2 vols.

Grattan's Reports. From 1844 to 1848. 5 vols.

Wisconsin.

Burritt's Reports. 1 vol.

ENGLISH AND IRISH REPORTS.

6. The following is a chronological list of English and Irish contemporary Reports, alphabetically arranged under each reign.

Henry III.—Oct. 19, 1216. Nov. 16, 1272.

Jenkins, Ex., 4, 19, 21.

Edward I.—Nov. 16, 1272. July 7, 1307.

Jenkins, Ex., 18, 34.

Keilwey, K. B. and C. P., 6.

Year Book, K. B., C. P. and Exchequer, part I.

Edward II.—July 7, 1307. Jan. 25, 1327.

Jenkins, Ex., 5, 15, 18.

Year Book, K. B., C. P., and Ex., part I.

Edward III.—Jan. 25, 1327. June 21, 1377.

Benloe, K. B. and C. P., 32.

Jenkins, Ex., 1 to 47.

Keilwey, K. B. and C. P., 1 to 47.

Year Book, K. B. and C. P., part 2—1 to 10.

Year Book, K. B. and C. P., part 3—17, 18, 21 to 28, 38, 89.

Year Book, K. B. and C. P., part 4—40 to 50.

Year Book, part 5—Liber Assisarum, 1 to 51.

Richard II.—June 21, 1377. Sept. 29, 1399.

Bellewe, K. B. and C. P., 1 to 22.

Jenkins, Ex., 1 to 22.

Henry IV.—Sept. 29, 1399. Mar. 20, 1413.

Jenkins, Ex., 1 to 14.

Year Book, K. B. and C. P., part 6—1 to 14.

Henry V.—Mar. 20, 1413. Aug. 31, 1422.

Jenkins, Ex., 1 to 10.

Year Book, K. B. and C. P., part 6—1, 2, 5, 7 to 10.

Henry VI.—Aug. 31, 1422. Mar. 4, 1461.

Benloe, K. B. and C. P., 2, 18.

Jenkins, Ex., 1 to 39.

Year Book, K. B. and C. P., parts 7 and 8—1 to 4, 7 to 12, 14, 18 to 22, 27, 28, 30 to 39.

Edward IV.—Mar. 4, 1461. April 9, 1483.

Jenkins, Ex., 1 to 21.

Year Book, K. B. and C. P., part 9—1 to 22.

Year Book, K. B., C. P., and Ex., part 10—5.

Edward V.—April 9, 1483. June 22, 1483.

Jenkins, Ex.

Year Book, K. B. and C. P., part 11.

Richard III.—June 22, 1483. Aug. 22, 1485.

Jenkins, Ex., 1, 2.

Year Book, K. B. and C. P., part 11—1, 2.

Henry VII.—Aug. 22, 1485. April 22, 1509.

Benloe, K. B. and C. P., 1.

Jenkins, Ex., 1 to 21.

Keilwey, K. B. and C. P., 12, 13, 17 to 24.

Moore, K. B. and C. P., Ex. and Chan., 1 to 24.

Year Book, K. B. and C. P., part 11—1 to 16, 20 to 24.

Henry VIII.—April 22, 1509. Jan. 28, 1547.

Anderson, C. P., 25, &c.

Benloe, C. P., 1 to 38.

Benloe, (New), K. B., C. P., and Ex., 22, &c.

Benloe, Keilwey and Ashe, K. B., C. P., and Ex.

Brooke's New Cases, K. B., C. P., and Exchequer.

Dalison, C. P., 38.

Dyer, K. B., C. P., Ex. and Chan., 4, &c.

Jenkins, Ex., 1 to 38.

Keilwey, K. B. and C. P., 1 to 11, and 21.

Moore, K. B., C. P., Ex. and Chan., 3.

Year Book, K. B., and C. P., part 11—13, 14, 18, 19, 26, 27, 29 to 38.

Edward VI.—Jan. 28, 1547. July 6, 1553.

Anderson, C. P., 1 to 6.

Benloe and Dalison, C. P., 2,

Brooke's New Cases, K. B., C. P. and Ex.

Benloe (New), K. B., C. P. and Ex., 1 to 6.

Dyer, K. B., C. P., Ex. and Chan., 1 to 6.

Jenkins, Ex., 1 to 6.

Moore, K. B., C. P., Ex. and Chan., 1 to 6.

Plowden, K. B., C. P. and Exchequer, 4 to 6.

Mary.—July 6, 1553. Nov. 17, 1558.

Anderson, C. P., 1 to 6.

Benloe and Dalison, C. P., 1 to 5.

Benloe in Keilwey and Ashe, K. B., C. P. and Ex., 1 to 5.

Benloe (New), K. B., C. P. and Ex., 1 to 5.

Brooke's New Cases, K. B., C. P., and Ex., 1 to 5.

Cary, Chan., 5.

Dyer, K. B., C. P., Ex. and Chan., 1 to 5.

Dalison, in Keilwey and Ashe, C. P., 1, 4, 5.

Jenkins, Ex., 1 to 5.

Leonard, K. B., C. P., and Ex., 1 to 5.
 Owen, K. B. and C. P., 4, 5.
 Plowden, K. B., C. P. and Ex., 1 to 5.

Elizabeth.—Nov. 17, 1558. Mar. 24, 1603.

Anderson, C. P., 1 to 45.
 Benloe in Keilwey and Ashe, K. B., C. P., and Ex., 2 to 20.
 Benloe, K. B., C. P., and Ex., 1 to 17.
 Benloe, C. P., 1 to 21.
 Brownlow and Goldesborough, C. P., 11 to 45.
 Cary, Chan., 1 to 45.
 Coke, K. B., C. P., Ex. and Chan., 14 to 45.
 Croke, K. B., and C. P., 24 to 45.
 Dalison, C. P., 1 to 16.
 Dalison in Keilwey and Ashe, C. P., 2 to 7.
 Dickens, Chan., a few cases.
 Dyer, K. B. and C. P., 1 to 23.
 Godbolt, K. B., &c., 17 to 45.
 Goldesborough, K. B., &c., 28 to 31, 39 to 43.
 Hobart, K. B., &c., a few cases.
 Hutton, C. P., 26 to 38.
 Jenkins, Ex., 1 to 45.
 Leonard, K. B., C. P. and Ex., 1 to 45.
 Moore, K. B., C. P., Ex. and Chan. 1 to 45.
 Noy, K. B. and C. P., 1 to 45.
 Owen, K. B. and C. P., 1 to 45.
 Plowden, K. B., C. P. and Ex., 1 to 21.
 Popham, K. B., C. P. and Chan., 34, 39
 Saville, C. P. and Ex., 22 to 36.
 Tothill, Chan., 1 to 45.
 Yelverton, K. B. 44, 45.

James I.—Mar. 24, 1603. Mar. 27, 1625.

Anderson, C. P., 1.
 Benloe, K. B., C. P., and Ex., 19 to 23.
 Bridgman, C. P., 12 to 19.
 Brownlow and Goldesborough, C. P., 1 to 23.
 Bulstrode, K. B., 7 to 15.
 Cary, Chan. 1.
 Coke, K. B., C. P., Ex. and Chan. 1 to 13.
 Croke, K. B. and C. P., 1, 23.
 Davis, K. B., C. P. and Ex., 2 to 9.
 Glanville, election before committee of H. C., 21, 22.
 Godbolt, K. B., &c., 1 to 23.
 Hobart, K. B., &c., 1 to 23.
 Hutton, C. P., 10 to 23.
 Jenkins, Ex., 1 to 21.
 Jones (W.) K. B. and C. P., 18 to 33.
 Lane, Ex., 3 to 9.
 Leonard, K. B., C. P. and Ex., 1 to 12.
 Ley, K. B., C. P., Ex. and Court of Wards, 6 to 23.
 Moore, K. B., C. P., Ex. and Chan., 1 to 18.
 Noy, K. B. and C. P., 1 to 23.
 Owen, K. B. and C. P., 1 to 12.
 Palmer, K. B., 17 to 23.
 Popham, K. B., C. P., and Chan., 15 to 23.
 Reports in Chancery, 13.
 Rolle, K. B., 12 to 22.
 Tothill, Chan., 1 to 23.
 Winch, C. P., 19 to 23.
 Yelverton, K. B., 1 to 10.

Charles I.—Mar. 27, 1625. Jan. 30, 1649.

Aleyn, K. B., 22 to 24.
 Benloe, K. B., C. P. and Ex., 1 to 3.
 Bulstrode, K. B., 1 to 14.

Clayton, Pleas of As. York, 7 to 24.
 Croke, K. B. and C. P., 1 to 16
 Godbolt, K. B., &c., 1 to 13.
 Hetley, C. P., 3 to 7.
 Hutton, C. P., 1 to 14.
 Jones, (W.) K. B. and C. P., 1 to 16.
 Latch, K. B., 1 to 3.
 Ley, K. B., C. P., Ex. and Court of Wards, 1 to 4.
 Littleton, C. P. and Ex., 2 to 7.
 March, K. B. and C. P., 15 to 18.
 Nelson, Chan., 1 to 24.
 Noy, K. B. and C. P., 1 to 24.
 Palmer, K. B. and C. P., 1 to 4.
 Popham, K. B., C. P. and Chan., 1, 2.
 Reports in Chancery, 1 to 24.
 Style, K. B., 21 to 24.
 Tothill, Chan., 1 to 21.

Charles II.—May 29, 1660. Feb. 6, 1685.

Bridgman, C. P., 1 to 8.
 Carter, C. P., 16 to 27.
 Cases in Chancery, part 1—12 to 30.
 Cases in Chancery, part 2—26 to 37. Most of these cases in 2 C. C. are grossly misreported, said per Lord Loughborough, 1 H. Bl. 332
 Cayton, Pleas of As. York, 1, 2.
 Dickens, Chan., a few cases.
 Finch, Chan., 25 to 32.
 Freeman, K. B., C. P., Ex. and Chan., 22 to 37.
 Hardres, Ex., 7 to 21.
 Jones (Tho.) K. B. and C. P., 19 to 37
 Kreble, K. B., 13 to 30.
 Kelyng (Sir J.) Crown Cases and in K. B., 14 to 20.
 Levinz, K. B. and C. P., 12 to 37
 Lutwyche, C. P., 34 to 37.
 Modern, K. B., C. P. Ex. and Chan., vols. 1, 2—1 to 29.
 Modern, K. B., C. P., Ex. and Chan., vol. 2—26 to 30.
 Modern, K. C., C. P., Ex. and Chan., vol. 3—34 to 37.
 Nelson, Chan., 1 to 37.
 Parker, Ex., 30.
 Pollexfen, K. B., C. P. and Chan., 22 to 37.
 Raymond, (T.) K. B., C. P. and Ex., 12 to 35.
 Reports in Chancery, 1 to 37.
 Saunders, K. B., 18 to 24.
 Select Cases in Chancery, 33.
 Shower, K. B., 30 to 37.
 Siderfin, K. B., C. P. and Ex., 9 to 22.
 Skinner, K. B., 33 to 37.
 Style, K. B., 1 to 7.
 Vaughan, C. P., 17 to 25.
 Ventris, K. B., C. P., Ex. and Chan., 20 to 37.
 Vernon, Chan., 32 to 37

James II.—Feb. 6, 1685. Feb. 13, 1689.

Carthew, K. B., 2 to 4. N
 Cases in Chancery, part 2—1 to 3.
 Cases of Settlement, K. B., 2 to 4.
 Comberbach, K. B., 1 to 4. Comberbach is said, by Lord Thurlow, to be bad authority. 1 Bro. C. C. 97.
 Freeman, K. B., C. P., Ex. and Chan., 1 to 4.
 Levinz, K. B. and C. P., 1, 2.
 Lutwyche, C. P., 1 to 4. N
 Modern, K. B., C. P. and Chan. vol. 3—1 to 4.

Parker, Ex., 3, 4.
 Reports in Chancery, 1 to 3.
 Shower, K. B., 1 to 4.
 Skinner, K. B., 1 to 4.
 Ventris, K. B., C. P., Ex. and Chan., 1 to 4.
 Vernon, Chan., 1 to 4.

William III. & Mary.—Feb. 13, 1682. Mar. 8, 1702.

Carthew, K. B., 1 to 12.
 Cases concerning Settlements, K. B., 1 to 14.
 Colles, Parliamentary Cases, 9 to 14.
 Comberbach, K. B., 1 to 10.
 Comyns, K. B., C. P., Ex. Chan. and before the Delegates, 7 to 14.
 Fortescue, K. B., C. P., Ex. and Chan., 7 to 14.
 Freeman, K. B., C. P., Ex. and Chan., 1 to 14.
 Kelyng, (Sir J.) Crown Cases, and in K. B., 8 to 13.
 Levinz, K. B. and C. P., 1 to 18.
 Lutwyche, C. P., 1 to 14.
 Modern, K. B., C. P., Ex. and Chan., vol. 3—1, 2.
 Modern, K. B., C. P., Ex. and Chan., vol. 4—3 to 7.
 Modern, K. B., C. P., Ex. and Chan., vol. 5—5 to 11.
 Modern, K. B., C. P., Ex. and Chan., vol. 12—2 to 14.
 Parker, Ex., 4 to 13.
 Peere Williams, Chan. and K. B., 7 to 14.
 Precedents in Chancery, 1 to 4.
 Raymond, (Lord) K. B. and C. P., 4 to 14.
 Reports in Chancery, vol. 2—5.
 Reports temp. Holt, K. B., C. P., Ex. and Chan., 1 to 14.
 Salkeld, K. B., C. P., Ex. and Chan., 1 to 14.
 Select Cases in Chancery, 5, 9.
 Shower, K. B., 1 to 6.
 Skinner, K. B., 1 to 9.
 Ventris, K. B., C. P., Ex. and Chan., 1, 2.
 Vernon, Chan., 1 to 14.

Anne.—Mar. 8, 1702. Aug. 1, 1714.

Brown's Parliamentary Cases, 1 to 13.
 Banbury, Ex., 12, 13.
 Cases concerning Settlements, K. B., 1 to 13.
 Cases on Practice, C. P., 5 to 13.
 Colles, Parliamentary Cases, 1 to 8.
 Comyns, K. B., C. P., Ex. Chan. and before the Delegates, 1 to 13.
 Dickens, Chan., a few cases.
 Fortescue, K. B., C. P., Ex. and Chan., 1 to 13.
 Freeman, K. B., C. P., Ex. and Chan., 1 to 5.
 Gilbert's Cases in Law and Equity, 12, 13.
 Gilbert, K. B., Chan. and Ex., 4 to 43.
 Kelyng, (Sir J.) Crown Cases, and in K. B.
 Lutwyche, C. P., 1, 2.
 Modern, K. B., C. P., Ex. and Chan., vol. 6—2, 3.
 Modern, K. B., C. P., Ex. and Chan., vol. 7—1.
 Modern, K. B., C. P., Ex. and Chan., vol. 10—8 to 13.
 Modern, K. B., C. P., Ex. and Chan., vol. 11—4 to 8.
 Parker, Ex., 6 to 12.
 Peere Williams, Chan. and K. B., 1 to 13.
 Practical Register, C. P., 3 to 13.

Precedents in Chancery, 1 to 13.
 Raymond, (Lord) K. B. and C. P., 1 to 13.
 Reports in Chancery, 4 to 8.
 Reports temp. Holt, 1 to 9.
 Robertson's App. Cases, 5 to 13.
 Salkeld, K. B., C. P., Ex. and Chan., 1 to 10.
 Session Cases, K. B., 9 to 13.
 Vernon, Chan., 1 to 13.

George I.—Aug. 1, 1714. June 11, 1727.

Barnardiston, K. B., 12, 13. This book is said to be "not of much authority;" Dougl. 333, n.; "of still less authority than 10 Mod.;" Dougl. 689, n.; "a bad reporter." 1 East, 642, n.
 Brown's Parliamentary Cases, 1 to 13.
 Bunbury, Ex., 1 to 13. Mr. Bunbury never meant that those cases should be published; they are very loose notes. 5 Burr. 2568.
 Cases concerning Settlements, K. B., 1 to 13.
 Cases of Practice, C. P., 1 to 13.
 Comyns, K. B., C. P., Ex. Chan. and before the Delegates, 1 to 13.
 Dickens, Chan., 1 to 13.
 Fortescue, K. B., C. P., Ex. and Chan., 1 to 13.
 Gilbert, K. B., Chan. and Ex., 1 to 12.
 Modern, K. B., C. P., Ex. and Chan., vols. 8 and 9—8 to 12.
 Modern, K. B., C. P., Ex., and Chan., vol. 10—1 to 11.
 Mosely, Chan., 12, 13.
 Parker, Ex., 4 to 13.
 Peere Williams, Chan. and K. B., 1 to 13.
 Practical Register, C. P., 1 to 13.
 Precedents in Chancery, 1 to 8.
 Raymond (Lord) K. B. and C. P., 1 and 10 to 13.
 Robertson's Appeal Cases, 1 to 13.
 Select Cases in Chan., 10 to 12.
 Sessions Cases, K. B., 1 to 13.
 Strange, K. B., C. P., Ex. and Chan., 2 to 13.
 Vernon, Chan. 1 to 5.

George II.—June 11, 1727. Oct. 25, 1760.

Ambler, Chan. and Ex. 11 to 34.
 Andrews, K. B., 11, 12.
 Atkyn's Chan., 9 to 27.
 Barnardiston, C. B., 1 to 7.
 Barnardiston, Chan., 13, 14.
 Barnes, C. P., 5 to 34.
 Belt's Supplement to Vesey, Chan., 20 to 28.
 Blackstone (Wm.) K. B. and C. P., 20 to 24, and 30 to 34. These reports are said not to be very accurate, per Lord Mansfield, Dougl. 92, n.
 Brown's Parl. Cases, 1 to 34.
 Bunbury, Ex., 1 to 14.
 Burrow's K. B., 30 to 34.
 Burrow's Settlement Cases, K. B., 5 to 34.
 Cases of Settlement, K. B., 1 to 5.
 Cases of Practice, C. P., 1 to 20.
 Cases temp. Talbot, Chan. K. B., C. P., 7, 10.
 Comyns, Ex., Chan. and before the Delegates, 1 to 13.
 Cunningham, K. B., 7, 8.
 Dickens, Chan., 1 to 34. Mr. Dickens was a very attentive and diligent register; but his notes being rather loose, are not to be considered as of very high authority, per Lord Redesdale, 1 Sch. & Lef. 240. Vide also Sug. Vend. 146.
 Eden, Chan., 30 to 34.
 Fitzgibbon, K. B., C. P., Ex. and Chan., 1 to 5.

Fortescue, 1 to 10.
 Foster, Crown Cases, 16 to 34.
 Kelynge, (W.) K. B., C. P. and Chan., 1 to 8.
 Kenyon, K. B., &c., 26 to 30.
 Leach, Crown Cases, 4 to 34.
 Lee, (Sir Geo.) Ecclesiastical, 25 to 32.
 Moseley, Chan., 1 to 3.
 Parker, Ex., 16 to 34.
 Peere Williams, Chan. and K. B., 1 to 8.
 Practical Register, C. P., 1 to 15.
 Raymond, (Lord) K. B. and C. P., 1 to 6.
 Reports temp. Hardwicke, K. B., 7, 10.
 Robertson's Appeal Cases, a few.
 Sayer, K. B., 25 to 29.
 Select Cases in Chancery, 6.
 Sessions Cases, K. B., 1 to 20.
 Strange, K. B., C. P., Ex. and Chan., 1 to 21.
 Vesey, (son.) Chan., 20 to 28.
 Willes, C. P., Exch., Chan. and House of Lords, 11 to 32.
 Wilson, K. B., C. P., 16 to 34.

George III.—Oct. 25, 1762. Jan. 29, 1820.

Acton, Appeal Cases, 49, 50.
 Ambler, Chan. and Ex., 1 to 24.
 Anstruther, Ex., 32 to 37.
 Ball and Beatty, Irish Chan., 47 to 54.
 Barnewell and Alderson, K. B., 58 to 60.
 Blackstone, (Sir W.) K. B. and C. P., 1 to 20.
 Blackstone, (H.) C. P. and Ex. Chamb., 28 to 36.
 Bligh, Appeal Cases, 59, 60.
 Bosanquet and Puller, C. P., and Exch. Chamb., to 47.
 Bott, Settlement Cases, 1 to 60.
 Broderip and Bingham, C. P., 59, 60.
 Brown, Chancery, 18 to 34.
 Brown, Parl. Cases, 1 to 40.
 Buck, Bankruptcy, 57 to 60.
 Burrow, K. B., 1 to 12.
 Burrow, Settlement Cases, K. B., 1 to 16.
 Caldecot, Settlement Cases, K. B., 17 to 26.
 Campbell, Nisi Prius, K. B., C. P., and Home Circuit, 48 to 56.
 Cases of Practice, K. B., 1 to 14.
 Chitty, K. B., 47 to 60.
 Cooper, Chan., 55.
 Corbet and Daniel, Election Cases.
 Cowper, K. B., 14 to 18.
 Cox, Chan., 23 to 36.
 Daniell, Ex., 57 to 60.
 Dickens, Chan., 1 to 38.
 Dodson, Admiralty, 51 to 57.
 Douglas, K. B., 19 to 25.
 Dow, H. of Lords, 53 to 58.
 Durnford and East, K. B., 26 to 40.
 East, K. B., 41 to 52.
 Edwards, Admiralty, 48, 49.
 Eden, Chan., 1 to 7.
 Espinasse, Nisi Prius, K. B., C. P. and Home Circuit, 33 to 47.
 Forrest, Ex., 41.
 Fraser, Elec., H. Com. 32.
 Gow, Nisi Prius, C. P., 59, 60.
 Haggard, Consistory Court, 29 to 60.
 Holt, Nisi Prius, C. P. and North Circuit, 55 to 58.
 Jacob & Walker, Chan., 60.
 Kenyon, K. B., &c.
 Leach's Crown Cases, 1 to 55.
 Loft, K. B., C. P. and Chan., 12 to 14.

Luders, Election Cases, 25 to 30.
 Mariott, Admiralty, 16 to 19.
 Marshall, C. P., 54 to 57.
 Maddock, Vice Chan., 55 to 60.
 Maule & Selwyn, K. B., 53 to 57.
 Merivale, Chan., 57 to 58.
 Moore, C. P., 57 to 60.
 Nolan, K. B., 32 to 34.
 Parker, Ex., 1 to 7.
 Peake, Nisi Prius, K. B., 30 to 35.
 Peckwell, Election Cases, 45, 46.
 Phillimore, Ecclesiastical, 49 to 60.
 Price, Ex., 54 to 60.
 Robinson, Admiralty, 39 to 48.
 Rose, Bankruptcy, 50 to 56.
 Russell & Ryan, Crown Cases, 39, &c.
 Schoales & Lefroy, Irish Chan., 42 to 44.
 Smith, K. B. and Chan., 44 to 46.
 Starkie, Nisi Prius, K. B., C. P. and North Cir., 55 to 60.
 Swanston, Chan., 58 to 60.
 Taunton, C. P., 48 to 58.
 Vesey, jun., Chan., 29 to 52.
 Vesey & Beames, Chan., 52 to 54.
 Wightwick, Ex., 50, 51.
 Wilson, K. B. and C. P., 1 to 14.
 Wilson, Chan., 58 to 60.
 Wilson, Ex., 57.

George IV.—Jan. 29, 1820, June 26, 1830.

Addams, Eccl., 2 to 6.
 Barnwell & Alderson, K. B., 1 to 3.
 Barnwell & Cresswell, K. B., 3 to 10.
 ——— Adolphus, K. B., 10, &c.
 Batty, K. B., (*Ireland*) 5 & 6.
 Beatty, Chan., (*do.*) 7 & 8.
 Bingham, C. P., 3, &c.
 Bligh, H. of Lords, 1, &c.
 Bott, Settlement Cases, 1 to 7.
 Broderip & Bingham, C. P., 1 to 3.
 Carrington & Payne, N. P., 4, &c.
 Chitty, K. B., 1 to 3.
 Cresswell, Insolvent, 7 to 9.
 Daniell, Exchequer.
 Danson & Lloyd, Mercantile Cases, 8, 9.
 Dowling & Ryland, 2 to 7.
 Fox & Smith, K. B., (*Ireland*) 3 to 5.
 Glyn & Jameson, Bankruptcy.
 Haggard, Eccles., 7 to 10.
 Hogan, Rolls, (*Ireland*) 6 & 7.
 Hudson & Brooke, K. B., (*Ireland*) 7 to 11.
 Jacob & Walker, Chan., 1, 2.
 Jacob, Chan., 2, 3.
 Lloyd & Welsby, Mercantile Cases, 10, &c.
 Maddock, Vice-Chan., 1 to 3.
 Manning & Ryland, K. B., 7 to 9.
 Molloy, Chan., (*Ireland*) 7 to 11.
 Moody & Malkin, N. P., 7, &c.
 Moore, C. P., 1 to 7.
 Moore & Payne, C. P., 7, &c.
 Phillimore, Eccles., 1, 2.
 Price, Exchequer, 1, &c.
 Russell & Ryan, Cro. Cases, 1 to 3.
 Russell, Chan., 6 &c.
 Russell & Mylne, 9, &c.
 Ryan & Moody, N. P., 4 to 7.
 Ryan & Moody, Cro. Cases, 4 to 10.
 Simon & Stuart, Vice-Chan., 2 to 7.
 Simons, Vice-Chan., 7, &c.
 Smith & Batty, K. B., (*Ireland*) 4 & 5.
 Starke, N. P., 1, &c.

Turner, Chan., 3, &c.
 Younge & Jervis, Ex., 7, &c.
 Younge, Ex. Eq., 11, &c.

William IV.—June 26, 1830. June 20, 1837.

Adolphus & Ellis, K. B., 4 to
 Barnwell & Adolphus, K. B., 1 to 3.
 Bingham, C. P., 1 to
 Bligh, H. of Lords, 1 to
 Carrington & Payne, N. P., 1 to
 Clark & Finnelly, 2 to
 Cockburn & Rowe, 3.
 Crompton & Jervis, Exch., 1 & 2.
 Crompton & Meeson, Exch., 3 & 4.
 Crompton, Meeson & Roscoe, Exch., 4 to 6.
 Curteis, 5 to
 Deacon & Chitty, Bankruptcy, 2 to 5.
 Deacon, Bankruptcy, 6 to
 Dow & Clarke, H. of Lords, 1 to
 Dowling, Practice Cases, 1 to
 Haggard, Ecclesiastical, 1 to
 Haggard, Admiralty, 1 to
 Hayes, Exch., (*Ireland*) 1 to 3.
 Knapp, Appeal Cases, 1 to
 Knapp & Ombler, Election Cases, 5 to
 Lloyd & Goold, Irish Chan., 5 to
 Manning & Ryland, K. B., 1 to
 Meeson & Welsby, 6.
 Montagu & Bligh, Bankruptcy, 2 & 3.
 Montagu & Ayrton, Bankruptcy, 3 to
 Moody & Malkin, N. P., 1 to
 Moore & Payne, C. P., 1 to
 Moore & Scott, C. P., 1 to
 Mylne & Craig.
 Mylne & Keen, Chan., 3 to
 Neville & Manning, K. B., 3
 Perry & Knapp, Election Cases, 3 to 5.
 Russell & Mylne, Chan., 1 to 3.
 Scott, C. P., 5 to
 Simons, Vice-Chan., 1 to
 Tamlyn, Rolls, 1 to
 Tyrwhitt, Exch., 1 to
 Tyrwhitt & Granger.
 Wilson & Shaw, H. of Lords, 1 to
 Wilson & Courtenay, H. of Lords, 2 to
 Younge, Equity Exch., 1 to
 Younge & Collyer, Equity Exch., 4 to

Victoria.—June 20, 1837.

Adolphus & Ellis, K. B.
 Adolphus & Ellis, New Series.
 Alcock & Napier, K. B., (*Ireland*)
 Alcock's Registry Cases.
 Armstrong & Macartney, N. P., (*Ireland*)
 Baron & Austin, Election Cases.
 Baron & Arnold, Election Cases.
 Beavan, Rolls Court.
 Bells, Appeal Cases to H. of L., (*Ireland*)
 Bell, Murray, Young & Tennent, Session Cases,
 (*Ireland*)
 Brown, High Court of Justiciary, (*Ireland*)
 Bingham, C. P., 1 to
 Bligh, House of Lords.
 Bligh, New Series.
 Carrington & Kirwan, N. P.
 Carrington & Marshman, N. P., C. P. and Exch.
 Carrington & Payne, N. P., Q. P., C. P. Exch.
 Carrow, Hamerton & Allen, Magistrates' Cases.
 Clark & Finnelly, H. of Lords.
 Collyer, Chancery.

Connor & Lawson, Chancery, (*Ireland*)
 Cooper, Chancery Practice Cases.
 Cooper tempore Brougham, Chancery.
 Craig & Phillips, Chancery.
 Crawford & Dix, Abridged Cases in all the
 Courts, (*Ireland*)
 Crawford & Dix, Circuit Cases, (*Ireland*)
 Curtis, Ecclesiastical.
 Davison & Manning, Q. B.
 Deacon, Bankruptcy.
 Denison, Crown Cases, reserved.
 De Gex & Smales, Chancery.
 Dow & Clark, H. of L.
 Dowling & Lowndes, Points of Practice.
 Dowling, Practice Cases.
 Dowling, New Series.
 Drury & Walsh, Chancery, (*Ireland*)
 Drury & Warren, Chancery, (*Ireland*)
 Dunlap, Bell & Murray, Sessions Cases, (*Ireland*)
 Dunlap, Bell, Murray & Donaldson, Sessions
 Cases, (*Ireland*)
 Exchequer Reports, by Welsby, Hurstone &
 Gordon.
 Falconer & Fitzherbert, Election.
 Flanagan & Kelle, Rolls, (*Ireland*)
 Gale & Davison, K. B.
 Haggard, Admiralty.
 Hare, Chancery.
 Jebb & Bourke, Q. B., (*Ireland*)
 Jebb & Symes, K. B., (*Ireland*)
 Jones & Latouche, Q. B., (*Ireland*)
 Jones, Exchequer, (*Ireland*)
 Jones & Carey, Exchequer, (*Ireland*)
 Keen, Rolls.
 Law Recorder, in all the Courts, (*Ireland*)
 Longfield & Townsend, Exch., (*Ireland*)
 McLean & Robinson, H. of L., (*Ireland*)
 Manning & Granger, C. P.
 Manning, Granger & Scott, C. P.
 Meeson & Welsby, Exch.
 Montagu & Ayrton, Bankruptcy.
 Montagu & Chitty, Bankruptcy.
 Montagu, Deacon & De Gex, Bankruptcy.
 Montagu & Neale, Election.
 Moody, N. P. and Crown Cases.
 Moody & Robinson, Nisi Prius.
 Moore, Appeal Cases.
 Moore, East India Appeals.
 Moore, Privy Council.
 Mylne & Craig, Chancery.
 Neville & Perry, K. B.
 Perry & Davidson, K. B.
 Phillips, Chancery.
 Robinson, Admiralty.
 Robinson, House of Lords.
 Sausse & Scully, Rolls, (*Ireland*)
 Scott, C. P.
 Scott, New Series.
 Shaw & Maclean, House of Lords.
 Smyth, C. P., (*Ireland*)
 Simons, Vice-Chancellor.
 Welsh, Registry Cases, (*Ireland*)
 West, Parl. Reports.
 Younge & Collyer, Equity Ex.

REPRESENTATIVE. One who represents or is in the place of another.

2. In legislation, it signifies one who has been elected a member of that branch

of the legislature called the house of representatives.

3. A representative of a deceased person, sometimes called a "personal representative," or "legal personal representative," is one who is executor or administrator of the person described. 6 Madd. 159; 5 Ves. 402.

REPRESENTATIVE DEMOCRACY. A form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. 1 Bouv. Inst. n. 31.

TO REPRESENT. To exhibit; to expose before the eyes: to represent a thing is to produce it publicly. Dig. 10, 4, 2, 3.

REPRESENTATION, insurances. A representation is a collateral statement, either by writing, not inserted in the policy, or by parol, of such facts or circumstances relative to the proposed adventure, as are necessary to be communicated to the underwriters, to enable them to form a just estimate of the risk.

2. A representation, like a warranty, may be either *affirmative*, as where the insured avers the existence of some fact or circumstance which may affect the risk; or *promissory*, as where he engages the performance of something executory.

3. There is a material difference between a representation and a warranty.

4. A warranty, being a condition upon which the contract is to take effect, is always a part of the written policy, and must appear on the face of it. Marsh. Ins. c. 9, § 2. Whereas a representation is only a matter of collateral information or intelligence on the subject of the voyage insured, and makes no part of the policy. A warranty being in the nature of a condition precedent, must be strictly and literally complied with; but it is sufficient if the representation be true in substance. Whether a warranty be material to the risk or not, the insured stakes his claim of indemnity upon the precise truth of it, if it be affirmative, or upon the exact performance of it, if executory; but it is sufficient if a representation be made without fraud, and be not false in any material point, or if it be substantially, though not literally, fulfilled. A false warranty avoids the policy, as being a breach of the condition upon which the contract is to take effect; and the insurer is not liable for any loss though it do not happen in consequence of the breach of the warranty;

a false representation is no breach of the contract, but if material, avoids the policy on the ground of fraud, or at least because the insurer has been misled by it. Marsh. Insur. B. 1, c. 10, s. 1; Dougl. R. 247; 4 Bro. P. C. 482.

See 2 Caines' R. 155; 1 Johns. Cas. 408; 2 Caines' Cas. 173, n.; 3 Johns. Cas. 47; 1 Caines' Rep. 288; 2 Caines' R. 22; Id. 329; Sugd. Vend. 5; Bouv. Inst. Index, h. t.; and *Concealment; Misrepresentation.*

REPRESENTATION, Scotch law. The name of a plea or statement presented to a lord ordinary of the court of sessions, when his judgment is brought under review.

REPRESENTATION OF PERSONS. A fiction of the law, the effect of which is to put the representative in the place, degree, or right of the person represented.

2. The heir represents his ancestor. Bac. Abr. Heir and Ancestor, A. The devisee, his testator; the executor, his testator; the administrator, his intestate; the successor in corporations, his predecessor. And generally speaking they are entitled to the rights of the persons whom they represent, and bound to fulfil the duties and obligations, which were binding upon them in those characters.

3. Representation was unknown to the Romans, and was invented by the commentators and doctors of the civil law. Toull. Dr. Civ. Fr. liv. 3, t. 1, c. 3, n. 180. Vide Ayl. Pand. 397; Dall. Dict. mot Succession, art. 4, § 2.

REPRIEVE, crim. law, practice. This term is derived from *reprendre*, to take back, and signifies the withdrawing of a sentence for an interval of time, and operates in delay of execution. 4 Bl. Com. 394.

2. It is granted by the favor of the pardoning power, or by the court who tried the prisoner.

3. Reprieves are sometimes granted *ex necessitate legis*; for example, when a woman is convicted of a capital offence, after judgment she may allege pregnancy in delay of execution. In order, however, to render this plea available she must be *quick with child*, (q. v.) the law presuming, perhaps absurdly enough, that before that period, life does not commence in the fetus. 3 Inst. 17; 2 Hale, 413; 1 Hale, 868; 4 Bl. Com. 395.

4. The judge is also bound to grant a reprieve when the prisoner becomes insane. 4 Harg. St. Tr. 205, 6; 3 Inst. 4; Hawk B. 1, c. 1, s. 4; 1 Chit. Cr. Law, 757.

REPRIMAND, punishment. The censure which in some cases a public officer pronounces against an offender.

2. This species of punishment is used by legislative bodies to punish their members or others who have been guilty of some impropriety of conduct towards them. The reprimand is usually pronounced by the speaker.

REPRISALS, war. The forcibly taking a thing by one nation which belonged to another, in return or satisfaction for an injury committed by the latter on the former. Vatt. B. 2, ch. 18, s. 342; 1 Bl. Com. ch. 7.

2. Reprisals are used between nation and nation to do themselves justice, when they cannot otherwise obtain it. Congress have the power to grant letters of marque (q. v.) and reprisal. Const. art. 1, s. 8, cl. 11.

3. Reprisals are made in two ways, either by embargo, in which case the act is that of the state; or, by letters of marque and reprisals, in which case the act is that of the citizen, authorized by the government. Vide 2 Bro. Civ. Law, 334.

4. Reprisals are divided into *negative*, when a nation refuses to fulfil a perfect obligation which it has contracted, or to permit another state to enjoy a right which it justly claims; or *positive*, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.

5. They are also *general* or *special*. They are *general* when a state which has received, or supposes is has received, an injury from another nation delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, in retaliation for such acts, wherever they may be found. It usually amounts to a declaration of war. *Special* reprisals are such as are granted in times of peace, to particular individuals who have suffered an injury from the citizens or subjects of the other nation. Bynker. Quæst. Jur. Pub. lib. 1, Duponceau's Translation, p. 182, note; Dall. Dict. Prises maritimes, art. 2, § 5.

6. The property seized in making reprisals is preserved, while there is any hope of obtaining satisfaction or justice; as soon as that hope disappears, it is confiscated, and then the reprisal is complete. Vattel, B. 2, c. 18, § 342.

REPRISES. The deductions, and pay-

ments out of lands, annuities, and the like, are called reprises, because they are *taken back*; when we speak of the clear yearly value of an estate, we say it is worth so much a year *ultra reprises*, besides all reprises.

2. In Pennsylvania, lands are not to be sold when the rents can pay the encumbrances in seven years, beyond all reprises.

REPROBATION, eccl. law. The propounding exceptions either against facts, persons or things; as, to allege that certain deeds or instruments have not been duly and lawfully executed; or that certain persons are such that they are incompetent as witnesses; or that certain things ought not for legal reasons to be admitted.

REPUBLIC. A commonwealth; that form of government in which the administration of affairs is open to all the citizens. In another sense, it signifies the state, independently of its form of government. 1 Toull. n. 28, and n. 202, note. In this sense, it is used by Ben Jonson.

Those that by their deeds make it known,
Whose dignity they do sustain;
And life, state, glory, all they gain,
Count the *Republic's*, not their own.

Vide *Body Politic; Nation; State*.

REPUBLICAN GOVERNMENT. A government in the republican form; a government of the people; it is usually put in opposition to a monarchical or aristocratic government.

2. The fourth section of the fourth article of the constitution, directs that "the United States shall guaranty to every state in the Union a republican form of government." The form of government is to be *guarantied*, which supposes a form already *established*, and this is the republican form of government the United States have undertaken to protect. See Story, Const. § 1807.

REPUBLICATION. An act done by a testator, from which it can be concluded that he intended that an instrument which had been revoked by him, should operate as his will; or it is the reëxecution of a will by the testator, with a view of giving it full force and effect.

2. The republication is express or implied. It is express when there has been an actual reëxecution of it; 1 Ves. 440; 2 Rand. R. 192; 9 John. R. 812; it is implied, when, for example, the testator by a codicil executed according to the statute of frauds, reciting that he had made his will, added, "I hereby ratify and confirm my said

will, except in the alterations after mentioned." Com. R. 381; 3 Bro. P. C. 85. The will might be at a distance, or not in the power of the testator, and it may be thus republished. 1 Ves. 437; 3 Bing. 614; 1 Ves. jr. 486; 4 Bro. C. C. 2.

3. The republication of a will has the effect; 1st. To give it all the force of a will made at the time of the republication; if, for example, a testator by his will devise "all his lands in A," then revokes his will, and afterwards buys other lands in A, the republication, made after the purchase, will pass all the testator's lands in A. Cro. Eliz. 493. See 1 P. Wms. 275. 2d. It sets up a will which had been revoked. See, generally, 2 Hill. Ab. 509; 3 Lomax, Dig. tit. 28, c. 6; 2 Bouv. Inst. n. 2162-4.

TO REPUDIATE. To repudiate a right is to express in a sufficient manner, a determination not to accept it, when it is offered.

2. He who repudiates a right cannot by that act transfer it to another. Repudiation differs from renunciation in this, that by the former he who repudiates simply declares that he will not accept, while he who renounces a right does so in favor of another. Renunciation is however sometimes used in the sense of repudiation. See *To Renounce; Renunciation*; Wolff, Inst. § 339.

REPUDIATION. In the civil law this term is used to signify the putting away of a wife or a woman betrothed.

2. Properly divorce is used to point out the separation of married persons; repudiation, to denote the separation either of married people, or those who are only affianced.

Divortium est repudium et separatio maritorum; repudium est renunciatio sponsalium, vel etiam est divortium. Dig. 50, 16, 101,

1. Repudiation is also used to denote a determination to have nothing to do with any particular thing; as, a repudiation of a legacy, is the abandonment of such legacy, and a renunciation of all right to it.

3. In the canon law, repudiation is the refusal to accept a benefice which has been conferred upon the party repudiating.

REPUGNANCY, *contracts*. That which in a contract, is inconsistent with something already contracted for; as, for example, where a man by deed grants twenty acres of land, excepting one, this latter clause is repugnant, and is to be rejected. But if a farm or tract of land is conveyed by general terms, an exception of any number of acres,

or any particular lot, is not repugnant, but valid. 4 Pick. 54. Vide 3 Pick. 272; 6 Cowen, 677.

REPUGNANCY, *pleading*. Where the material facts stated in a declaration or other pleading, are inconsistent one with another; for example, where in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then lately built; this declaration was considered bad, for repugnancy; for the timber could not be for the building of a house already built. 1 Salk. 213.

2. Repugnancy of immaterial facts, and what is merely redundant, and which need not have been put into the sentence, and contradicting what was before alleged, will not, in general, vitiate the pleading. Gilb. C. P. 131; Co. Litt. 303 b; 10 East, R. 142; 1 Chit. Pl. 233. See *Laves*, Pl. 64; Steph. Pl. 378; Com. Dig. Abatement, H 6; 1 Vin. Ab. 36; 19 Id. 45; Bac. Ab. Amendment, &c. E 2; Bac. Ab. Pleas, Ac. I 4; Vin. Ab. h. t.

REPUGNANT. That which is contrary to something else; a repugnant condition is one contrary to the contract itself; as, if I grant you a house and lot in fee, upon condition that you shall not aliene, the condition is repugnant and void. Bac. Ab. Conditions, L.

REPUGNANT CONDITION. One which is contrary to the contract itself; as, if I grant you a house and lot in fee, upon condition that you shall not aliene, the condition is repugnant and void, as being inconsistent with the right granted.

REPUTATION, *evidence*. The opinion generally entertained by persons who know another, as to his *character*, (q. v.) or it is the opinion generally entertained by persons who know a family as to its pedigree, and the like.

2. In general, reputation is evidence to prove, 1st. A man's character in society. 2d. A *pedigree*. (q. v.) 3d. Certain prescriptive or customary rights and obligations, and matters of public *notoriety*. (q. v.) But as such evidence is in its own nature very weak, it must be supported. 1st. When it relates to the exercise of a right or privilege, by proof of acts of enjoyment of such right or privilege, within the period of living memory; 1 Maule & Selw. 679; 5 T. R. 32; afterwards evidence of reputation may be given. 2d. The fact must be of a public nature. 3d. It must

be derived from persons likely to know the facts. 4th. The facts must be general and not particular. 5th. They must be free from suspicion. 1 Stark. Ev. 54 to 65. Vide 1 Har. & M'H. 152; 2 Nott & M'C. 114; 5 Day, R. 290; 4 Hen. & M. 507; 1 Tayl. R. 121; 2 Hayw. 3; 8 S. & R. 159; 4 John. R. 52; 18 John. R. 346; 9 Mass. R. 414; 4 Burr. 2057; Dougl. 174; Cowp. 594; 3 Swanst. 400; Dudl. So. Car. R. 346; and arts. *Character; Memory*.

REQUEST, contracts. A notice of a desire on the part of the person making it, that the other party shall do something in relation to a contract.

2. In general when a debt exists payable immediately, the law does not impose on the creditor to make a request of payment. But when by the express terms of a contract, a request is necessary, it must be made. And in some cases where there is no express agreement a request is also requisite; as, where A sells a horse to B to be paid for on delivery, a demand or request to deliver must be made before B can sustain an action; 5 T. R. 409; 1 East, 209; or it must be shown that A has incapacitated himself to deliver the horse because he has sold the horse to another person. 10 East. 359; 5 B. & A. 712. On a general promise to marry, a request must be made before action, unless the proposed defendant has married another. 2 Dow. & Ry. 55. Vide *Demand*.

3. A request, like a notice, ought to be in writing, and state distinctly what is required to be done, without any ambiguous terms. 1 Chit. Pr. 497, 498.

REQUEST, pleading. The statement in the plaintiff's declaration that a demand or request has been made by the plaintiff from the defendant, to do some act which he was bound to perform, and for which the action is brought.

2. A request is general or special. The former is called the *licet sapius requisitus*, (q. v.) or "although often requested so to do;" though generally inserted in the common breach, to the money counts, it is of no avail in pleading, and the omission of it will not vitiate the declaration. 2 Hen. Bl. 131; 1 Bos. & Pull. 59, 60; and see 1 John. Cas. 100. Whenever it is essential to the cause of action, that the plaintiff should have requested the defendant to perform his contract, such request must be stated in the declaration and proved. The special request must state by whom, and the

time and place when it was made, in order that the court may judge of its sufficiency. 1 Str. 89. Vide Com. Dig. Pleader, C 69, 70; 1 Saund. 33; 2 Ventr. 75; 3 Bos. & Pull. 438; 3 John. R. 207; 1 John. Cas. 319; 10 Mass. R. 230; 8 Day's R. 327; and the articles *Demand; Licet sapius requisitus*.

REQUEST NOTES, Engl. law. Certain notes or requests from persons amenable to the excise laws, to obtain a permit for removing any excisable goods or articles from one place to another.

REQUISITION. The act of demanding a thing to be done by virtue of some right.

2. The constitution of the United States, art. 4, s. 2, provides that fugitives from justice shall be delivered up to the authorities of the state from which they are fugitives, on the demand of the executive from such state. The demand made by the governor of one state on the governor of another for a fugitive is called a requisition.

RES, property. Things. The terms "Res," "Bona," "Biens," used by jurists who have written in the Latin and French languages, are intended to include movable or personal, as well as immovable or real property. 1 Burge, Confl. of Laws, 19. See *Biens; Bona; Things*.

RES GESTA, evidence. The subject matter; thing done.

2. When it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible evidence, as part of the *res gesta*, for the purpose of showing its true character. On an indictment for a rape, for example, what the girl said so recently after the fact as to exclude the possibility of practising on her, has been held to be admissible evidence, as a part of the transaction. East, P. C. 414; 2 Stark. Cas. 241; 1 Stark. Ev. 47; 1 Phil. Ev. 218; Bouv. Inst. Index, h. t.

RES INTEGRA. An entire thing; an entirely new or untouched matter. This term is applied to those points of law which have not been decided, which are "untouched by dictum or decision." 3 Meriv. R. 269; 1 Burge on the Confl. of Laws, 241.

RES INTER ALIOS ACTA, evidence. This is a technical phrase which signifies acts of others, or transactions between others.

2. Neither the declarations, nor any other acts of those who are mere strangers, or, as it is usually termed, any *res inter*

alioe acta, are admissible in evidence against any one; when the party against whom such acts are offered in evidence, was privy to the act, the objection ceases; it is no longer *res inter alios*. 1 Stark. Ev. 52; 3 Id. 1800.

RES JUDICATA, practice. The decision of a legal or equitable issue, by a court of competent jurisdiction.

2. It is a general principle that such decision is binding and conclusive upon all other courts of concurrent power. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, founded on the soundest policy. If, therefore, Paul sue Peter to recover the amount due to him upon a bond, and on the trial the plaintiff fails to prove the due execution of the bond by Peter, in consequence of which a verdict is rendered for the defendant, and judgment is entered thereupon, this judgment, till reversed on error, is conclusive upon the parties, and Paul cannot recover in a subsequent suit, although he may then be able to prove the due execution of the bond by Peter, and that the money is due to him, for, to use the language of the civilians, *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum*.

3. The constitution of the United States and the amendments to it declare, that no fact, once tried by a jury, shall be otherwise reëxaminable in any court of the United States, than according to the rules of the common law. 3 Pet. 483; Dig. 44, 2; and Voet, *ibid.*; Kaime's Equity, vol. 2, p. 367; 1 Johns. Ch. R. 95; 2 M. R. 142; 3 M. R. 623; 4 M. R. 813, 456, 481; 5 M. R. 282, 465; 9 M. R. 38; 11 M. R. 607; 6 N. S. 292; 5 N. S. 664; 1 L. R. 318; 8 L. R. 187; 11 L. R. 517. Toullier, Droit Civil Français, vol. 10, No. 65 to 259.

4. But in order to make a matter *res judicata* there must be a concurrence of the four conditions following, namely: 1. Identity in the thing sued for. 2. Identity of the cause of action; if, for example, I have claimed a right of way over Blackacre, and a final judgment has been rendered against me, and afterwards I purchase Blackacre, this first decision shall not be a bar to my recovery, when I sue as owner of the land, and not for an easement over it, which I claimed as a right appurtenant to my land Whiteacre. 3. Identity of persons and of parties to the action; this rule is a neces-

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sary consequence of the rule of natural justice: *ne inauditus condemnetur*. 4. Identity of the quality in the persons for or against whom the claim is made; for example, an action by Peter to recover a horse, and a final judgment, against him, is no bar to an action by Peter, administrator of Paul, to recover the same horse. Vide *Things adjudged*.

RES MANCIPI, Rom. civ. law. Those things which might be sold and alienated, or the property of them transferred from one person to another. The division of things into *res mancipi* and *res nec mancipi*, was one of ancient origin, and it continued to a late period in the empire. *Res mancipi* (Ulph. Frag. xix.) are *prædia in italico solo*, both rustic and urban; also, *jura rusticorum prædiorum* or *servitutes*, as *via*, *iter*, *aquæductus*; also slaves, and four-footed animals, as oxen, horses, &c., *quæ collo dorsove domantur*. Smith, Dict. Gr. and Rom. Antiq. To this list, may be added children of Roman parents, who were, according to the old law, *res mancipi*. The distinction between *res mancipi* and *nec mancipi* was abolished by Justinian in his code. Id.; Coop. Ins. 442.

RES NOVA. Something new; something not before decided.

RES NULLIUS. A thing which has no owner. A thing which has been abandoned by its owner is as much *res nullius* as if it had never belonged to any one.

2. The first possessor of such a thing becomes the owner, *res nullius fit primi occupantis*. Bowy. Com. 97.

RES PERIT DOMINO. The thing is lost to the owner. This phrase is used to express that when a thing is lost or destroyed, it is lost to the person who was the owner of it at the time. For example, an article is sold; if the seller have perfected the title of the buyer so that it is his, and it be destroyed, it is the buyer's loss; but if, on the contrary, something remains to be done before the title becomes vested in the buyer, then the loss falls on the seller. See *Risk*.

RES UNIVERSATIS. Those things which belong to cities or municipal corporations are so called; they belong so far to the public that they cannot be appropriated to private use; such as public squares, market houses, streets, and the like. 1 Bouv. Inst. n. 446.

RESALE. A second sale made of an article; as, for example, if A sell a horse to

B, and the latter not having paid, for him, refuse to take him away, when by his contract he was bound to do so, and then A sells the horse to C.

2. The effect of a resale, is not always to annul the first sale, because, as in this case, B would be liable to A for the difference of the price between the sale and resale. 4 Bing. 722; Blackb. on Sales, 386; 4 M. & G. 898.

RESCUIT. The act of receiving or admitting a third person to plead his right in a cause commenced by two; as when an action is brought against a tenant for life or term of years, the reversioner is allowed to defend. Cowell.

RESCUIT OR RECEIT. The admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons; as, when an action is brought against a tenant for life or years, or any other particular tenant, and he makes default, in such case the reversioner may move that he may be received to defend his right, and to plead with the demandant. Jacob, L. D. h. t. Rescuit is also applied to the admittance of a plea, when the controversy is between the same two persons. Co. Litt. 192; 3 Nels. Ab. 146.

RESCISSION OF A CONTRACT. The destruction or annulling of a contract.

2. The right to rescind a contract seems to suppose not that the contract has existed only in appearance; but that it has never had a real existence on account of the defects which accompanied it; or which prevented its actual execution. 7 Toul. n. 551; 17 Id. n. 114.

3. A contract cannot, in general, be rescinded by one party unless both parties can be placed in the same situation, and can stand upon the same terms as existed when the contract was made. 5 East, 449; 15 Mass. 319; 5 Binn. 355; 3 Yeates, 6. The most obvious instance of this rule is, where one party by taking possession, &c., has received a partial benefit from the contract. Hunt v. Silk. 5 East, 449.

4. A contract cannot be rescinded in part. It would be unjust to destroy a contract in toto, when one of the parties has derived a partial benefit, by a performance of the agreement. In such case it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee to recover, by a cross-action, damages for the breach of the contract. 7 East, 480, in the note. But according to

the later and more convenient practice, the vendee, in such case, is allowed, in an action for the price, to give evidence of the inferiority of the goods in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefit the defendant has actually derived from the goods or labor; and when the latter has derived no benefit the plaintiff cannot recover at all. Stark. on Evidence, part 4, tit. Goods sold and delivered; Chitty on Contr. 276.

5. A sale of land, by making a deed for the same, and receiving security for the purchase money, may be rescinded, before the deed has been recorded, by the purchaser surrendering the property and the deed to the buyer, and receiving from him the securities he had given; in Pennsylvania, these acts vest the title in the original owner. 4 Watts, 196, 199. But this appears contrary to the current of decisions in other states and in England. 4 Wend. 474; 2 John. 86; 5 Conn. 262; 4 Conn. 350; 4 N. H. Rep. 191; 9 Pick. 105; 2 H. Bl. 263, 264; Pre. in Chan. 235; 6 East, 86; 4 B. & A. 672.

See 7 East, 484; 1 Mass. R. 101; 14 Mass. 282; Wharton's Dig. 119, 120; 10 East, 564; 1 Campb. 78, 190; 3 Campb. 451; 3 Starkie, 32; 1 Stark. R. 108; 2 Taunt. 2; 2 New Rep. 136; 6 Moore, 114; 3 Chit. Com. L. 153; 1 Saund. 320, b. note; 1 Mason, 437; 1 Chip. R. 159; 2 Stark. Ev. 97, 280; 3 Ib. 1614, 1645; 3 New Hamp. R. 455; 2 South, R. 780; Day's note to Templer v. McLachlan, 2 N. R. 141; 1 Mason, 93; 20 Johns. 196; 5 Com. Dig. 631, 636; and Com. Dig. Action upon the case upon Assumpsit, A 1, note x, p. 829, for a very full note; Com. Dig. Biens, D 3, n. s.

6. As to the cases where a contract will be rescinded in equity on the ground of mistake, see Newl. Cont. 432; or where heirs are dealing with their expectancies, Ibid. 435; sailors with their prize money, Ibid. 443; children dealing with their parents, Ibid. 445; guardians with their wards, Ibid. 448; attorney with his client, Ibid. 453; cestui que trust, with trustee, Ibid. 459; where contracts are rescinded on account of the turpitude of their consideration, Ibid. 469; in fraud of marital rights, Ibid. 424; in fraud of marriage agreement, Ibid. 417; on account of imposition, Ibid. 351; in fraud of creditors, Ib. 369; in fraud of purchasers, Ib. 391; in fraud

of a deed of composition by creditors, Ib. 409.

RESCOUS, *crim. law, torts*. This word is used synonymously with rescue, (q. v.) and denotes the illegal taking away and setting at liberty a distress taken, or a person arrested by due process of law. Co. Litt. 160.

2. In civil cases when a defendant is rescued the officer will or will not be liable, as the process under which the arrest is made, is or is not final. When the sheriff executes a *fi. fa.* or *ca. sa.* he may take the *posse comitatus*; Show. 180; and, neglecting to do so, he is responsible; but on mesne or original process, if the defendant rescue himself, *vi et armis*, the sheriff is not answerable. 1 Holt's R. 537; 3 Engl. Com. Law Rep. 179, S. C. Vide Com. Dig. h. t.; Yelv. 51; 2 T. R. 156; Woodf. L. & T. 521; Bac. Ab. Rescue, D; Doct. Pl. 483.

RESCRIPT, *conv.* A counterpart.

2. In the canon law, by rescripts are understood apostolical letters, which emanate from the pope, under whatever form they may be. The answers of the pope in writing are so called. Dict. Dr. Can. h. v. Vide *Chirograph; Counterpart; Part*.

RESCRIPTION, *French law*. A rescription is a letter by which the maker requests some one to pay a certain sum of money, or to account for him to a third person for it. Poth. Du Contr. de Change, n. 225.

2. According to this definition, bills of exchange are a species of rescription. The difference appears to be this, that a bill of exchange is given when there has been a contract of exchange between the drawer and the payee; whereas the rescription is sometimes given in payment of a debt, and at other times it is lent to the payee. Id.

RESCRIPTS, *civ. law*. The answers of the prince at the request of the parties, respecting some matter in dispute between them, or to magistrates in relation to some doubtful matter submitted to him.

2. The rescript was differently denominated, according to the character of those who sought it. They were called *annotationes* or *subnotationes*, when the answer was given at the request of private citizens; *letters* or *epistles*, when he answered the consultation of magistrates; *pragmatic sanctions*, when he answered a corporation, the citizens of a province, or a municipality.

Leçons El. du Dr. Rom. § 53; Code, 1, 14, 8.

RESCUE, *crim. law*. A forcible setting at liberty against law of a person duly arrested. Co. Litt. 160; 1 Chitty's Cr. Law, *62; 1 Russ. on Cr. 383. The person who rescues the prisoner is called the rescuer.

2. If the rescued prisoner were arrested for felony, then the rescuer is a felon; if for treason, a traitor; and if for a trespass, he is liable to a fine as if he had committed the original offence. Hawk. B. 5, c. 21. If the principal be acquitted, the rescuer may nevertheless be fined for the misdemeanor in the obstruction and contempt of public justice. 1 Hale, 598.

3. In order to render the rescuer criminal, it is necessary he should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he is in the custody of a private person; but if he be under the care of a public officer, then he is to take notice of it at his peril. 1 Hale, 606.

4. In another sense rescue is the taking away and setting at liberty, against law, a distress taken for rent, or services, or damage feasant. Bac. Ab. Rescue, A.

5. For the law of the United States on this subject, vide Ing. Dig. 150. Vide, generally, 19 Vin. Ab. 94.

RESCUE, *mar. war*. The retaking by a party captured of a prize made by the enemy. There is still another kind of rescue which partakes of the nature of a recapture; it occurs when the weaker party before he is overpowered, obtains relief from the arrival of fresh succors, and is thus preserved from the force of the enemy. 1 Rob. Rep. 224; 1 Rob. Rep. 271.

2. Rescue differs from recapture. (q. v.) The rescuers do not by the rescue become owners of the property, as if it had been a new prize; but the property is restored to the original owners by the right of postliminium. (q. v.)

RESCUSSOR. The party making a rescue, is sometimes so called, but more properly he is a rescuer.

RESERVATION, *contracts*. That part of a deed or other instrument which reserves a thing not in esse at the time of the grant, but newly created. 2 Hill. Ab. 359; 3 Pick. R. 272. It differs from an exception. (q. v.) See 4 Verm. 622; Brayt. R. 230; 9 John. R. 73; 20 John. R. 87; 3 Ridg. P. C. 402; Co. Litt. 43 a; 2 Tho. Co. Litt. 412.

RESET OF THEFT, *Scotch law*. The receiving and keeping of stolen goods, knowing them to be stolen, with a design of feloniously retaining them from the real owner. *Alis. Pr. Cr.* 328.

RESETTER, *Scotch law*. A receiver of stolen goods, knowing them to have been stolen.

RESIANCE. A man's residence or permanent abode. Such a man is called a *resiant*. *Kitch.* 33.

RESIDENCE. The place of one's domicile. (q. v.) There is a difference between a man's residence and his domicile. He may have his domicile in Philadelphia, and still he may have a residence in New York; for although a man can have but one domicile, he may have several residences. A residence is generally transient in its nature, it becomes a domicile when it is taken up *animo manendi*. *Roberts, Ecc. R.* 75.

2. Residence is *prima facie* evidence of national character, but this may at all times be explained. When it is for a special purpose and transient in its nature, it does not destroy the national character.

3. In some cases the law requires that the residence of an officer shall be in the district in which he is required to exercise his functions. Fixing his residence elsewhere, without an intention of returning, would violate such law. *Vide* the cases cited under the article *Domicil; Place of residence*.

RESIDENT, *international law*. A minister, according to diplomatic language, of a third order, less in dignity than an ambassador or an envoy. This term formerly related only to the continuance of the minister's stay, but now it is confined to ministers of this class.

2. The resident does not represent the prince's person in his dignity, but only his affairs. His representation is in reality of the same nature as that of the envoy; hence he is often termed, as well as the envoy, a minister of the second order, thus distinguishing only two classes of public ministers, the former consisting of ambassadors who are invested with the representative character in preëminence, the latter comprising all other ministers, who do not possess that exalted character. This is the most necessary distinction, and indeed the only essential one. *Vattel, liv. 4, c. 6, § 73.*

RESIDENT, *persons*. A person coming into a place with intention to establish his

domicil or permanent residence, and who in consequence actually remains there. Time is not so essential as the intent, executed by making or beginning an actual establishment, though it be abandoned in a longer or shorter period. See 6 *Hall's Law Journ.* 68; 3 *Hagg. Eccl. R.* 373; 20 *John.* 211; 2 *Pet. Ad. R.* 450; 2 *Scamm. R.* 377.

RESIDUARY LEGATEE. He to whom the residuum of the estate is devised or bequeathed by will. *Roper on Leg. Index, h. t.*; *Powell Mortg. Index, h. t.*; 8 *Com. Dig.* 444.

RESIDUE. That which remains of something after taking away a part of it; as, the residue of an estate, which is what has not been particularly devised by will.

2. A will bequeathing the general residue of personal property, passes to the residuary legatee everything not otherwise effectually disposed of, and it makes no difference whether a legacy falls into the estate by lapse, or as void at law, the next of kin is equally excluded. 15 *Ves.* 416; 2 *Mer.* 392. *Vide* 7 *Ves.* 391; 4 *Bro. C. C.* 55; 1 *Bro. C. C.* 589; *Rop. on Leg. Index, h. t.*; *Worth. on Wills*, 454.

RESIGNATION. The act of an officer by which he declines his office, and renounces the further right to use it. It differs from abdication. (q. v.)

2. As offices are held at the will of both parties, if the resignation of an officer be not accepted, he remains in office. 4 *Dev. R.* 1.

RESIGNEE. One in favor of whom a resignation is made. 1 *Bell's Com.* 125 n.

RESISTANCE. The opposition of force to force.

2. Resistance is either lawful or unlawful. 1. It is lawful to resist one who is in the act of committing a felony or other crime, or who maliciously endeavors to commit such felony or crime. See *Self-defence*. And a man may oppose force to force against one who endeavors to make an arrest or to enter his house without lawful authority for the purpose; or, if in certain cases he abuse such authority, and do more than he was authorized to do; or if it turn out in the result he has no right to enter, then the party about to be imprisoned, or whose house is about to be illegally entered, may resist the illegal imprisonment or entry by self-defence, not using any dangerous weapons, and may escape, be rescued, or even break prison, and others may assist him in so doing. 5 *Taunt.* 765; 1 *B. & Adol.* 166; 1 *East, P. C.* 295; 5 *East,*

804; 1 Chit. Pr. 684. See *Regular and Irregular Process*.

3.—2. Resistance is unlawful when the persons having a lawful authority to arrest, apprehend, or imprison, or otherwise to advance or execute the public justice of the country, either civil or criminal, and using the proper means for that purpose, are resisted in so doing; and if the party guilty of such resistance, or others assisting him, be killed in the struggle, such homicide is justifiable; while on the other hand, if the officer be killed, it will, at common law, be murder in those who resist. Fost. 270; 1 Hale, 457; 1 East, P. C. 305.

RESOLUTION. A solemn judgment or decision of a court. This word is frequently used in this sense, in Coke and some of the more ancient reporters. It also signifies an agreement to a law or other thing adopted by a legislature or popular assembly. Vide Dict. de Jurisp. h. t.

RESOLUTION, civil law. The act by which a contract which existed and was good, is rendered null.

2. Resolution differs essentially from rescission. The former presupposes the contract to have been valid, and it is owing to a cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning. Resolution may be by consent of the parties or by the decision of a competent tribunal; rescission must always be by the judgment of a court. 7 Troplong, de la Vente, n. 689; 7 Toull. 551; Dall. Dict. h. t.

RESOLUTORY CONDITION. One which has for its object, when accomplished, the revocation of the principal obligation; for example, I will sell you my crop of cotton, if my ship America does not arrive in the United States, within six months. My ship arrives in one month, my contract with you is revoked. 1 Bouv. Inst. n. 764.

RESORT. The authority or jurisdiction of a court. The supreme court of the United States, is a court of the last resort.

RESPECTABLE WITNESS. One who is competent to testify in a court of justice. To pass lands in Alabama, a will must be attested by three or more respectable witnesses. See *Attesting witness*; *Competent witness*; *Credible witness* and *Witness*.

RESPIRATION, med. jur. Breathing, which consists of the drawing into, inhaling, or more technically, *inspiring*, atmospheric air into the lungs, and then forcing out, expelling, or technically *expiring*, from the lungs the air therein. Chit. Med. Jur. 92 and 416, note n.

RESPITE, contracts, civil law. An act by which a debtor who is unable to satisfy his debts at the moment, transacts (i. e. compromises) with his creditors, and obtains from them time or delay for the payment of the sums which he owes to them. Louis. Code, 8051.

2. The respite is either voluntary or forced; it is voluntary when all the creditors consent to the proposal, which the debtor makes to pay in a limited time the whole or a part of his debt; it is forced when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law. Id. 3052; Poth. Procéd. Civ. 5eme partie, ch. 3.

3. In Pennsylvania, there is a provision in the insolvent act of June 16, 1836, s. 41, somewhat similar to involuntary respite. It is enacted, that whenever a majority in number and value of the creditors of any insolvent, as aforesaid, residing within the United States, or having a known attorney therein, shall consent in writing thereto, it shall be lawful for the court by whom such insolvent shall have been discharged, upon the application of such debtor, and notice given thereof, in the manner hereinbefore provided for giving notice of his original petition, to make an order that the estate and effects which such insolvent may afterwards acquire, shall be exempted for the term of seven years thereafter from execution, for any debt contracted, or cause of action existing previously to such discharge, and if after such order and consent, any execution shall be issued for such debt or cause of action, it shall be the duty of any judge of the court from which such execution issued, to set aside the same with costs.

4. Respite also signifies a delay, forbearance or continuation of time.

RESPITE, crim. law. A suspension of a sentence, which is to be executed at a future time. It differs from a pardon, which is an abolition of the crime. See *Abolition*; *Pardon*.

RESPONDEAT OUSTER. The name

of a judgment, when an issue in law, arising on a dilatory plea, has been decided for the plaintiff, that the defendant *answer over*. See 1 Meigs, 122; 1 Ala. R. 442; 3 Ala. R. 278; 3 Pike, 339; 4 Pike, 445; 4 Misso. R. 366; 5 Blackf. 167; 5 Metc. 88; 1 Gilm. R. 395; 16 Conn. 436; 24 Pick. 49. Vide *Judgment of Respondent Ouster*.

RESPONDENT, practice. The party who makes an answer to a bill or other proceeding in chancery. In the civil law, this term signifies one who answers or is security for another; a fidejussor. Dig. 2, 8, 6.

RESPONDENTIA, maritime law. A loan of money on maritime interest, on goods laden on board of a ship, which, in the course of the voyage must, from their nature, be sold or exchanged, upon this condition, that if the goods should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon.

2. The contract is called *respondentia*, because the money is lent on the personal responsibility of the borrower. It differs principally from bottomry, in the following circumstances: bottomry is a loan on the ship; *respondentia* is a loan upon the goods. The money is to be repaid to the lender, with maritime interest, upon the arrival of the ship, in the one case; and of the goods, in the other. In all other respects the contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the person of the borrower; in the latter, the lender has, in general, only the personal security of the borrower. Marsh. Ins. B. 2, c. 1, p. 734. See Lex Mer. Amer. 354; Com. Dig. Merchant, E 4; 1 Fonb. Eq. 247, n. 1; Id. 252, n. o.; 2 Bl. Com. 457; Park. Ins. ch. 21; Wesk. Ins. 44; Beawes' Lex. Mex. 143; 3 Chitty's Com. Law, 445 to 536; Bac. Abr. Merchant and Merchandise, K; *Bottomry*.

RESPONDERE NON DEBET. The prayer of a plea where the defendant insists that he ought not to answer, as when he claims a privilege; for example, as being a member of congress, or a foreign ambassador. 1 Chit. Pl. *433.

RESPONSA PRUDENTUM, civil law.

Opinions given by Roman lawyers. Before the time of Augustus, every lawyer was authorized *de jure*, to answer questions put to him, and all such answers, *responsa prudentum* had equal authority, which had not the force of law, but the opinion of a lawyer. Augustus was the first prince who gave to certain distinguished juriconsults the particular privilege of answering in his name; and from that period their answers required greater authority. Adrian determined in a more precise manner the degree of authority which these answers should have, by enacting that the opinions of such authorized juriconsults, when unanimously given, should have the force of law (*legis vicem*), and should be followed by the judges; and that when they were divided, the judge was allowed to adopt that which to him appeared the most equitable.

2. The opinions of other lawyers held the same place they had before, they were considered merely as the opinions of learned men. Mackel. Man. Intro. § 43; Mackel. Hist. du Dr. Rom. §§ 40, 49; Hugo, Hist. du Dr. Rom. § 313; Inst. 1, 2, 8; Institutes Explicuées, n. 39.

RESPONSALIS, old Eng. law. One who appeared for another in court. Fleta, lib. 6, c. 21. In the ecclesiastical law, this name is sometimes given to a proctor.

RESPONSIBILITY. The obligation to answer for an act done, and to repair any injury it may have caused.

2. This obligation arises without any contract, either on the part of the party bound to repair the injury, or of the party injured. The law gives to the person who has suffered loss, a compensation in damages.

3. It is a general rule that no one is answerable for the acts of another unless he has, by some act of his own, concurred in them. But when he has sanctioned those acts, either explicitly or by implication, he is responsible. An innkeeper is, in general, civilly liable for the acts of his servants towards his guests, for anything done in their capacity of servants. The owner of a carriage is also civilly responsible to a passenger for any injury done by the driver as such. See *Driver*.

4. There are cases where persons are made civilly responsible for the acts of others, by particular laws and statutory provisions, when they have not done anything by which they might be considered as participating in such acts. The responsi-

bility which the hundred (q. v.) in England formerly incurred to make good any robbery committed within its precincts, may be mentioned as an instance. A somewhat similar liability is incurred now in some places in this country by a county, when property has been destroyed by a mob.

5. Penal responsibility is always personal, and no one can be punished for the commission of a crime but the person who has committed it or his accomplice. *Vide Damages; Injury; Loss.*

RESTITUTION, *maritime law*. The placing back or restoring articles which have been lost by jettison; this is done when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; but when the remainder of the goods are afterwards lost, there is not any restitution. *Stev. on Av. part 1, c. 1, s. 1, art. 1, n. 8. Vide Recompense.*

RESTITUTION, *practice*. The return of something to the owner of it, or to the person entitled to it.

2. After property has been taken into execution, and the judgment has been reversed or set aside, the party against whom the execution was sued out shall have restitution, and this is enforced by a writ of restitution. *Cro. Jac. 698; 4 Mod. 161.* When the thing levied upon under an execution has not been sold, the thing itself shall be restored; when it has been sold, the price for which it is sold is to be restored. *Roll. Ab. 778; Bac. Ab. Execution, Q; 1 M. & S. 425.*

3. The phrase *restitution of conjugal rights* frequently occurs in the ecclesiastical courts. A suit may there be brought for this purpose whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without sufficient reason; by which the party injured may compel the other to return to cohabitation. *1 Bl. Com. 94; 1 Addams, R. 305; 3 Hagg. Eccl. R. 619.*

TO RESTORE. To return what has been unjustly taken; to place the owner of a thing in the state in which he formerly was. By restitution is understood not only the return of the thing itself, but all its accessories. It is to return the thing and its fruits. *Dig. 50, 16, 35, 75 et 246, § 1.*

RESTRAINING. Narrowing down, making less extensive; as, a restraining statute, by which the common law is nar-

rowed down or made less extensive in its operation.

RESTRAINING POWERS. A term used in equity. When the donor of a power, who is the owner of the estate, imposes certain restrictions by the terms of the powers, these restrictions are called *restraining powers*.

RESTRAINT. Something which prevents us from doing what we would desire to do.

2. Restraint is lawful and unlawful. It is lawful when its object is to prevent the violation of the law, or the rights of others. It is unlawful when it is used to prevent others from doing a lawful act; for example, when one binds himself not to trade generally; but an agreement not to trade in a particular place is lawful. A legacy given in restraint of marriage, or on condition that the legatee shall not marry, is good, and the condition alone is void. The Roman civil law agrees with ours in this respect; a legacy given on condition that the legatee shall not marry is void. *Clef des Lois Rom. mot Passion. See Condition; Limitation.*

RESTRICTIVE INDORSEMENT, *contracts*. One which confines the negotiability of a promissory note or bill of exchange, by using express words to that effect, as by indorsing it "payable to A B only." *1 Wash. C. C. 512; 2 Murph. 138; 1 Bouv. Inst. n. 1188.*

RESULTING TRUSTS, *estates*. Resulting, implied or constructive trusts, are those which arise in cases where it would be contrary to the principles of equity that he in whom the property becomes vested, should hold it otherwise than as a trustee. *2 Atk. 150.*

2. As an illustration of this description of a resulting trust, may be mentioned the case of a contract made for the purchase of a real estate; on the completion of the contract, a trust immediately results to the purchaser, and the vendor becomes a trustee for him till the conveyance of the legal estate is made. Again, when an estate is purchased in the name of one person, and the purchase money is paid by another, there is a resulting trust in favor of the person who gave or paid the consideration. *Willis on Tr. 55; 1 Cruise, Dig. tit. 12, s. 40, 41; Ch. Ca. 39; 9 Mod. 78; 7 Ves. 725; 3 Hen. & Munf. 367; 1 Supp. to Ves. jr. 11; Pow. Mortg. Index, h. t.; 2 John. Ch. R. 409, 450; 3 Bibb, R. 15,*

506; 4 Munf. R. 222; 1 John. Ch. Rep. 450, 582; Sugd. on Vend. ch. 15, s. 2; 2 Cox, Ch. Rep. 93; Bac. Ab. Trusts, C; Bouv. Inst. Index, h. t. Vide *Trusts; Use*.

RESULTING USE, estates. One which having been limited by deed, expires or cannot vest; it then returns back to him who raised it, after such expiration, or during such impossibility.

2. When the legal seisin and possession of land is transferred by any common law conveyance, and no use is expressly declared, nor any consideration nor evidence of intent to direct the use, such use shall result back to the original owner of the estate; for in such case, it cannot be supposed that it was intended to give away the estate. 2 Bl. Com. 335; Cruise, Dig. t. 11, c. 4, s. 20, et seq.; Bac. Tracts, Read. on Stat. of Uses, 351; Co. Litt. 23, a.; Id. 271, a; 2 Binn. R. 387; 3 John. R. 396.

RESUMPTION. To reassume; to promise again; as, the resumption of payment of specie by the banks is general. It also signifies to take things back; as the government has resumed the possession of all the lands which have not been paid for according to the requisitions of the law, and the contract of the purchasers. Cow. Int. h. t.

RETAIL. To sell by retail, is to sell by small parcels, and not in the gross. 5 N. S. 279.

RETAILER OF MERCHANDISE. One who deals in merchandise by selling it in smaller quantities than he buys, generally with a view to profit.

TO RETAIN, practice. To engage the services of an attorney or counsellor to manage a cause, at which time it is usual to give him a fee, called the retaining fee. The act by which the attorney is authorized to act in the case is called a retainer.

2. Although it is not indispensable that the retainer should be in writing, unless required by the other side, it is very expedient. It is therefore recommended, particularly when the client is a stranger, to require from him a written retainer, signed by himself; and, in order to avoid the insinuation that it was obtained by contrivance, it should be witnessed by one or more respectable persons. When there are several plaintiffs, it should be signed by all, and not by one for himself and the others, especially if they are trustees or assignees of a bankrupt or insolvent. The retainer

should also state whether it be given for a general or a qualified authority. Vide the form of a retainer in 3 Chit. Pr. 116, note *m*.

3. There is an implied contract on the part of an attorney who has been retained, that he will use due diligence in the course of legal proceedings, but it is not an undertaking to recover a judgment. Wright, R. 446. An attorney is bound to act with the most scrupulous honor, he ought to disclose to his client if he has any adverse retainer which may affect his judgment, or his client's interest; but the concealment of the fact does not necessarily imply fraud. 3 Mason's R. 305; 2 Greenl. Ev. § 139.

RETAINER. The act of withholding what one has in one's own hands by virtue of some right.

2. An executor or administrator is entitled to retain in certain cases, for a debt due to him by the estate of a testator or intestate.

3. It is proposed to inquire, 1. Who may retain. 2. Against whom. 3. On what claims. 4. What amount may be retained.

4.—I. In inquiring who may retain, it is natural to consider, 1st. Those cases where there is but one executor or administrator. 2d. Where there are several, and one of them only has a claim against the estate of the deceased.

5.—1. A *sole* executor may retain in those cases where, if the debt had been due to a stranger, such stranger might have sued the executor and recovered judgment; or where the executor might, in the due administration of the estate, have paid the same. 3 Burr. 1380. He may, therefore, retain a debt due to himself; 3 Bl. Com. 18; or to himself in right of another; 3 Burr. 1380; or to another in trust for him; 2 P. Wms. 298; the debt may be retained when administration is committed to another for the use of the creditor who is a lunatic; 3 Bac. Abr. 10, n; Com. Dig. Administration, C 2; or an infant entitled to administration. 4 Ves. 763. An executor may retain if he be the executor of the first testator; but an executor of one of the executors of the first testator, the other executor being still living, is not an executor of the first testator, and therefore cannot retain. 11 Vin. Abr. 363. An executor may retain before he has proved the will, and if he die after having intermeddled with the goods of the testator and

before probate, his executor has the same power. 3 P. Wms. 188, and note B.; 11 Vin. Abr. 263.

6.—2. Where there are *several* executors, and one has a claim against the estate of the deceased, he may retain with or without the consent of the others; Off. Ex. 33; but where several of them have debts of equal degree they can retain only *pro rata*. Bac. Abr. Executors, A 9.

7.—II. *Against whom*. In those cases,
1. Where the deceased was alone bound.
2. Where he was bound with others. 3. Where the executor of the obligee is also his executor.

8.—1. Where the deceased was sole obligor, his executor may clearly retain.

9.—2. Where two are jointly and severally bound, and one of them appoints the obligee his executor; Hob. 10; 2 Lev. 73; Bac. Abr. Executors, A 9; Com. Dig. Administration, C 1; or the obligee takes out letters of administration to him, the debt is immediately satisfied by way of retainer, if the executor or administrator have sufficient assets.

10.—3. If the obligee make the administrator of the obligor his executor, it is a discharge of the debt, if the administrator have assets of the estate of the obligor; but if he have fully administered, or if no assets to pay the debt came to his hands, it is no discharge, for there is nothing for him to retain. 8 Serg. & Rawle, 17.

11.—III. *On what claims*. 1. As to the *priority* of the claim. 2. As to its *nature*.

12.—1. In the payment of the debts of a decedent, the law gives a preference to certain debts over others, an executor cannot, therefore, retain his debt, while there are unpaid debts of a superior degree, because if he could have brought an action for the recovery of his claim, he could not have recovered in prejudice of such a creditor. 5 Binn. 167; Bac. Ab. Executors, A 9; Com. Dig. Administration, C 2; 1 Hayw. 413. He may retain only where he has superior claim, or one of equal degree. 3 Bl. Com. 18; 11 Vin. Abr. 261; Com. Dig. Administration, C 1. And in a case where two men were jointly bound in a bond, one as principal, the other as surety, after which the principal died intestate, and the surety took out administration to his estate, the bond being forfeited, the administrator paid the debt; it was held he could not retain as a specialty creditor, because being a party

to the bond it became his own debt; 11 Vin. Abr. 265; Godb. 149, pl. 194; but see 7 Serg. & Rawle, 9; after having paid the debt, however, he became a simple contract creditor, and might retain it as such. Com. Dig. Administration, C 2, n.

13.—2. As to the *nature* of the claim for which an executor may retain, it seems that damages which are in their nature arbitrary cannot be retained, because, till judgment, no man can foretell their amount; such are damages upon torts. But where damages arise from the breach of a pecuniary contract, there is a certain measure for them, and such damages may well be retained. 2 Bl. Rep. 965; and see 3 Munf. 222. A debt barred by the act of limitation may be retained, for the executor is not bound to plead the act against others, and it shall, therefore, not operate against him. 1 Madd. Ch. 583.

14.—IV. What amount may be retained.

1. By the common law an executor is entitled to retain his debt in preference to all other creditors in an equal degree. 3 Bl. Com. 18; 11 Vin. Abr. 261. This he might do, because he is to be placed in the situation of the most vigilant creditor, who by suing and obtaining a judgment might have obtained a preference. Where, however, the executor cannot, by bringing suit, obtain a preference, the reason seems changed, and therefore in Pennsylvania, when no such preference can be obtained, the executor is entitled to retain only *pro rata* with creditors of the same class. 8 Serg. & Rawle, 17; 5 Binn. 167. A creditor cannot obtain a preference by bringing suit and obtaining judgment against executors in the following states, namely: Alabama; 4 Griff. L. R. 582; Connecticut; 3 Griff. L. R. 75; Illinois; Id. 422; Louisiana; 4 Griff. L. R. 698; Maine; Id. 1004; Maryland; Id. 938; Massachusetts; 3 Griff. L. R. 516; Mississippi; 4 Griff. L. R. 669; Missouri; Id. 625; New Hampshire; 3 Griff. L. R. 46; Ohio; Id. 402; Pennsylvania; Id. 262; 8 Serg. & Rawle, 17; 5 Binn. 167; Rhode Island; 3 Griff. L. R. 114; South Carolina; 4 Griff. L. R. 860; Vermont; 3 Griff. L. R. 20. Such a preference can be given by the laws of the following states, namely: Delaware; 4 Griff. L. R. 1064; Kentucky; Id. 1135; North Carolina; 3 Griff. L. R. 221; New Jersey; 4 Griff. L. R. 1282; New York; 3 Griff. L. R. 141; Tennessee; 4 Griff. L. R. 791; Virginia; 3 Griff. L. R. 360. In Georgia; 3 Griff. L. R. 444:

and Indiana; Id. 467; the matter is doubtful.

15.—2. Where the estate is solvent an executor may of course retain for the whole of his debt, with interest.

RETAINER, practice. The act of a client, by which he engages an attorney or counselor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant.

2. "The effect of a retainer to prosecute or defend a suit," says Professor Greenleaf; Ev. vol. ii. § 141; "is to confer on the attorney all the powers exercised by the forms and usages of the courts, in which the suit is pending. He may receive payment; may bring a second suit after being non-suited in the first for want of formal proof; may sue a writ of error on the judgment; may discontinue the suit; may restore an action after a *non pros*; may claim an appeal, and bind his client in his name for the prosecution of it; may submit the suit to arbitration; may sue out an alias execution; may receive livery of seisin of land taken by an extent; may waive objections to evidence, and enter into stipulation for the admission of facts or conduct of the trial; and for release of bail; may waive the right of appeal, review, notice, and the like, and confess judgment. But he has no authority to execute a discharge of a debtor, but upon the actual payment of the full amount of the debt, and that in money only; nor to release sureties; nor to enter a *retraxit*; nor to act for the legal representatives of his deceased client; nor to release a witness."

RETAINING FEE. A fee given to counsel on being consulted in order to insure his future services.

RETAKING. The taking one's goods, wife, child, &c., from another, who without right has taken possession thereof. Vide *Reception*; *Rescue*.

RETALIATION. The act by which a nation or individual treats another in the same manner that the latter has treated them. For example, if a nation should lay a very heavy tariff on American goods, the United States would be justified in laying heavy duties on the manufactures and productions of such country. Vatt. Dr. des Gens, liv. 2, c. 18, § 341. Vide *Lex talionis*.

RETENTION, Scottish law. The right which the possessor of a movable has of holding the same until he shall be satisfied for his claim either against such movable or the owner of it; a lien.

2. The right of retention is of two kinds, namely, special or general. 1. Special retention is the right of withholding or retaining property or goods which are in one's possession under a contract, till indemnified for the labor or money expended on them. 2. General retention is the right to withhold or detain the property of another, in respect of any debt which happens to be due by the proprietor to the person who has the custody; or for a general balance of accounts arising on a particular train of employment. 2 Bell's Com. 90, 91, 5th ed. Vide *Lien*.

RETORNO HABENDO. The name of a writ issued to compel a party to return property which has been adjudged to the other in an action of replevin. Vide *Writ pro retorno habendo*.

RETORSION, war. The name of the act employed by a government to impose the same hard treatment on the citizens or subjects of a state, that the latter has used towards the citizens or subjects of the former, for the purpose of obtaining the removal of obnoxious measures. Vattel, liv. 2, c. 18, § 341; De Martens, Précis, liv. 8, c. 2, § 254; Klüber, Droit des Gens, s. 2, c. 1, § 234; Mann. Comm. 105.

2. Retorsion signifies also the act by which an individual returns to his adversary evil for evil; as, if Peter call Paul thief, and Paul says you are a greater thief.

TO RETRACT. To withdraw a proposition or offer before it has been accepted.

2. This the party making it has a right to do as long as it has not been accepted; for no principle of law or equity can, under these circumstances, require him to persevere in it.

3. The retraction may be express, as when notice is given that the offer is withdrawn; or, tacit as by the death of the offering party, or his inability to complete the contract; for then the consent of one of the parties has been destroyed, before the other has acquired any existence; there can therefore be no agreement. 16 Toull. 55.

4. After pleading guilty, a defendant will, in certain cases where he has entered that plea by mistake or in consequence of some error, be allowed to retract it. But where a prisoner pleaded guilty to a charge of larceny, and sentence has been passed upon him, he will not be allowed to retract his plea, and plead not guilty. 9 C.

& P. 346; S. C. 38 E. C. L. R. 146; Dig. 12, 4, 5.

RETRAXIT, practice. The act by which a plaintiff withdraws his suit; it is so called from the fact that this was the principal word used when the law entries were in Latin.

2. A retraxit differs from a nonsuit; the former being the act of the plaintiff himself, for it cannot even be entered by attorney; 8 Co. 58; 3 Salk. 245; 8 P. S. R. 157, 163; and it must be after declaration filed; 3 Leon. 47; 8 P. S. R. 163; while the latter occurs in consequence of the neglect merely of the plaintiff. A retraxit also differs from a *nolle prosequi*. (q. v.) The effect of a *retraxit* is a bar to all actions of a like or a similar nature; Bac. Ab. Nonsuit, A; a *nolle prosequi* is not a bar even in a criminal prosecution. 2 Mass. R. 172. Vide 2 Sell. Pr. 338; Bac. Abr. Nonsuit; Com. Dig. Pleader, X 2. Vide article *Judgment of retraxit*.

RETRIBUTION. 1. That which is given to another to recompense him for what has been received from him; as a rent for the hire of a house. 2. A salary paid to a person for his services. 3. The distribution of rewards and punishments.

RETROCESSION, civil law. When the assignee of heritable rights conveys his rights back to the cedent, it is called a retrocession. Erskine, Prin. B. 3, t. 5, n. 1; Dict. de Jur. h. t.

RETROSPECTIVE. Looking backwards.

2. This word is usually applied to those acts of the legislature, which are made to operate upon some subject, contract or crime which existed before the passage of the acts, and they are therefore called *retrospective laws*. These laws are generally unjust, and are, to a certain extent, forbidden by that article in the constitution of the United States, which prohibits the passage of *ex post facto* laws or laws impairing contracts.

3. The right to pass retrospective laws, with the exceptions above mentioned, exists in the several states, according to their own constitutions, and become obligatory if not prohibited by the latter. 4 S. & R. 364; 3 Dall. R. 396; 1 Bay, R. 179; 7 John. R. 477; vide 4 S. & R. 403; 1 Binn. R. 601; 3 S. & R. 169; 2 Cranch. R. 272; 2 Pet. 414; 8 Pet. 110; 11 Pet. 420; 1 Bald. R. 74; 5 Penn. St. R. 149.

4. An instance may be found in the

laws of Connecticut. In 1795, the legislature passed a resolve, setting aside a decree of a court of probate disapproving of a will and granted a new hearing; it was held that the resolve not being against any constitutional principle in that state, was valid. 3 Dall. 386. And in Pennsylvania a judgment was opened by the act of April 1, 1837, which was holden by the supreme court to be constitutional. 2 Watts & Serg. 271.

5. Laws should never be considered as applying to cases which arose previously to their passage, unless the legislature have clearly declared such to be their intention. 12 L. R. 352 Vide Barringt. on the Stat. 466, n.; 7 John. R. 477; 1 Kent, Com. 455; Tayl. Civil Law, 168; Code, 1, 14, 7; Bracton, lib. 4, fo. 228; Story, Cons. § 1393; 1 McLean, Rep. 40; 1 Meigs, Rep. 437; 3 Dall. 391; 1 Blackf. R. 193; 2 Gallis. R. 139; 1 Yerg. R. 360; 5 Yerg. R. 320; 12 S. & R. 330; and see *Ex post facto*.

RETURN, contracts, remedies. Persons who are beyond the sea are exempted from the operation of the statute of limitations of Pennsylvania, and of other states, till after a certain time has elapsed after their *returning*. As to what shall be considered a return, see 14 Mass. 203; 1 Gall. 342; 3 Johns. 263; 3 Wils. 145; 2 Bl. Rep. 723; 3 Littell's Rep. 48; 1 Harr. & Johns. 89, 350; 17 Mass. 180.

RETURN DAY. A day appointed by law when all writs are to be returned which have issued since the preceding return day. The sheriff is in general not required to return his writ until the return day. After that period he may be ruled to make a return.

RETURN OF WRITS, practice. A short account, in writing, made by the sheriff, or other ministerial officer, of the manner in which he has executed a writ. Steph. on Pl. 24.

2. It is the duty of such officer to return all writs on the return day; on his neglecting to do so, a rule may be obtained on him to return the writ, and, if he do not obey the rule, he may be attached for contempt. See 19 Vin. Ab. 171; Com. Dig. Return; 2 Lilly's Abr. 476; Wood. b. 1, c. 7; 1 Penna. R. 497; 1 Rawle, R. 520; 3 Yeates, 17; 3 Yeates, 47; 1 Dall. 439.

REUS, civil law. This word has two different meanings. 1. A party to a suit, whether plaintiff or defendant; *Reus est quicum altero litem contestatam habet, sive i*

egit, sive cum eo actum est. 2. A party to a contract; *reus credendi* is he to whom something is due, by whatever title it may be; *reus debendi* is he who owes, for whatever cause. Poth. Pand. lib. 50, h. t.

REVENDECATION, *civil and French law.* An action by which a man demands a thing of which he claims to be owner. It applies to immovables as well as movables; to corporeal or incorporeal things. Merlin, Rép. h. t.

2. By the civil law, he who has sold goods for cash or on credit may demand them back from the purchaser, if the purchase-money is not paid according to contract. The action of *revendication* is used for this purpose. See an attempt to introduce the principle of revendication into our law, in 2 Hall's Law Journal, 181.

3. Revendication, in another sense, corresponds, very nearly, to the *stoppage in transitu* (q. v.) of the common law. It is used in that sense in the Code de Commerce, art. 577. Revendication, says that article, can take place only when the goods sold are on the way to their place of destination, whether by land or water, and before they have been received into the warehouse of the insolvent, (*failli*), or that of his factor or agent, authorized to sell them on account of the insolvent. See Dig. 14, 4, 15; Dig. 18, 1, 19, 53; Dig. 19, 1, 11.

REVENUE. The income of the government, arising from taxation, duties, and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government. Story, Const. § 877. Vide *Money Bills*. By revenue is also understood the income of private individuals and corporations.

REVERSAL, *international law.* *First.* A declaration by which a sovereign promises that he will observe a certain order, or certain conditions, which have been once established, notwithstanding any changes that may happen to cause a deviation therefrom; as, for example, when the French court, consented for the first time, in 1745, to grant to Elizabeth, the Czarina of Russia, the title of empress, exacted as a *reversal*, a declaration purporting that the assumption of the title of an imperial government, by Russia, should not derogate from the rank which France had held towards her. *Secondly.* Those letters are also termed *reversals*, *Litteræ Reversales*, by which a sovereign

declares that, by a particular act of his, he does not mean to prejudice a third power. Of this we have an example in history: formerly, the emperor of Germany, whose coronation, according to the golden ball, ought to have been solemnized at Aix-la-Chapelle, gave to that city, when he was crowned elsewhere, reversals, by which he declared that such coronation took place without prejudice to its rights, and without drawing any consequences therefrom for the future.

TO REVERSE, *practice.* The decision of a superior court by which the judgment, sentence or decree of the inferior court is annulled.

2. After a judgment, sentence or decree has been rendered by the court below, a writ of error may be issued from the superior to the inferior tribunal, when the record and all proceedings are sent to the supreme court on the return to the writ of error. When, on the examination of the record, the superior court gives a judgment different from the inferior court, they are said to reverse the proceeding. As to the effect of a reversal, see 9 C. & P. 513; S. C. 38 E. C. L. Rep. 201.

REVERSION, *estates.* The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him; it is also defined to be the return of land to the grantor, and his heirs, after the grant is over. Co. Litt. 142, b.

2. The reversion arises by operation of law, and not by deed or will, and it is a vested interest or estate, and in this it differs from a remainder, which can never be limited unless by either deed or devise. 2 Bl. Comm. 175; Cruise, Dig. tit. 17; Plowd. 151; 4 Kent, Com. 349; 19 Vin. Ab. 217; 4 Com. Dig. 27; 7 Com. Dig. 289; 1 Bro. Civil Law, 213; Wood's Inst. 151; 2 Lill. Ab. 483. A reversion is said to be an incorporeal hereditament. Vide 4 Kent, Com. 354. See, generally, 1 Hill. Ab. c. 52, p. 418; 2 Bouv. Inst. n. 1850, et seq.

REVERSIONER, *estates.* One entitled to a reversion.

2. Although not in actual possession, the reversioner having a vested interest in the reversion, is entitled to his action for an injury done to the inheritance. 4 Burr. 2141. The reversioner is entitled to the rent, and this important incident passes with a grant or assignment of the rever-

sion. It is not inseparable from it, and may be severed and excepted out of the grant by special words. Co. Litt. 143, a, 151, a, b; Cruise, Digest, t. 17, s. 19.

REVERSOR, law of Scotland. A debtor who makes a wadset, and to whom the right of reversion is granted. Ersk. Pr. L. Scotl. B. 2, t. 8, sect. 1. A reversioner. Jacob, L. D. h. t.

REVERTER. Reversion. A formedon in reverter is a writ which was a proper remedy when the donee in tail or issue died without issue and a stranger abated; or they who were seised by force of the entail discontinued the same. Bac. Ab. Formedon, A 3.

REVIEW, practice. A second examination of a matter. For example, by the laws of Pennsylvania, the courts having jurisdiction of the subject may grant an order for a view of a proposed road; the viewers make a report, which when confirmed by the court would authorize the laying out of the same. After this, by statutory provision, the parties may apply for a review, or second examination; and the last viewers may make a different report. For the practice of reviews, in chancery, the reader is referred to *Bill of Review*, and the cases there cited.

REVIVAL, contracts. An agreement to renew the legal obligation of a just debt, after it has been barred by the act of limitation or lapse of time, is called its revival. Vide *Promise*.

REVIVAL, practice. The act by which a judgment, which has lain dormant or without any action upon it for a year and a day, is, at common law, again restored to its original force.

REVIVE, practice. When a judgment is more than a day and a year old, no execution can issue upon it at common law; but till it has been paid, or the presumption arises from lapse of time, that it has been satisfied, it may be revived and have all its original force, which was merely suspended. This may be done by a *scire facias*, or an action of debt on the judgment. Vide *Scire facias*; *Wakening*.

REVIVOR. The name of a bill in chancery used to renew an original bill which for some reason has become inoperative. Vide *Bill of Revivor*.

REVOCATION. The act by which a person having authority, calls back or annuls a power, gift, or benefit, which had been bestowed upon another. For example,

a testator may revoke his testament; a constituent may revoke his letter of attorney; a grantor may revoke a grant made by him, when he has reserved the power in the deed.

2. Revocations are expressed or implied. An express revocation of a will must be as formal as the will itself. 2 Dall. 289; 2 Yeates, R. 170. But this is not the rule in all the states. See 2 Conn. Rep. 67; 2 Nott & McCord, Rep. 485; 14 Mass. 208; 1 Harr. & McHenry, R. 409; Cam. & Norw. Rep. 174; 2 Marsh. Rep. 17.

3. Implied revocations take place, by marriage and birth of a child, by the English law. 4 Johns. Ch. R. 506, and the cases there cited by Chancellor Kent. 1 Wash. Rep. 140; 3 Call, Rep. 341; Cooper's Just. 497, and the cases there cited. In Pennsylvania, marriage or birth of a child, is a revocation as to them. 3 Binn. 498. A woman's will is revoked by her subsequent marriage, if she dies before her husband. Cruise, Dig. tit. 38, c. 6, s. 51.

4. An alienation of the estate by the deviser, has the same effect of revoking a will. 1 Roll. Ab. 615. See, generally, as to revoking wills, Lovelass on Wills, ch. 3, p. 177; Fonbl. Eq. c. 2, s. 1; Roberts on Wills, ch. 2, part 1.

5. Revocation of wills may be effected, 1. By cancellation or obliteration. 2. By a subsequent testamentary disposition. 3. By an express revocation contained in a will or codicil, or in any other distinct writing. 4. By the republication of a prior will; by presumptive or implied revocation. Williams on Wills, 67; 3 Lom. on Ex'rs, 59. Vide Domat, Loix Civ. liv. 3, t. 1, s. 5.

6. The powers and authority of an attorney or agent may be revoked or determined by the acts of the principal; by the acts of the attorney or agent; and by operation of law.

7.—1. By the acts of the principal, which may be express or implied. An express revocation is made by a direct and formal and public declaration, or by an informal writing, or by parol. An implied revocation takes place when such circumstances occur as manifest the intention of the principal to revoke the authority; such, for example, as the appointment of another agent or attorney to perform acts which are incompatible with the exercise of the power formerly given to another; but this presumption arises only when there is such incompatibility, for if the original agent has

a general authority, and the second only a special power, the revocation will only operate *pro tanto*. The performance by the principal himself of the act which he has authorized to be done by his attorney, is another example; as, if the authority be to collect a debt, and afterwards the principal receive it himself.

8.—2. The renunciation of the agency by the attorney will have the same effect to determine the authority.

9.—3. A revocation of an authority takes place by operation of law. This may be done in various ways: 1st. When the agency terminates by lapse of time; as, when it is created to endure for a year, it expires at the end of that period; or when a letter of attorney is given to transact the constituent's business during his absence, the power ceases on his return. Poth. du Mandat, n. 119; Poth. Ob. n. 500.

10.—2d. When a change of condition of the principal takes place, so that he is rendered incapable of performing the act himself, the power he has delegated to another to do it must cease. Liverm. Ag. 306; 8 Wheat. R. 174. If an unmarried woman give a power of attorney, and afterwards marry, the marriage does, ipso facto, operate as a revocation of the authority; 2 Kent, Com. 645, 3d edit. Story Bailm. § 206; Story, Ag. § 481; 5 East, R. 206; or, if the principal become insane, at least after the establishment of the insanity by an inquisition. 8 Wheat. R. 174, 201 to 204. When the principal becomes a bankrupt, his power of attorney, in relation to property or rights of which he was divested by the bankruptcy, is revoked by operation of law. 2 Kent, Com. 644, 3d edit.; 16 East, R. 382.

11.—3d. The death of the principal will also have the effect of a revocation of the authority. Co. Litt. 52; Paley, Ag. by Lloyd, 185; 2 Liverm. Ag. 301; Story, Ag. § 488; Story, Bailm. § 203; Bac. Ab. Authority, E; 2 Kent, Com. 454, 3d edit.; 3 Chit. Com. Law, 223.

12.—4th. When the condition of the agent or attorney has so changed as to render him incapable to perform his obligation towards the principal. When a married woman is prohibited by her husband from the exercise of an authority given to her, it thereby determines. When the agent becomes a bankrupt, his authority is so far revoked, that he cannot receive any money on account of his principal; 5 B. & Ald. 27; Story, Bailm. § 211; 2 Kent, Com.

645, 3d edit.; but for certain other purposes, the bankruptcy of the agent does not operate as a revocation. 3 Meriv. 322; Story, Ag. § 486. The insanity of the agent would render him unfit to act in the business of the agency, and would determine his authority.

13.—5th. The death of the agent of course put an end to the agency. Litt. § 66.

14.—6th. The extinction of the subject-matter of the agency, or of the principal's power over it, or the complete execution of the trust confided to the agent, will put an end to and determine the agency.

15. It must be remembered that an authority, coupled with an interest, cannot be revoked either by the acts of the principal, or by operation of law. 2 Mason's R. 244, 342; 8 Wheat. R. 170; 1 Pet. R. 1; 2 Esp. R. 565; 10 B. & Cr. 731; Story, Ag. § 477, 483.

16. It is true in general, a power ceases with the life of the person making it; but if the interest or estate passes with the power, and vests in the person by whom the power is exercised, such person acts in his own name. The estate being in him, passes from him by a conveyance in his own name. He is no longer a substitute acting in the name of another, but is the principal acting in his own name, in pursuance of powers which limit the estate. The legal reason which limits the power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. 8 Wheat. R. 174.

17. The revocation of the agent is a revocation of any substitute he may have appointed. Poth. Mandat, n. 112; 2 Liverm. Ag. 307; Story, Ag. § 469. But in some cases, as in the case of the master of a ship, his death does not revoke the power of the mate whom he had appointed; and in some cases of public appointments, on the death, or removal of the principal officer, the deputies appointed by him are, by express provisions in the laws, authorized to continue in the performance of their duties.

18. The time when the revocation takes effect must be considered, first, with regard to the agent, and secondly, as it affects third persons. 1. When the revocation can be lawfully made, it takes effect, as to the agent, from the moment it is communicated to him. 2. As to third persons, the revocation has no effect until it is made known

to them; if, therefore, an agent, knowing of the revocation of his authority, deal with a third person in the name of his late principal, when such person was ignorant of the revocation, both the agent and the principal will be bound by his acts. Story, Ag. § 470; 2 Liverm. Ag. 306; 2 Kent, Com. 644, 3d edit.; Paley, Ag. by Lloyd, 108, 570; Story, Bailm. § 208; 5 T. R. 215. A note or bill signed, accepted or indorsed by a clerk, after his discharge, who had been authorized to sign, indorse, or accept bills and notes for his principal while in his employ, will be binding upon the latter, unless notice has been given of his discharge and the revocation of his authority. 3 Chit. Com. Law, 197.

REVOCATUR. Recalled. This word is used when a judgment is annulled for an error in fact, the judgment is then said to be recalled, *revocatur*; and not *reversed*, which is the word used when a judgment is annulled for an error in law. Tidd's Pr. 1126.

REVOLT, crim. law. The act of congress of April 30, 1790, s. 8, 1 Story's L. U. S. 84, punishes with death any seaman who shall lay violent hands upon his commander, thereby to hinder or prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship. What is a revolt is not defined in the act of congress, nor by the common law; it was therefore contended, that it could not be deemed an offence for which any person could be punished. 1 Pet. R. 118.

2. In a case which occurred in the circuit court for the eastern district of Pennsylvania, the defendants were charged with an endeavour to make a revolt. The judges sent up the case to the supreme court upon a certificate of division of opinion of the judges, as to the definition of the word revolt. 4 W. C. C. R. 528. The opinion of the supreme court was delivered by Washington, J., and is in these words:—

"This case comes before the court upon a certificate of division of the opinion of the judges of the circuit court for the eastern district of Pennsylvania, upon the following point assigned by the defendants as a reason in arrest of judgment, viz. 'that the act of congress does not define the offence of endeavoring to make a revolt; and it is not competent to the court to give a judicial definition of an offence heretofore unknown.'

"This court is of opinion that although the act of congress does not define this offence, it is nevertheless, competent to the court to give a judicial definition of it. We think that the offence consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command; or against his will to take possession of the vessel by assuming the government and navigation of her; or by transferring their obedience from the lawful commander to some other person." 11 Wheat. R. 417. Vide 4 W. C. C. R. 528, 405; Mason's R. 147; 4 Mason, R. 105; 4 Wash. C. C. R. 548; 1 Pet. C. C. R. 213; 5 Mason, R. 464; 1 Sumn. 448; 3 Wash. C. C. R. 525; 1 Carr. & Kirw. 429.

3. According to Wolff, revolt and rebellion are nearly synonymous; he says it is the state of citizens who unjustly take up arms against the prince or government. Wolff, Dr. de la Nat. § 1232.

REWARD. An offer of recompense given by authority of law for the performance of some act for the public good; which, when the act has been performed, is to be paid; or it is the recompense actually paid.

2. A reward may be offered by the government, or by a private person. In criminal prosecutions, a person may be a competent witness although he expects, on conviction of the prisoner, to receive a reward. 1 Leach, 314, n; 9 Barn. & Cresw. 556; S. C. Eng. C. L. R. 441; 1 Leach, 134; 1 Hayw. Rep. 3; 1 Root, R. 249; Stark. Ev. pt. 4, p. 772, 3; Roscoe's Cr. Ev. 104; 1 Chit. Cr. Law, 881; Hawk. B. 2, c. 12, s. 21 to 38; 4 Bl. Com. 294; Burn's Just. Felony, iv. See 6 Humph. 113.

3. By the common law, informers, who are entitled under penal statutes to part of the penalty, are not in general competent witnesses. But when a statute can receive no execution, unless a party interested be a witness, then it seems proper to admit him, for the statute must not be rendered ineffectual for want of proof. Gilb. 114. In many acts of the legislature there is a provision that the informer shall be a witness, notwithstanding the reward. 1 Phil. Ev. 92, 99.

RHODE ISLAND. The name of one of the original states of the United States of America. This state was settled by emigrants from Massachusetts, who assumed

the government of themselves by a voluntary association, which was soon discovered to be insufficient for their protection. In 1643, a charter of incorporation of Providence Plantations was obtained; and in 1644, the two houses of parliament, during the forced absence of Charles the First, granted a charter for the incorporation of the towns of Providence, Newport and Portsmouth, for the absolute government of themselves, according to the laws of England. Soon after the restoration of Charles the Second, in July, 1663, the inhabitants obtained a new charter from the crown. Upon the accession of James, the inhabitants were accused of a violation of their charter; and a *quo warranto* was filed against them, when they resolved to surrender it. In 1686, their government was dissolved, and Sir Edward Andros assumed, by royal authority, the administration of the colony. The revolution of 1688 put an end to his power, and the colony immediately resumed its charter, the powers of which, with some interruptions, it continued to maintain and exercise down to the period of the American Revolution.

2. This charter remained as the fundamental law of the state until the first Tuesday of May, one thousand eight hundred and forty-three. A convention of the people assembled in November, 1842, and adopted a constitution which went into operation in May, 1843, as above mentioned.

3. By the third article of the constitution the powers of the government are distributed into three departments; the legislative, the executive, and the judicial.

4.—§ 1. The fourth article regulates the legislative power as follows, to wit:

Sect. 1. This constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

5.—Sect. 2. The legislative power, under this constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws. The style of their laws shall be, *It is enacted by the general assembly as follows.*

6.—Sect. 3. There shall be two sessions of the general assembly holden annually; one at Newport, on the first Tuesday of

May, for the purposes of election and other business; the other on the last Monday of October, which last session shall be holden at South Kingstown once in two years, and the intermediate years alternately at Bristol and East Greenwich; and an adjournment from the October session shall be holden annually at Providence.

7.—Sect. 4. No member of the general assembly shall take any fee, or be of counsel in any case pending before either house of the general assembly, under penalty of forfeiting his seat, upon proof thereof to the satisfaction of the house of which he is a member.

8.—Sect. 5. The person of every member of the general assembly shall be exempt from arrest and his estate from attachment, in any civil action, during the session of the general assembly, and two days before the commencement, and two days after the termination thereof; and all process served contrary hereto shall be void. For any speech in debate in either house, no member shall be questioned in any other place.

9.—Sect. 6. Each house shall be the judge of the elections and qualifications of its members; and a majority shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner, and under such penalties, as may be prescribed by such house or by law. The organization of the two houses may be regulated by law, subject to the limitations contained in this constitution.

10.—Sect. 7. Each house may determine its rules of proceeding, punish contempts, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member; but not a second time for the same cause.

11.—Sect. 8. Each house shall keep a journal of its proceedings. The yeas and nays of the members of either house, shall, at the desire of one-fifth of those present, be entered on the journal.

12.—Sect. 9. Neither house shall, during a session, without the consent of the other, adjourn for more than two days, nor to any other place than that in which they may be sitting.

13.—Sect. 10. The general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution.

14.—Sect. 11. The senators and repre-

representatives shall receive the sum of one dollar for every day of attendance, and eight cents per mile for travelling expenses in going to and returning from the general assembly. The general assembly shall regulate the compensation of the governor and all other officers, subject to the limitations contained in this constitution.

15.—Sect. 12. All lotteries shall hereafter be prohibited in this state, except those already authorized by the general assembly.

16.—Sect. 13. The general assembly shall have no power hereafter, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion, nor shall they in any case, without such consent, pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with this state by the government of the United States.

17.—Sect. 14. The assent of two-thirds of the members elected to each house of the general assembly shall be required to every bill appropriating the public money or property for local or private purposes.

18.—Sect. 15. The general assembly shall, from time to time, provide for making new valuations of property for the assessment of taxes, in such manner as they may deem best. A new estimate of such property shall be taken before the first direct state tax, after the adoption of this constitution, shall be assessed.

19.—Sect. 16. The general assembly may provide by law for the continuance in office of any officers of annual election or appointment, until other persons are qualified to take their places.

20.—Sect. 17. Hereafter when any bill shall be presented to either house of the general assembly, to create a corporation for any other than for religious, literary or charitable purposes, or for a military or fire company, it shall be continued until another election of members of the general assembly shall have taken place, and such public notice of the pendency thereof shall be given as may be required by law.

21.—Sect. 18. It shall be the duty of the two houses upon the request of either, to join in grand committee for the purpose of electing senators in congress, at such times and in such manner as may be prescribed by law for said elections.

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22. Having disposed of the rules which regulate both houses, a detailed statement of the powers of the house of representatives will here be given.

23.—1. The *house of representatives* is regulated by the fifth article as follows;

24.—Sect. 1. The house of representatives shall never exceed seventy-two members, and shall be constituted on the basis of population, always allowing one representative for a fraction, exceeding half the ratio; but each town or city shall always be entitled to at least one member; and no town or city shall have more than one-sixth of the whole number of members to which the house is hereby limited. The present ratio shall be one representative to every fifteen hundred and thirty inhabitants, and the general assembly may, after any new census taken by the authority of the United States or of this state, re-apportion the representation by altering the ratio; but no town or city shall be divided into districts for the choice of representatives.

25.—Sect. 2. The house of representatives shall have authority to elect its speaker, clerks and other officers. The senior member from the town of Newport, if any be present, shall preside in the organization of the house.

26.—2. The *senate* is the subject of the sixth article, as follows:

Sect. 1. The senate shall consist of the lieutenant-governor and of one senator from each town or city in the state.

27.—Sect. 2. The governor, and, in his absence the lieutenant-governor, shall preside in the senate and in grand committee. The presiding officer of the senate and grand committee shall have a right to vote in case of equal division, but not otherwise.

28.—Sect. 3. If, by reason of death, resignation, absence, or other cause, there be no governor or lieutenant governor present, to preside in the senate, the senate shall elect one of their own members to preside during such absence or vacancy; and until such election is made by the senate, the secretary of state shall preside.

29.—Sect. 4. The secretary of state shall, by virtue of his office, be secretary of the senate, unless otherwise provided by law; and the senate may elect such other officers as they may deem necessary.

30.—§ 2. The seventh article regulates the *executive power*. It provides,

Sect. 1. The chief executive power of this state shall be vested in a governor, who, together with a lieutenant governor, shall be annually elected by the people.

31.—Sect. 2. The governor shall take care that the laws be faithfully executed.

32.—Sect. 3. He shall be captain general and commander-in-chief of the military and naval force of this state, except when they shall be called into the service of the United States.

33.—Sect. 4. He shall have power to grant reprieves after conviction, in all cases except those of impeachment, until the end of the next session of the general assembly.

34.—Sect. 5. He may fill vacancies in office not otherwise provided for by this constitution, or by law, until the same shall be filled by the general assembly, or by the people.

35.—Sect. 6. In case of disagreement between the two houses of the general assembly, respecting the time or place of adjournment, certified to him by either, he may adjourn them to such time and place as he shall think proper; provided that the time of adjournment shall not be extended beyond the day of the next stated session.

36.—Sect. 7. He may, on extraordinary occasions, convene the general assembly at any town or city in this state, at any time not provided for by law; and in case of danger from the prevalence of epidemic or contagious disease, in the place in which the general assembly are by law to meet, or to which they may have been adjourned; or for other urgent reasons, he may, by proclamation, convene said assembly, at any other place within this state.

37.—Sect. 8. All commissions shall be in the name and by the authority of the state of Rhode Island and Providence Plantations; shall be sealed with the state seal, signed by the governor and attested by the secretary.

38.—Sect. 9. In case of vacancy in the office of governor, or of his inability to serve, impeachment, or absence from the state, the lieutenant governor shall fill the office of governor and exercise the powers and authority appertaining thereto, until a governor is qualified to act, or until the office is filled at the next annual election.

39.—Sect. 10. If the offices of governor and lieutenant governor be both vacant by reason of death, resignation, impeachment,

absence, or otherwise, the person entitled to preside over the senate for the time being, shall in like manner fill the office of governor during such absence or vacancy.

40.—Sect. 11. The compensation of the governor and lieutenant governor shall be established by law, and shall not be diminished during the term for which they are elected.

41.—Sect. 12. The duties and powers of the secretary, attorney general, and general treasurer, shall be the same under this constitution as are now established, or as from time to time may be prescribed by law.

42.—§ 3. The *judicial power* is regulated by the tenth article as follows:

Sect. 1. The judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may from time to time, ordain and establish.

43.—Sect. 2. The several courts shall have such jurisdiction as may from time to time be prescribed by law. Chancery powers may be conferred on the supreme court, but on no other court to any greater extent than is now provided by law.

44.—Sect. 3. The judges of the supreme court shall in all trials, instruct the jury in the law. They shall also give their written opinion upon any question of law whenever requested by the governor, or by either house of the general assembly.

45.—Sect. 4. The judges of the supreme court shall be elected by the two houses in grand committee. Each judge shall hold his office until his place be declared vacant by a resolution of the general assembly to that effect; which resolution shall be voted for by a majority of all the members elected to the house in which it may originate, and be concurred in by the same majority of the other house. Such resolution shall not be entertained at any other than the annual session for the election of public officers: and in default of the passage thereof at said session, the judge shall hold his place as herein provided. But a judge of any court shall be removed from office, if, upon impeachment, he shall be found guilty of any official misdemeanor.

46.—Sect. 5. In case of vacancy by death, resignation, removal from the state or from office, refusal or inability to serve, of any judge of the supreme court, the office may be filled by the grand committee,

until the next annual election, and the judge then elected shall hold his office as before provided. In cases of impeachment, or temporary absence or inability, the governor may appoint a person to discharge the duties of the office during the vacancy caused thereby.

47.—Sect. 6. The judges of the supreme court shall receive a compensation for their services, which shall not be diminished during their continuance in office.

48.—Sect. 7. The towns of New Shoreham and Jamestown may continue to elect their wardens as heretofore. The other towns and the city of Providence, may elect such number of justices of the peace resident therein, as they may deem proper. The jurisdiction of said justices and wardens shall be regulated by law. The justices shall be commissioned by the governor.

RHODIAN LAW. A code of marine laws established by the people of Rhodes, bears this name. Vide *Law Rhodian*.

RIAL OF PLATE and RIAL OF VELLON, comm. law. Denominations of money of Spain.

2. In the ad valorem duty upon goods, &c., the former are computed at ten cents, and the latter at five cents each. Act of March 2, 1799, s. 61, 1 Story's Laws U. S. 626. Vide *Foreign Coins*.

RIBAUD. A rogue; a vagrant. It is not used.

RIDER, practice, legislation. A schedule or small piece of paper or parchment, added to some part of the record; as, when, on the reading of a bill in the legislature, a new clause is added, this is tacked to the bill on a separate piece of paper, and is called a rider.

RIDING, Eng. law. An ascertained district, part of a county. This term has the same meaning in Yorkshire, which division has in Lincolnshire. 4 T. R. 459.

RIEN. This is a French word which signifies *nothing*. It has generally this meaning; as, *rien in arrears*; *rien passe per le fait*, nothing passes by the deed; *rien per descent*, nothing by descent; it sometimes signifies not, as *rien culpable*, not guilty. Doct. Plac. 435.

RIEN EN ARREARE, pleading. Nothing in arrear; nothing remaining due and unpaid.

2. The plea in an action of debt for rent, may be *rien en arrears*. This is a good general issue. Cowp. 588; Bac. Ab. Pleas, 11; 2 Saund. 297, n. 1; 2 Lord Raym.

1503; 2 Chit. Pl. 486; 4 Bouv. Inst. n. 8576.

RIENS PASSA PAR LE FAIT. The name of a plea; it signifies that nothing passed by the deed; for example, when a deed is acknowledged in court, a man cannot plead *non est factum*, because the act was done in court, which cannot be denied; but when the deed has been acknowledged in a court not having jurisdiction, the party may avoid the effect or operation of the deed by pleading *riens passa par le fait*, for this plea does not impeach the court where it was acknowledged. Bac. Ab. Evidence F; 1 Gilb. Ev. by Lofft, 326.

RIGHT. This word is used in various senses: 1. Sometimes it signifies a law, as when we say that natural right requires us to keep our promises, or that it commands restitution, or that it forbids murder. In our language it is seldom used in this sense. 2. It sometimes means that quality in our actions by which they are denominated just ones. This is usually denominated rectitude. 3. It is that quality in a person by which he can do certain actions, or possess certain things which belong to him by virtue of some title. In this sense, we use it when we say that a man has a right to his estate or a right to defend himself. Ruth. Inst. c. 2, § 1, 2, 3; Merlin, Répert. de Jurisp. mot Droit. See Wood's Inst. 119.

2. In this latter sense alone, will this word be here considered. Right is the correlative of duty, for, wherever one has a right due to him, some other must owe him a duty. 1 Toull. n. 96.

3. Rights are perfect and imperfect. When the things which we have a right to possess, or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one. If a man demand his property, which is withheld from him, the right that supports his demand is a perfect one; because the thing demanded is, or may be fixed and determinate.

4. But if a poor man ask relief from those from whom he has reason to expect it, the right, which supports his petition, is an imperfect one; because the relief which he expects, is a vague indeterminate thing. Ruth. Inst. c. 2, § 4; Grot. lib. 1, c. 1, § 4.

5. Rights are also absolute and qualified. A man has an absolute right to recover pro

party which belongs to him; an agent has a qualified right to recover such property, when it had been entrusted to his care, and which has been unlawfully taken out of his possession. Vide *Trover*.

6. Rights might with propriety be also divided into natural and civil rights; but as all the rights which man has received from nature, have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.

7. Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses.

8. Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights, which is not the case with political rights; for an alien, for example, has no political, although in the full enjoyment of his civil rights.

9. These latter rights are divided into absolute and relative. The absolute rights of mankind may be reduced to three principal or primary articles: the right of personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; the right of personal liberty, which consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without any restraint, unless by due course of law; the right of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. 1 Bl. 124 to 139.

10. The relative rights are public or private: the first are those which subsist between the people and the government, as the right of protection on the part of the people, and the right of allegiance which is due by the people to the government; the second are the reciprocal rights of husband

and wife, parent and child, guardian and ward, and master and servant.

11. Rights are also divided into legal and equitable. The former are those where the party has the legal title to a thing, and in that case, his remedy for an infringement of it, is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not in general, in that of the *cestui que trust*. 1 East, 497; 8 T. R. 332; 1 Saund. 158, n. 1; 2 Bing. 20. The latter, or equitable rights, are those which may be enforced in a court of equity by the *cestui que trust*. See, generally, Bouv. Inst. Index, h. t.; *Remedy*.

RIGHT OF DISCUSSION, *Scottish law*. The right which the cautioner (surety,) has to insist that the creditor shall do his best to compel the performance of the contract by the principal debtor, before he shall be called upon. 1 Bell's Com. 347, 5th ed. Vide 8 Serg. & Rawle, 116; 15 Serg. & Rawle, 29, 30; and the articles *Surety*; *Suretyship*.

RIGHT OF DIVISION, *Scottish law*. The right which each of several cautioners (sureties,) has to refuse to answer for more than his own share of the debt. To entitle the cautioner to this right, the other cautioners must be solvent, and there must be no words in the bond to exclude it. 1 Bell's Com. 347, 5th ed.

RIGHT OF HABITATION. By this term, in Louisiana, is understood the right of dwelling gratuitously in a house, the property of another. Civ. Code, art. 623; 3 Toull. ch. 2, p. 325; 14 Toull. n. 279, p. 330; Poth. h. t., n. 22-25.

RIGHT OF RELIEF, *Scottish law*. The right which the cautioner (surety) has against the principal debtor, when he has been forced to pay his debt. 1 Bell's Com. 347, 5th ed.

RIGHT PATENT. The name of an ancient writ, which Fitzherbert says, "ought to be brought of lands and tenements, and not of an advowson, or of common, and lieth only of an estate of fee simple, and not for him who has a lesser estate, as tenant in tail, tenant in frank marriage, or tenant for life." F. N. B. 1.

RIGHT, WRIT OF. Breve de recto. Vide *Writ of right*.

RING DROPPING, *crim. law*. This phrase is applied in England to a trick frequently practised in committing larcenies.

It is difficult to define it; it will be sufficiently exemplified by the following cases. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich brilliant diamond ring." They offered to leave the ring with the prosecutor, if he would deposit some money and his watch as a security. The prosecutor having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to a larceny. 1 Leach, 238; 2 East, P. C. 678. In another case under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him. This was also held to be larceny. 1 Leach, 314; 2 East, P. C. 679. In these cases the prosecutor had no intention of parting with the property in the money or goods stolen. It was taken, in the first case, while the transaction was proceeding, without his knowledge; and, in the last, under the promise that it should be returned. Vide 2 Leach, 640.

RINGING THE CHANGE, *crim. law*. A trick practised by a criminal, by which, on receiving a good piece of money in payment of an article, he pretends it is not good, and, changing it, returns to the buyer a counterfeit one, as in the following case: The prosecutor having bargained with the prisoner, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness, and returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling, which he also affected to bite, and then returned another shilling, saying it was a bad one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being, in every respect, bad. 2 Leach, 64.

2. This was held to be an uttering of false money. 1 Russ. on Cr. 114.

RIOT, *crim. law*. At common law a riot is a tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent, mutually to assist each other against any who shall oppose them, in the execution of some

enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.

2. In this case there must be proved, first, an unlawful assembling; for if a number of persons lawfully met together, as, for example, at a fire, in a theatre or a church, should suddenly quarrel and fight, the offence is an affray and not a riot, because there was no unlawful assembling; but if three or more being so assembled, on a dispute occurring, they form into parties with promises of mutual assistance, which promises may be express, or implied from the circumstances, then the offence will no longer be an affray, but a riot; the unlawful combination will amount to an assembling within the meaning of the law. In this manner any lawful assembly may be converted into a riot. Any one who joins the rioters after they have actually commenced, is equally guilty as if he had joined them while assembling.

3. Secondly, proof must be made of actual violence and force on the part of the rioters, or of such circumstances as have an apparent tendency to force and violence, and calculated to strike terror into the public mind. The definition requires that the offenders should assemble of their own authority, in order to create a riot; if, therefore, the parties act under the authority of the law, they may use any necessary force to enforce their mandate, without committing this offence.

4. Thirdly, evidence must be given that the defendants acted in the riot, and were participants in the disturbance. Vide 1 Russ. on Cr. 247; Vin. Ab. h. t.; Hawk. c. 65, s. 1, 8, 9; 3 Inst. 176; 4 Bl. Com. 146; Com. Dig. h. t.; Chit. Cr. Law, Index, h. t.; Roscoe, Cr. Ev. h. t.

RIOTOUSLY, *pleadings*. A technical word properly used in an indictment for a riot, and *ex vi termini*, implies violence. 2 Sess. Cas. 13; 2 Str. 834; 2 Chit. Cr. Law, 489.

RIPA. The bank of a river, or the place beyond which the waters do not in their natural course overflow.

2. An extraordinary overflow does not change the banks of the river. Poth. Pand. lib. 50, h. t. See *Banks of rivers; Riparian proprietors; Rivers*.

RIPARIAN PROPRIETORS, *estates*. This term, used by the civilians, has been

adopted by the common lawyers. 4 Mason's Rep. 397. Those who own the land bounding upon a water course, are so called.

2. Each riparian proprietor owns that portion of the bed of the river (not navigable) which is adjoining his land *usque ad filum aquæ*; or, in other words, to the thread or central line of the stream. Harg. Tr. 5; Holt's R. 499; 3 Dane's Dig. 4; 7 Mass. R. 496; 5 Wend. R. 423; 3 Caines, 319; 2 Conn. 482; 20 Johns. R. 91; Angell, Water Courses, 3 to 10; 9 Porter, R. 577; Kames, Eq. part 1, c. 1, s. 1; 26 Wend. R. 404; 11 Stanton, 138; 4 Hill, 369. The proprietor of land adjoining a navigable river has an exclusive right to the soil, between high and low water marks, for the purpose of erecting wharves or buildings thereon. 7 Conn. 186. But see 1 Pennsylv. 462. Vide *River*.

RIPUARIAN LAW. A code of laws of the Franks, who occupied the country upon the Rhine, the Meuse and Scheldt, who were collectively known by the name Ripuarians, and their laws as Ripuarian law.

RISK. A danger, a peril to which a thing is exposed. The subject will be divided by considering, 1. Risks with regard to insurances. 2. Risks in the contracts of sale, barter, &c.

2.—§ 1. In the contract of insurance, the insurer takes upon him the risks to which the subject of the insurance is exposed, and agrees to indemnify the insured when a loss occurs. This is equally the case in marine and terrestrial insurance. But as the rules which govern these several contracts are not the same, the subject of marine risks will be considered, and, afterwards, of terrestrial risks.

3.—1st. Marine risks are perils which are incident to a sea voyage; 1 Marsh. Ins. 215; or those fortuitous events which may happen in the course of the voyage. Poth. Contr. d'assur. n. 49; Pardes. Dr. Com. n. 770. It will be proper to consider, 1. Their nature. 2. Their duration.

4.—1. The *nature* of the risks usually insured against. These risks may be occasioned by storms, shipwreck, jetsom, prize, pillage, fire, war, reprisals, detention by foreign governments, contribution to losses experienced for the common benefit, or for expenses which would not have taken place if it had not been for such events. But the insurer may by special contract limit his responsibility for these risks. He may in-

sure against *all* risks, or only against *enumerated* risks; for the benefit of *particular persons*, or *for whom it may concern*. 2 Wash. C. C. R. 346; 1 John. Cas. 337; 2 John. Cas. 480; 1 Pet. 151; 2 Mass. 365; 8 Mass. 308. The law itself has made some exceptions founded on public policy, which require that in certain cases men shall not be permitted to protect themselves against some particular perils by insurance; among these are, first, that no man can insure any loss or damage proceeding directly from his own fault. 1 John. Cas. 337; Poth. h. t. n. 65; Pard. h. t. n. 771; Marsh. Ins. 215. Secondly, nor can he insure risks or perils of the sea upon a trade forbidden by the laws. Thirdly, the risks excluded by the usual memorandum (q. v.) contained in the policy. Marsh. Ins. 221.

5. As the insurance is upon maritime risks, the accidents must have happened on the sea, unless the agreement include other risks. The loss by accidents which might happen on land in the course of the voyage, even when the unloading may have been authorized by the policy, or is required by local regulations, as where they are necessary for sanitary measures, is not borne by the insurer. Pard. Dr. Com. n. 770.

6.—2. As to the *duration* of the risk. The commencement and end of the risk depend upon the words of the policy. The insurer may take and modify what risks he pleases. The policy may be on a voyage *out*, or a voyage *in*, or it may be for *part* of the route, or for a *limited time*, or from *port to port*. See 3 Kent, Com. 254; Pard. Dr. Com. n. 775; Marsh. 246; 1 Binn. 592. The duration of the risk on goods is considered in Marsh. Ins. 247 a; on ships, p. 280; on freight, p. 278, and 12 Wheat. 383.

7.—2d. In insurances against fire, the risks and losses insured against, are "all losses or damages by fire;" but, as in cases of marine insurances, this may be limited as to the things insured, or as to the cause or occasion of the accident, and many policies exclude fires caused by a mob or the enemies of the commonwealth. The duration of the policy is limited by its own provisions.

8.—3d. In insurances on lives, the risks are the death of the party from whatever cause, but in general the following risks are excepted, namely: 1. Death abroad or in a district excluded by the terms of the policy. 2. Entering into the naval or military service without the consent of the insurer. 3. Death by suicide. 4. Death by

duelling. 5. Death by the hands of justice. See *Insurance* on lives. The duration of the risks is limited by the terms of the policy.

9.—§ 2. As a general rule, whenever the sale has been completed, the risk of loss of the things sold is upon the buyer; but until it is complete, and while something remains to be done by either party, in relation to it, the risk is on the seller; as, if the goods are to be weighed or measured. See *Sale*.

10. In sales, the risks to which property is exposed and the loss which may occur, before the contract is fully complete, must be borne by him in whom the title resides; when the bargain, therefore, is made and rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attaches to the purchaser. 2 Kent, Com. 892.

11. In Louisiana, as soon as the contract of sale is completed, the thing sold is at the risk of the buyer, but with the following modifications: Until the thing sold is delivered to the buyer, the seller is obliged to guard it as a faithful administrator, and, if, through his want of care, the thing is destroyed, or its value diminished, the seller is responsible for the loss. He is released from this degree of care, when the buyer delays obtaining the possession; but he is still liable for any injury which the thing sold may sustain through gross neglect on his part. If it is the seller who delays to deliver the thing, and it be destroyed, even by a fortuitous event, it is he who sustains the loss, unless it appears that the fortuitous event would equally have occasioned the destruction of the thing in the buyer's possession, after delivery. Art. 2442–2445. For the rules of the civil law on this subject, see Inst. 2, 1, 41; Poth. Contr. de Vente, 4eme partie, n. 308, et seq.

RIVER. A natural collection of waters, arising from springs or fountains, which flow in a bed or canal of considerable width and length, towards the sea.

2. Rivers may be considered as public or private.

3. Public rivers are those in which the public have an interest.

4. They are either navigable, which, technically understood, signifies such rivers in which the tide flows; or not navigable. The soil or bed of such a navigable river,

understood in this sense, belongs not to the riparian proprietor, but to the public. 3 Caines' Rep. 307; 10 John. R. 236; 17 John. R. 151; 20 John. R. 90; 5 Wend. R. 423; 6 Cowen, R. 518; 14 Serg. & Rawle, 9; 1 Rand. Rep. 417; 3 Rand. R. 33; 3 Greenl. R. 269; 2 Conn. R. 481; 5 Pick. 199.

5. Public rivers, not navigable, are those which belong to the people in general, as public highways. The soil of these rivers belongs generally, to the riparian owner, but the public have the use of the stream, and the authors of nuisances and impediments over such a stream are indictable. Ang. on Water Courses, 202; Davies' Rep. 152; Callis on Sewers, 78; 4 Burr. 2162.

6. By the ordinance of 1787, art. 4, relating to the north-western territory, it is provided that the navigable waters, leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free. 3 Story, L. U. S. 2077.

7. A private river, is one so naturally obstructed, that there is no passage for boats; for if it be capable of being so navigated, the public may use its waters. 1 M'Cord's Rep. 580. The soil in general belongs to the riparian proprietors. (q. v.) A river, then, may be considered, 1st. As private, in the case of shallow and obstructed streams. 2d. As private property, but subject to public use, when it can be navigated; and, 3d. As public, both with regard to its use and property. Some rivers possess all these qualities. The Hudson is mentioned as an instance; in one part it is entirely private property; in another the public have the use of it; and it is public property from the mouth as high up as the tide flows. Ang. Wat. Co. 205, 6.

8. In Pennsylvania, it has been held that the great rivers of that state, as the Susquehanna, belong to the public, and that the riparian proprietor does not own the bed or canal. 2 Binn. R. 75; 14 Serg. & Rawle, 71. Vide, generally, Civ. Code of Lo. 444; Bac. Ab. Prerogatives, B 3; 7 Com. Dig. 291; 1 Bro. Civ. Law, 170; Merl. Répert, h. t.; Jacobsen's Sea Laws, 417; 2 Hill. Abr. c. 13; 2 Fairf. R. 278; 3 Ohio Rep. 496; 6 Mass. R. 435; 15 John. R. 447; 1 Pet. C. C. Rep. 64; 1 Paige's Rep. 448; 3 Dane's R. 4; 7 Mass. Rep. 496; 17 Mass. Rep. 289; 5 Greenl. R. 69; 10 Wend. R. 260; Kames, Eq. 38; 6 Watts & Serg. 101. As to the boundaries

of rivers, see *Metc. & Perk. Dig. Boundaries*, IV.; as to the grant of a river, see 5 Cowen, 216; *Co. Litt.* 4 b; *Com. Dig. Grant*, E 5.

RIX DOLLAR. The name of a coin. The rix dollar of Bremen, is deemed as money of account, at the custom-house, to be of the value of seventy-eight and three quarters cents. *Act of March 3, 1843.* The rix dollar is computed at one hundred cents. *Act of March 2, 1799, s. 61. Vide Foreign coins.*

RIXA, civil law. A dispute; a quarrel. *Dig.* 48, 8, 17.

RIXATRIX. A common scold. (*q. v.*)

ROAD. A passage through the country for the use of the people. 3 Yeates, 421.

2. Roads are public or private. Public roads are laid out by public authority, or dedicated by individuals to public use. The public have the use of such roads, but the owner of the land over which they are made and the owners of land bounded on the highway, have, *prima facie*, a fee in such highway, *ad medium filum viae*, subject to the easement in favor of the public. 1 Conn. 193; 11 Conn. 60; 2 John. 357; 15 John. 447. But where the boundary excludes the highway, it is, of course, excluded. 11 Pick. 193. See 18 Mass. 259. The proprietor of the soil, is therefore entitled to all the fruits which grow by its side; 16 Mass. 366, 7; and to all the mineral wealth it contains. 1 Rolle, 392, l. 5; 4 Day, R. 328; 1 Conn. Rep. 103; 6 Mass. R. 454; 4 Mass. R. 427; 15 Johns. Rep. 447, 533; 2 Johns. R. 357; *Com. Dig. Chimin*, A 2; 6 Pet. 498; 1 Sumn. 21; 10 Pet. 25; 6 Pick. 57; 6 Mass. 454; 12 Wend. 98.

3. There are public roads, such as turn-pikes and railroads, which are constructed by public authority, or by corporations. These are kept in good order by the respective companies to which they belong, and persons travelling on them, with animals and vehicles, are required to pay toll. In general these companies have only a right of passage over the land, which remains the property, subject to the easement, of the owner at the time the road was made, or of his heirs or assigns.

4. Private roads are such as are used for private individuals only, and are not wanted for the public generally. Sometimes roads of this kind are wanted for the accommodation of land otherwise enclosed and without access to public roads. The soil

of such roads belongs to the owner of the land over which they are made.

5. Public roads are kept in repair at the public expense, and private roads by those who use them. *Vide Domain; Way.* 13 Mass. 256; 1 Sumn. Rep. 21; 2 Hill. Ab. c. 7; 1 Pick. R. 122; 2 Mass. R. 127; 6 Mass. R. 454; 4 Mass. R. 427; 15 Mass. Rep. 33; 8 Rawle, R. 495; 1 N. H. Rep. 16; 1 McCord, R. 67; 1 Conn. R. 103; 2 John. R. 357; 1 John. Rep. 447; 15 John. R. 483; 4 Day, Rep. 330; 2 Bailey, Rep. 271; 1 Burr. 133; 7 B. & Cr. 304; 11 Price, R. 736; 7 Taunt. R. 39; *Str.* 1004; 1 Shepl. R. 250; 5 Conn. Rep. 528; 8 Pick. R. 473; Crabb, R. P. §§ 102-104.

ROAD, mar. law. A road is defined by Lord Hale to be an open passage of the sea, which, from the situation of the adjacent land, and its own depth and wideness, affords a secure place for the common riding and anchoring of vessels. *Hale de Port. Mar. p. 2, c. 2.* This word, however, does not appear to have a very definite meaning. 2 Chit. Com. Law, 4, 5.

ROARING. A disease among horses occasioned by the circumstance of the neck of the windpipe being too narrow for accelerated respiration; the disorder is frequently produced by sore throat or other topical inflammation.

2. A horse affected with this malady is rendered less serviceable, and he is therefore unsound. 2 Stark. R. 81; S. C. 3 Engl. Com. Law Rep. 255; 2 Camp. R. 523.

ROBBER. One who commits a robbery. One who feloniously and forcibly takes goods or money to any value from the person of another by violence or putting him in fear.

ROBBERY, crimes. The felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear. 4 Bl. Com. 243; 1 Bald. 102.

2. By "taking from the person" is meant not only the immediate taking from his person, but also from his presence when it is done with violence and against his consent. 1 Hale, P. C. 533; 2 Russ. Crimes, 61. The taking must be by violence or putting the owner in fear, but both these circumstances need not concur, for if a man should be knocked down and then robbed while he is insensible, the offence is still a robbery. 4 Binn. R. 379. And if the party be put in fear by threats and then robbed, it is not necessary there should be any greater violence.

3. This offence differs from a larceny from the person in this, that in the latter, there is no violence, while in the former the crime is incomplete without an actual or constructive force. *Id.* Vide 2 Swift's Dig. 298. Prin. Pen. Law, ch. 22, § 4, p. 285; and *Carrying away; Invito Domino; Larceny; Taking.*

ROD. A measure sixteen feet and a half long; a perch.

ROGATORY, LETTERS. A kind of commission from a judge authorizing and requesting a judge of another jurisdiction to examine a witness. Vide *Letters Rogatory.*

ROGUE. A French word, which in that language signifies proud, arrogant. In some of the ancient English statutes it means an idle, sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants. Although the word rogue is a word of reproach, yet to charge one as a rogue is not actionable. 5 Binn. 219. See 2 Dev. 162; Hardin, 529.

ROLE D'EQUIPAGE. The list of a ship's crew; the muster roll.

ROLL. A schedule of parchment which may be turned up with the hand in the form of a pipe or tube. Jacob, L. D. h. t.

2. In early times, before paper came in common use, parchment was the substance employed for making records, and, as the art of bookbinding was but little used, economy suggested as the most convenient mode of adding sheet to sheet, as were found requisite, and they were tacked together in such manner that the whole length might be wound up together in the form of spiral rolls.

3. Figuratively it signifies the records of a court or office. In Pennsylvania the master of the rolls was an officer in whose office were recorded the acts of the legislature. 1 Smith's Laws, 46.

ROOD OF LAND. The fourth part of an acre.

ROOT. That part of a tree or plant under ground from which it draws most of its nourishment from the earth.

2. When the roots of a tree planted in one man's land extend into that of another, this circumstance does not give the latter any right to the tree, though such is the doctrine of the civil law; Dig. 41, 1, 7, 13; but such person has a right to cut off the roots up to his line. Rolle's R. 394, vide *Tree.*

3. In a figurative sense, the term *root*

is used to signify the person from whom one or more others are descended. Vide *Descent; Per stirpes.*

ROSTER. A list of persons who are in their turn to perform certain duties, required of them by law. Tyltor on Courts Mart. 93.

ROUBLE. The name of a coin. The rouble of Russia, as money of account, is deemed and taken at the custom-house, to be of the value of seventy-five cents. Act March 3, 1848.

ROUT, *crim. law.* A disturbance of the peace by persons assembled together with an intention to do a thing, which, if executed, would have made them rioters, and actually making a motion towards the execution of their purpose.

2. It generally agrees in all particulars with a riot, except only in this, that it may be a complete offence without the execution of the intended enterprise. Hawk. c. 65, s. 14; 1 Russ. on Cr. 253; 4 Bl. Com. 140; Vin. Abr. Riots, &c., A 2; Com. Dig. Forcible Entry, D 9.

ROUTOUSLY, *pleadings.* A technical word properly used in indictments for a rout as descriptive of the offence. 2 Salk. 593.

ROYAL HONORS. In diplomatic language by this term is understood the rights enjoyed by every empire or kingdom in Europe, by the pope, the grand duchies of Germany, and the Germanic and Swiss confederations, to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other states public ministers of the first rank, as ambassadors, together with other distinctive titles and ceremonies. Vattel, Law of Nat. B. 2, c. 3, § 38; Wheat. Intern. Law, pt. 2, c. 3, § 2.

RUBRIC, *civil law.* The title or inscription of any law or statute, because the copyists formerly drew and painted the title of laws and statutes *rubro colore*, in red letters. Ayl. Pand. B. 1, t. 8; Dict. de Juris. h. t.

RUDENESS, *crim. law.* An impolite action; contrary to the usual rules observed in society, committed by one person against another.

2. This is a relative term which it is difficult to define: those acts which one friend might do to another, could not be justified by persons altogether unacquainted; persons moving in polished society could not be permitted to do to each other, what

boatmen, hostlers, and such persons might perhaps justify. 2 Hagg. Eccl. R. 73. An act done by a gentleman towards a lady might be considered rudeness, which, if done by one gentleman to another might not be looked upon in that light. Russ. & Ry. 130.

3. A person who touches another with rudeness is guilty of a battery. (q. v.)

RULE. This is a metaphorical expression borrowed from mechanics. The rule, in its proper and natural sense, is an instrument by means of which may be drawn, from one point to another, the shortest possible line, which is called a straight line.

2. The rule is a means of comparison in the arts to judge whether the line be straight, as it serves in jurisprudence, to judge whether an action be just or unjust. It is just or right, when it agrees with the rule, which is the law. It is unjust and wrong, when it deviates from it. It is the same with our will or our intention.

RULE OF LAW. Rules of law are general maxims, formed by the courts, who having observed what is common to many particular cases, announce this conformity by a maxim, which is called a rule; because in doubtful and unforeseen cases, it is a rule for their decision; it embraces particular cases within general principles. Toull. Tit. prel. n. 17; 1 Bl. Com. 44; Domat, liv. prel. t. 1, s. 1; Ram on Judgm. 30; 3 Barn. & Adol. 34; 2 Russ. R. 216, 580, 581; 4 Russ. R. 305; 10 Price's R. 218, 219, 228; 1 Barn. & Cr. 86; 7 Bing. R. 280; 1 Ld. Raym. 728; 5 T. R. 5; 4 M. & S. 348. See *Marim*.

RULE OF COURT. An order made by a court having competent jurisdiction.

2. Rules of court are either general or special; the former are the laws by which the practice of the court is governed; the latter are special orders made in particular cases.

3. Disobedience to these is punished by giving judgment against the disobedient party, or by attachment for contempt.

RULE TO SHOW CAUSE. An order made by the court, in a particular case, upon motion of one of the parties calling upon the other to appear at a particular time before the court, to show cause, if any he have, why a certain thing should not be done.

2. This rule is granted generally upon the oath or affirmation of the applicant; but upon the hearing, the evidence of competent witnesses must be given to sup-

port the rule, and the affidavit of the applicant is insufficient.

RULE OF THE WAR, 1756, comm. law, war. A rule relating to neutrals was the first time practically established in 1756, and universally promulgated, that "neutrals are not to carry on in times of war, a trade which was interdicted to them in times of peace." Chit. Law of Nat. 166; 2 Rob. R. 186; 4 Rob. App.; Reeve on Shipp. 271; 1 Kent, Com. 82; Mann. Law Nat. 196 to 202.

RULE, TERM, English practice. A term rule is in the nature of a day rule, by which a prisoner is enabled by the terms of one rule, instead of a daily rule, to quit the prison or its rules for the purpose of transacting his business. It is obtained in the same manner as a day rule. See *Rules*.

TO RULE. This has several meanings: 1. To determine or decide; as, the court rule the point in favor of the plaintiff. 2. To order by rule; as rule to plead.

RULES, English law. The rules of the King's Bench and Fleet are certain limits without the actual walls of the prisons, where the prisoner, on proper security previously given to the marshal of the king's bench, or warden of the fleet, may reside; those limits are considered, for all legal and practical purposes, as merely a further extension of the prison walls.

2. The rules or permission to reside without the prison, may be obtained by any person not committed criminally; 2 Str. R. 845; nor for contempt; Id. 817; by satisfying the marshal or warden of the security with which he may grant such permission.

RULES OF PRACTICE. Certain orders made by the courts for the purpose of regulating the practice of members of the bar and others.

2. Every court of record has an inherent power to make rules for the transaction of its business; which rules they may from time to time change, alter, rescind or repeal. While they are in force they must be applied to all cases which fall within them; they can use no discretion, unless such discretion is authorized by the rules themselves. Rules of court cannot, of course, contravene the constitution or the law of the land. 3 Pick. R. 512; 2 Har. & John. 79; 1 Pet. S. C. R. 604; 3 Binn. 227, 417; 3 S. & R. 258; 8 S. & R. 336; 2 Misso. R. 98; 11 S. & R. 131; 5 Pick. R. 187.

RUMOR. A general public report of

certain things, without any certainty as to their truth.

2. In general, rumor cannot be received in evidence, but when the question is whether such rumor existed, and not its truth or falsehood, then evidence of it may be given.

RUNCINUS. A nag. 1 Tho. Co. Litt. 471.

RUNNING DAYS. In settling the lay days, (q. v.) or the days of demurrage, (q. v.) the contract sometimes specifies "running days;" by this expression is, in general, understood, that the days shall be reckoned like the days in a bill of exchange. 1 Bell's Comm. 577, 5th ed.

RUNNING OF THE STATUTE OF LIMITATIONS. A metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing. 1 Bouv. Inst. n. 861.

RUNNING WITH THE LAND. A technical expression applied to covenants real, which affect the land; and if a lessee covenants that he and his assigns will repair the house demised, or pay a ground-rent, and the lessee grants over the term, and the assignee does not repair the house or pay the ground-rent, an action lies against the assignee at common law, because this covenant runs with the land. Bro. Covenant, 32; Rolle's Ab. 522; Bac. Ab. Covenant, E 4.

2. The same principle which regulates the annexation of incorporeal to corporeal property, determines what covenants may be annexed to a tenure. Those alone which tend directly, not merely through the intervention of collateral causes, to improve the estate, give stability to the tenant's title, assure him from a defective one, or add to the lord's means on the one hand, the tenant's on the other, of enforcing the stipulations between them, are of this sort. Cro. Eliz. 617; Cro. Jac. 125; 2 H. Bl. 133; T. Jones, 144; Cro. Car. 137, 503.

3. Covenants running with the land pass with the tenure, though not made with assigns. The parties to them are not A and B, but the tenant and the landlord in those characters. When the landlord assigns the reversion, the assignee becomes lord in his room, fills the precise situation

and character the assignor was clothed with, and is therefore entitled to the privileges annexed to that character. Whether the tenant is sued by the landlord or his assigns, he is sued by the same person, namely, his lord. The same argument, changing its terms, applies to the tenant's assignee. 5 Co. 24; Cro. Eliz. 552; 3 Mod. 538; 10 Mod. 152; 12 Mod. 371.

4. To make a covenant run with the land, it is not requisite that the covenantor should be possessed of any estate; he may be an entire stranger to the land, but the covenantee must have some transferable interest in it, to which the covenant can attach itself, for otherwise the covenant is merely personal. Co. Litt. 385 a; 3 T. R. 393; 2 Sc. 630; 2 Bing. N. S. 411. And to make the assignee liable, he must take the estate the covenantee had in the land, and no other, for when he takes another and a different estate in the same land, he cannot sue upon the covenants. 6 East, 289. Vide *Breach; Covenant*.

5. A covenant running with the land passes to the heir at law, on the death of the ancestor, whether the heir be named in such covenant or not. 2 Lev. 92; 2 Saund. 367 a. Vide *Covenant*.

RUPEE, comm. law. A denomination of money in Bengal. In the computation of ad valorem duties, it is valued at fifty-five and one half cents. Act of March 2, 1799, s. 61; 1 Story's L. U. S. 627. Vide *Foreign coins*.

2. The rupee of British India, as money of account, at the custom-house, shall be deemed and taken to be of the value of forty-four and one half cents. Act of March 3, 1848.

RURAL. That which relates to the country, as rural servitudes. See *Urban*.

RUSE DE GUERRE. Literally a trick in war; a stratagem. It is said to be lawful among belligerents, provided it does not involve treachery and falsehood. Grot. Droit de la Guerre, liv. 3, c. 1, § 9.

ROUTA, civ. law. The name given to those things which are extracted or taken from land, as sand, chalk, coal, and such other things. Poth. Pand. liv. 50, h. t.

S.

SABBATH. The same as Sunday. (q. v.)

SABINIANS. A sect of lawyers, whose first chief was Atteius Capito, and the second, Cælius Sabinus, from whom they derived their name. Clef des Lois Rom. h. t.

SACRAMENTUM. An oath; as, *qui dicunt supra sacramentum suum.*

SACQUIER, maritime law. The name of an ancient officer, whose business "was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise." Laws of Oleron, art. 11, published in an English translation in an Appendix to 1 Pet. Adm. R. XXV. See *Arrameur; Steve-dore.*

SACRILEGE. The act of stealing from the temples or churches dedicated to the worship of God, articles consecrated to divine uses. Pen. Code of China, B. 1, s. 2, § 6; Ayl. Par. 476.

SÆVETIA. Cruelty. (q. v.) It is required in order to constitute *sævetia* that there should exist such a degree of cruelty as to endanger the party's suffering bodily hurt. 1 Hagg. Cons. R. 35; 2 Mass. 150; 3 Mass. 321; 4 Mass. 587.

SAFE-CONDUCT, comm. law, war. A passport or permission from a neutral state to persons who are thus authorized to go and return in safety, and, sometimes, to carry away certain things in safety. According to common usage, the term *passport* is employed on ordinary occasions, for the permission given to persons when there is no reason why they should not go where they please: and *safe-conduct* is the name given to the instrument which authorizes certain persons, as enemies, to go into places where they could not go without danger, unless thus authorized by the government.

2. A safe-conduct is also the name of an instrument given to the captain or master of a ship to proceed on a particular voyage: it usually contains his name and residence, the name, description and destination of the ship, with such other matters as the practice of the place requires. This

document is indispensably necessary for the safety of every neutral ship.

3. The act of congress of April 30th, 1790, s. 27, punishes the violation of any safe-conduct or passport granted under the authority of the United States, on conviction, with imprisonment, not exceeding three years, and a fine at the discretion of the court. Vide *Conduct; Passport*; and 18 Vin. Ab. 272.

SAFE PLEDGE, salvus-plegius. A surety given that a man shall appear upon a certain day. Bract. lib. 4, c. 1.

SAID. Before mentioned.

2. In contracts and pleadings it is usual and proper when it is desired to speak of a person or thing before mentioned, to designate them by the term *said* or *aforesaid*, or by some similar term, otherwise the latter description will be ill for want of certainty. 2 Lev. 207; Com. Dig. Pleader, C 18; Gould on Pl. c. 3, § 63.

SAILING INSTRUCTIONS, mar. law. Written or printed directions, delivered by the commanding officer of a convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the place of rendezvous appointed for the fleet, in case of dispersion by storm, by an enemy, or by any other accident.

2. Without sailing instructions no vessel can have the full protection and benefit of convoy. Marsh. Ins. 368.

SAILORS. Seamen, mariners. Vide *Mariners; Seamen; Shipping Articles.*

SAISIE-EXECUTION, French law. This term is used in Louisiana. It is a writ of execution by which the creditor places under the custody of the law, the movables, which are liable to seizure, of his debtor, in order that out of them he may obtain payment of the debt due by him. Code of Practice, art. 641, Dall. Dict. h. t. It is a writ very similar to the *feri facias*.

SAISIE-FORAIN. A term used in Louisiana and in the French law; this is a permission given by the proper judicial officer, to authorize a creditor to seize the property of his debtor in the district which he inhabits. Dall. Dic. h. t. It has the

effect of an attachment of property, which is applied to the payment of the debt due.

SAISIE-GAGERIE, *French law*. A conservatory act of execution, by which the owner, or principal lessor of a house or farm, causes the furniture of the house or farm leased, and on which he has a lien, to be seized, in order to obtain the rent due to him. It is similar to the *distress* of the common law. *Dall. Dict. h. t.*

SAISIE-IMMOBILIERE. A writ by which the creditor puts in the custody of the law the immovables of his debtor, that out of the proceeds of their sale, he may be paid his demand. The term is French, and is used in Louisiana.

SALARY. A reward or recompense for services performed.

2. It is usually applied to the reward paid to a public officer for the performance of his official duties.

3. The salary of the president of the United States is twenty-five thousand dollars per annum; Act of 18th Feb. 1793; and the constitution, art. 2, s. 1, provides that the compensation of the president shall not be increased or diminished, during the time for which he shall have been elected.

4. Salary is also applied to the reward paid for the performance of other services; but if it be not fixed for each year, it is called *honorarium*. *Poth. Pand. h. t.* According to M. Duvergier, the distinction between *honorarium* and salary is this. By the former is understood the reward given to the most elevated professions for services performed; and by the latter the price of hiring of domestic servants and workmen. 19 *Toull. n.* 268, p. 292, note.

5. There is this difference between salary and price; the former is the reward paid for services, or for the hire of things; the latter is the consideration paid for a thing sold. *Lep. Elem.* § 907, 908.

SALE, contracts. An agreement by which one of the contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price. *Pard. Dr. Com. n.* 6; *Noy's Max. ch.* 42; *Shep. Touch.* 244; 2 *Kent, Com.* 363; *Poth. Vente, n.* 1; 1 *Duverg. Dr. Civ. Fr. n.* 7.

2. This contract differs from a barter or exchange in this, that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise, sus-

ceptible of a valuation. It differs from accord and satisfaction, because in that contract, the thing is given for the purpose of quieting a claim, and not for a price. An onerous gift, when the burden it imposes is the payment of a sum of money, is, when accepted, in the nature of a sale. When partition is made between two or more joint owners of a chattel, it would seem, the contract is in the nature of a barter. See 11 *Pick.* 311.

3. To constitute a valid sale there must be, 1. Proper parties. 2. A thing which is the object of the contract. 3. A price agreed upon; and, 4. The consent of the contracting parties, and the performance of certain acts required to complete the contract. These will be separately considered.

4.—§ 1. As a general rule all persons *sui juris* may be either buyers or sellers. But to this rule there are several exceptions.

1. There is a class of persons who are incapable of purchasing except *sub modo*, as infants, and married women; and, 2. Another class, who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers, while that relation exists; these are trustees, guardians, assignees of insolvents, and generally all persons who, by their connexion with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like. See *Purchaser*.

5.—§ 2. There must be a thing which is the *object* of the sale, for if the thing sold at the time of the sale had ceased to exist it is clear there can be no sale; if, for example, Paul sell his horse to Peter, and, at the time of the sale the horse be dead, though the fact was unknown to both parties: or, if you and I being in Philadelphia, I sell you my house in Cincinnati, and, at the time of the sale it be burned down, it is manifest there was no sale, as there was not a thing to be sold. It is evident, too, that no sale can be made of things not in commerce, as the air, the water of the sea, and the like. When there has been a mistake made as to the article sold, there is no sale; as, for example, where a broker, who is the agent of both parties, sells an article and delivers to the seller a sold note describing the article sold as "St. Petersburg clean hemp," and bought note to the buyer, as "Riga Rhine hemp," there is no sale. 5 *Taunt.* 786, 788; 5 *B. & C.* 437; 7 *East,* 569; 2 *Camp.* 337; 4 *Ad. & Ell. N. S.* 747

9 M. & W. 805; Holt. N. P. Cas. 173; 1 M. & P. 778.

6. There must be an agreement as to the specific goods which form the basis of the contract of sale; in other words, to make a perfect sale, the parties must have agreed the one to part with the title to a *specific article*, and the other to acquire such title; an agreement to sell one hundred bushels of wheat, to be measured out of a heap, does not change the property, until the wheat has been measured. 3 John. 179; Blackb. on Sales, 122, 5 Taunt. 176; 7 Ham. (part 2d) 127; 3 N. Hamp. R. 282; 6 Pick. 280; 15 John. 349; 6 Cowen, 250; 7 Cowen, 85; 6 Watts, 29.

7.—§ 3. To constitute a sale there must be a *price* agreed upon; but upon the maxim *id certum est quod reddi certum potest*, a sale may be valid although it is agreed that the price for the thing sold shall be determined by a third person. 4 Pick. 179. The price must have the three following qualities, to wit: 1. It must be an actual or serious price. 2. It must be certain or capable of being rendered certain. 3. It must consist of a sum of money.

8.—1. The price must be an actual or serious price, with an intention on the part of the seller, to require its payment; if, therefore, one should sell a thing to another, and, *by the same agreement*, he should release the buyer from the payment, this would not be a sale but a gift, because in that case the buyer never agreed to pay any price, the same agreement by which the title to the thing is passed to him discharging him from all obligations to pay for it. As to the quantum of the price that is altogether immaterial, unless there has been fraud in the transaction. 2. The price must be certain or determined, but it is sufficiently certain, if, as before observed, it be left to the determination of a third person. 4 Pick. 179; Poth. Vente, n. 24. And an agreement to pay for goods what they are worth, is sufficiently certain. Coxe, 261; Poth. Vente, n. 26. 3. The price must consist in a sum of money which the buyer agrees to pay to the seller, for if paid for in any other way, the contract would be an exchange or barter, and not a sale, as before observed.

9.—§ 4. The consent of the contracting parties, which is of the essence of a sale, consists in the agreement of the will of the seller to sell a certain thing to the buyer, for a certain price, and in the will of the buyer,

to purchase the same thing for the same price. Care must be taken to distinguish between an agreement to enter into a future contract, and a present actual agreement to make a sale. This consent may be shown, 1. By an express agreement. 2. By an implied agreement.

10.—1. The consent is certain when the parties expressly declare it. This, in some cases, it is requisite should be in writing. By the 17th section of the English statute, 29 Car. II., c. 3, commonly called the Statute of Frauds, it is enacted, "that no contract for the sale of any goods, wares, or merchandise, for the price of £10 or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized." This statute has been reenacted in most of the states of the Union, with amendments and alterations.

11. It not unfrequently happens that the consent of the parties to a contract of sale is given in the course of a correspondence. To make such contract valid, both parties must concur in it at the same time. See *Letter*, com. law, crim. law, § 2; 4 Wheat. 225; 6 Wend. 103; 1 Pick. 278; 10 Pick. 326.

12. An express consent to a sale may be given verbally, when it is not required by the statute of frauds to be in writing.

13.—2. When a party, by his acts, approves of what has been done, as if he knowingly uses goods which have been left at his house by another, who intended to sell them, he will, by that act, confirm the sale.

14. The consent must relate, 1. To the thing which is the object of the contract; 2. To the price; and, 3. To the sale itself. 1st. Both parties must agree upon the same object of the sale; if therefore one give consent to buy one thing, and the other to sell another, there is no sale; nor is there a sale if one sells me a bag full of oats, which I understand is full of wheat; because there is no consent as to the thing which is the object of the sale. But the sale would be valid, although I might be mistaken as to the quality of the thing sold. 20 John. 196; 8 Rawle, 23, 168. 2d. Both parties must agree as to the same price, for if the seller intends to sell for a greater sum than

the buyer intends to give, there is no mutual consent; but if the case were reversed, and the seller intended to sell for a less price than the buyer intended to give, the sale would be good for the lesser sum. Poth. Vente, n. 36. 3d. The consent must be on the sale itself, that is, one intends to sell, and the other to buy. If, therefore, Peter intended to lease his house for three hundred dollars a year for ten years, and Paul intended to buy it for three thousand dollars, there would not be a contract of sale nor a lease. Poth. Vente, n. 37.

15. In order to pass the property by a sale, there must be an express or implied agreement that the title shall pass. An agreement for the sale of goods is *prima facie* a bargain and sale of those goods; but this arises merely from the presumed intention of the parties, and if it appear that the parties have agreed, not that there shall be a mutual credit by which the property is to pass from the seller to the buyer, and the buyer is bound to pay the price to the seller, but that the exchange of the money for the goods shall be made on the spot, no property is transferred, for it is not the intention of the parties to transfer any. 4 Wash. C. C. R. 79. But, on the contrary, when the making of part payment, or naming a day for payment, clearly shows an intention in the parties that they should have some time to complete the sale by payment and delivery, and that they should in the meantime be trustees for each other, the one of the property in the chattel, and the other in the price. As a general rule, when a bargain is made for the purchase of goods, and nothing is said about payment and delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. 5 B. & C. 862.

16. Sales are absolute or conditional. An *absolute* sale is one made and completed without any condition whatever. A *conditional* sale is one which depends for its validity upon the fulfilment of some condition. See 4 Wash. C. C. R. 588; 4 Mass. 405; 17 Mass. 606; 10 Pick. 522; 13 John. 219; 18 John. 141; 8 Verm. 154; 2 Hall, 561; 2 Rawle, 326; Cox, 292; 1 Bailey, 563; 2 A. K. Marsh. 480.

17. Sales are also voluntary or forced, public or private.

18.—1. A *voluntary* sale is one made

without constraint freely by the owner of the thing sold; to such the usual rules relating to sales apply. 2. A *forced* sale is one made without the consent of the owner of the property by some officer appointed by law, as by a marshal or a sheriff in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guaranty a title to the thing sold, it merely transfers the rights of the person, as whose property it has been seized. This kind of a sale is sometimes called a judicial sale. 3. A *public* sale is one made at auction to the highest bidder. Auction sales sometimes are voluntary, as when the owner chooses to sell his goods in this way, and then as between the seller and the buyer the usual rules relating to sales apply; or they are involuntary or forced when the same rules do not apply. 4. *Private* sales are those made voluntarily and not at auction.

19. The above rules apply to sales of personal property. The sale of real estate is governed by other rules. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor, and it does not become vested in the vendee until he shall have received a lawful deed of conveyance from the vendor to him; and the only remedy of the purchaser at law, is to bring an action on the contract, and recover pecuniary damages for a breach of the contract. In equity, however, after a contract for the sale, the lands are considered as belonging to the purchaser, and the court will enforce his rights by a decree for a specific performance; and the seller will be entitled to the purchase money. Will. on Real Prop. 127. See *Specific performance*.

20. In general, the seller of real estate does not guaranty the title; and if it be desired that he should, this must be done by inserting a warranty to that effect. See, generally, Brown on Sales; Blackb. on Sales; Long on Sales; Story on Sales; Sugd. on Vendors; Pothier, Vente; Duvergier, Vente; Civil Code of Louisiana, tit. 7; Bouv. Inst. Index, h. t.; and *Contracts; Delivery; Purchaser; Seller; Stoppage in transitu*.

SALE NOTE. A memorandum given by a broker to a seller or buyer of goods, stating the fact that certain goods have been sold by him on account of a person called

the seller to another person called the buyer. Sale notes are also called *bought notes*, (q. v.) and *sold notes*. (q. v.)

SALE AND RETURN. When goods are sent from a manufacturer or wholesale dealer to a retail trader, in the hope that he may purchase them, with the understanding that what he may choose to take he shall have as on a contract of sale, and what he does not take he will retain as a consignee for the owner, the goods are said to have been sent on sale and return.

2. The goods taken by the receiver as on a sale, will be considered as sold, and the title to them is vested in the receiver of them; the goods he does not buy are considered as a deposit in the hands of the receiver of them, and the title is in the person who sent them. 1 Bell's Com. 268, 5th ed.

SALIQUE LAW. The name of a code of laws so called from the Salians, a people of Germany, who settled in Gaul under their king Pharamond.

2. The most remarkable law of this code is that which regards succession. De terrâ vero salicâ nulla portio hæreditatis transit in mulierem, sed hoc virilis sextus acquirit, hoc est filii in ipsâ hæreditate succedunt; no part of the salique land passes to females, but the males alone are capable of taking, that is, the sons succeed to the inheritance. This rule has ever excluded females from the throne of France.

SALVAGE, maritime law. This term originally meant the thing or goods saved from shipwreck or other loss; and in that sense it is generally to be understood in our old books. But it is at present more frequently understood to mean the compensation made to those by whose means the ship or goods have been saved from the effects of shipwreck, fire, pirates, enemies, or any other loss or misfortune. 1 Cranch, 1.

2. This compensation, which is now usually made in money, was, before the use of money became general, made by a delivery of part of the effects saved. Marsh. Ins. B. 1, c. 12, s. 8; Pet. Adm. Dec. 425; 2 Taunt. 302; 3 B. & P. 612; 4 M. & S. 159; 1 Cranch, 1; 2 Cranch, 240; 8 Cranch, 221; 3 Dall. 188; 4 Wheat. 98; 9 Cranch, 244; 8 Wheat. 91; 1 Day, 198; 1 Johns. R. 165; 4 Cranch, 347; Com. Dig. Salvage; 3 Kent, Com. 196. Vide *Salvors*.

SALVAGE CHARGES. The expenses incurred to remunerate services rendered to a

ship and cargo, which have prevented its being a total loss. Stev. on Av. c. 2, s. 1.

SALVAGE LOSS. By salvage loss is understood the difference between the amount of salvage, after deducting the charges, and the original value of the property. Stev. on Av. c. 2, s. 1.

SALVORS, mar. law. When a ship and cargo, or any part thereof, are saved at sea by the exertions of any person from impending perils, or are recovered after an actual abandonment or loss, such persons are denominated salvors; they are entitled to a compensation for their services, which is called salvage. (q. v.)

2. As soon as they take possession of property for the purpose of preserving it, as if they find a ship derelict at sea, or if they recapture it, or if they go on board a ship in distress, and take possession with the assent of the master or other person in possession, they are deemed bonâ fide possessors, and their possession cannot be lawfully displaced. 1 Dodson's Rep. 414. They have a lien on the property for their salvage, which the laws of all maritime countries will respect and enforce. Salvors are responsible not only for good faith, but for reasonable diligence in their custody of the salvage property. Story, Bail. § 623.

SAMPLE, contracts. A small quantity of any commodity or merchandise, exhibited as a specimen of a larger quantity called the bulk. (q. v.)

2. When a sale is made by sample, and it afterwards turns out that the bulk does not correspond with it, the purchaser is not, in general, bound to take the property on a compensation being made to him for the difference. 1 Campb. R. 113; vide 2 East, 314; 4 Campb. R. 22; 12 Wend. 566; 9 Wend. 20; 6 Cowen, 354; 12 Wend. 413. See 5 John. R. 395.

SANCTION. That part of a law which inflicts a penalty for its violation, or bestows a reward for its observance. Sanctions are of two kinds, those which redress civil injuries, called civil sanctions; and those which punish crimes, called penal sanctions. 1 Hoffm. Leg. Outl. 279; Just. Ins. lib. 2, t. 1, § 10; Ruthf. Inst. b. 2, c. 6, s. 6; Toull. tit. prel. 86; Fergus. Inst. of Mor. Phil. p. 4, c. 3, s. 13, and p. 6, c. 1, et seq.; 1 Bl. Com. 56.

SANCTUARY. A place of refuge, where the process of the law cannot be executed.

2. Sanctuaries may be divided into re

ligious and civil. The former were very common in Europe; religious houses affording protection from arrest to all persons, whether accused of crime, or pursued for debt. This kind was never known in the United States.

3. Civil sanctuary, or that protection which is afforded to a man by his own house, was always respected in this country. The house protects the owner from the service of all civil process in the first instance, but not if he is once lawfully arrested and takes refuge in his own house. Vide *Door; House*.

4. No place affords protection from arrest in criminal cases; a man may, therefore, be arrested in his own house in such cases, and the doors may be broken for the purpose of making the arrest. Vide *Arrest in criminal cases*.

SANE MEMORY. By this is meant that understanding which enables a man to make contracts and his will, and to perform such other acts as are authorized by law. Vide *Lunacy; Memory; Non compos mentis*.

SANG or SANC. Blood. These words are nearly obsolete.

SANITY, med. jur. The state of a person who has a sound understanding; the reverse of insanity.

2. The sanity of an individual is always presumed. 5 John. R. 144; 1 Pet. R. 163; 1 Hen. & M. 476; 4 Cowen. R. 207; 4 W. C. C. R. 262. See 9 Conn. 102; 9 Mass. 225; 3 Mass. 330; 1 Mass. 71; 8 Mass. 371; 8 Greenl. 42; 15 John. 503; 4 Pick. 82.

SANS GEO QUE. The same as *Absque hoc*. (q. v.)

SANS NOMBRE. This is a French phrase, which signifies without number.

2. In England it is used in relation to the right of putting animals on a common. The term common *sans nombre* does not mean that the beasts are to be innumerable, but only indefinite, not certain; Willes, 227; but they are limited to the commoner's own commonable cattle, levant et couchant, upon his lands, or as many cattle as the land of the commoner can keep and maintain in winter. 2 Brownl. 101; Vent. 54; 5 T. R. 48; 1 Saund. 28, n. 4.

SANS RECOURS. Without recourse.

2. These words are sometimes put on a bill before the payee endorses it; they have the effect of transferring the bill without responsibility to the endorser. Chit. on Bills, 179; 7 Taunt. 160; 1 Cowen, 588; 3

Cranch, 193; 7 Cranch, 159; 12 Mass. 172; 14 S. & R. 325.

SATISDACTION, civil law. This word is derived from the same root as satisfaction; for, in the same manner that to fulfil the demand which is made upon us, is called satisfaction, so satisfaction takes place when he who demands something has agreed to receive sureties instead of the thing itself. Dig. 2, 8, 1

SATISFACTION, practice. An entry made on the record, by which a party in whose favor a judgment was rendered, declares that he has been satisfied and paid.

2. In Alabama, Delaware, Illinois, Indiana, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, South Carolina, and Vermont, provision is made by statute, requiring the mortgagee to discharge a mortgage upon the record, by entering satisfaction in the margin. The refusal or neglect to enter satisfaction after payment and demand, renders the mortgagee liable to an action, after the time given him by the respective statutes for doing the same has elapsed, and subjects him to the payment of damages, and, in some cases, treble costs. In Indiana and New York, the register or recorder of deeds may himself discharge the mortgage upon the record on the exhibition of a certificate of payment and satisfaction signed by the mortgagee or his representatives, and attached to the mortgage, which shall be recorded. Ind. St. 1836, 64; 1 N. Y. Rev. St. 761.

SATISFACTION, construction by courts of equity. Satisfaction is defined to be the donation of a thing, with the intention, express or implied, that such donation is to be an extinguishment of some existing right or claim in the donee.

2. Where a person indebted bequeaths to his creditor a legacy, equal to, or exceeding the amount of the debt, which is not noticed in the will, courts of equity, in the absence of any intimation of a contrary intention, have adopted the rule that the testator shall be presumed to have meant the legacy as a satisfaction of the debt.

3. When a testator, being indebted, bequeaths to his creditor a legacy, *simpliciter*, and of the same nature as the debt, and not coming within the exceptions stated in the next paragraph, it has been held a satisfaction of the debt, when the legacy is equal to, or exceeds the amount of the debt. Pre. Ch. 240; 8 P. Wms. 353.

4. The following are exceptions to the

rule: 1. Where the legacy is of *less* amount than the debt, it shall not be deemed a part payment or satisfaction. 1 Ves. sen. 268.

5.—2. Where, though the debt and legacy are of equal amount, there is a difference in the times of payment, so that the legacy may not be equally beneficial to the legatee as the debt. Prec. Ch. 236; 2 Atk. 300; 2 Ves. sen. 635; 3 Atk. 96; 1 Bro. C. C. 129; 1 Bro. C. C. 195; 1 M'Clel. & Y. Rep. Exch. 41; 1 Swans. R. 219.

6.—3. When the legacy and the debt are of a *different nature*, either with reference to the subjects themselves, or with respect to the interests given. 2 P. Wms. 614; 1 Ves. jr. 298; 2 Ves. jr. 468.

7.—4. When the provision by the will is expressed to be given for a *particular purpose*, such purpose will prevent the testamentary gift being construed a satisfaction of the debt, because it is given *diverso intuitu*. 2 Ves. sen. 635.

8.—5. When the debt of the testator is contracted *subsequently* to the making of the will; for, in that case, the legacy will not be deemed a satisfaction. 2 Salk. 508.

9.—6. When the legacy is uncertain or contingent. 2 Atk. 300; 2 P. Wms. 343.

10.—7. Where the *debt* itself is contingent, as where it arises from a running account between the testator and legatee; 1 P. Wms. 296; or it is a negotiable bill of exchange. 3 Ves. jr. 561.

11.—8. Where there is an express direction in the will for the payment of *debts and legacies*, the court will infer from the circumstance, that the testator intended that both the debt owing from him to the legatee and the legacy, should be paid. 1 P. Wms. 408; 2 Roper, Leg. 54.

See, generally, Tr. of Eq. 333; Yelv. 11, n.; 1 Swans. R. 221; 18 Eng. Com. Law Rep. 201; 4 Ves. jr. 301; 7 Ves. jr. 507; 1 Suppl. to Ves. jr. 204, 308, 311, 342, 348, 329; 8 Com. Dig. Appen. tit. Satisfaction, p. 917; Rob. on Frauds, 46, n. 15; 2 Suppl. to Ves. jr. 22, 46, 205; 1 Vern. 346; Roper, Leg. c. 17; 1 Roper on Husb. and Wife, 501 to 511; 2 Id. 53 to 63; Math. on Pres. c. 6, p. 107; 1 Desaus. R. 314; 2 Munf. Rep. 413; Stallm. on El. and Sat.

SATISFACTION PIECE, *Eng. practice*. An instrument of writing in which it is declared that satisfaction is acknowledged between

the plaintiff and defendant. It is signed by the attorney, and on its production and the warrant of attorney to the clerk of the judgments, satisfaction is entered on payment of certain fees. Lee's Dict. of Pr. tit. Satisfaction.

SATISFACTORY EVIDENCE. That which is sufficient to induce a belief that the thing is true; in other words, it is credible evidence. 3 Bouv. Inst. n. 3049.

SCANDAL. A scandalous verbal report or rumor respecting some person.

2. The remedy is an action on the case.

3. In chancery practice, when a bill or other pleading contains scandal, it will be referred to a master to be expunged, and till this has been done, the opposite party need not answer. 3 Bl. Com. 342. Nothing is considered scandalous which is positively relevant to the cause, however harsh and gross the charge may be. The degree of relevancy is not deemed material. Coop. Eq. Pl. 19; 2 Ves. 24; 6 Ves. 514, 11 Ves. 526; 15 Ves. 477; Story Eq. Pl. § 269. Vide *Impertinent*.

SCANDALUM MAGNATUM. Great scandal or slander. In England it is the slander of the great men, the nobility of the realm.

SCHEDULE, practice. When an indictment is returned from an inferior court in obedience to a writ of certiorari, the statement of the previous proceedings sent with it, is termed the schedule. 1 Saund. 309, a, n. 2.

2. Schedules are also frequently annexed to answers in a court of equity, and to depositions and other documents, in order to show more in detail the matter they contain, than could otherwise be conveniently shown.

3. The term is frequently used instead of inventory.

SCHOOLMASTER. One employed in teaching a school.

2. A schoolmaster stands *in loco parentis* in relation to the pupils committed to his charge, while they are under his care, so far as to enforce obedience to his commands, lawfully given in his capacity of schoolmaster, and he may therefore enforce them by moderate correction. Com. Dig. Pleader, 3 M 19; Hawk. c. 60, sect. 23. Vide *Correction*.

3. The schoolmaster is justly entitled to be paid for his important and arduous services by those who employ him. See 1 Bing. R. 357; 8 Moore's Rep. 368. His duties

are to teach his pupils what he has undertaken, and to have a special care over their morals. See 1 Stark. R. 421.

SCIENDUM, *Eng. law.* The name given to a clause inserted in the record by which it is made "known that the justice here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law." Lee's Dict. art. Record.

SCIENTER, knowingly.

2. A man may do many acts which are justifiable or not, as he is ignorant or not ignorant of certain facts. He may pass a counterfeit coin, when he is ignorant of its being counterfeit, and is guilty of no offence; but if he knew the coin to be counterfeit, which is called the *scienter*, he is guilty of passing counterfeit money.

3. A man who keeps an animal which injures some person, or his property, is answerable for damages, or in some cases he may be indicted if he had a knowledge of such animal's propensity to do injury. 3 Blackst. Comm. 154; 2 Stark. Ev. 178; 4 Campb. 198; 2 Str. 1264; 2 Esp. 482; Bull. N. P. 77; Burr. 2092; 2 Lev. 172; Lord Raym. 110; 1 B. & A. 620; 2 C. M. & R. 496; 5 C. & P. 1; S. C. 24 E. C. L. R. 187; 1 Leigh, N. P. 552, 553; 7 C. & P. 755.

4. In this respect the civil law agrees with our own. Domat, Lois Civ. liv. 2, t. 8, s. 2. As to what evidence may be given to prove guilty knowledge, see Archb. Cr. Pl. 109. Vide *Animal*; *Dog*.

SCILICET. A Latin adverb, signifying that is to say; to wit; namely.

2. It is a clause to usher in the sentence of another, to particularize that which was too general before, distribute what was too gross, or to explain what was doubtful and obscure. It neither increases nor diminishes the premises or *habendum*, for it gives nothing of itself; it may make a restriction when the preceding words may be restrained. Hob. 171; 1 P. Wms. 18; Co. Litt. 180 b, note 1.

3. When the *scilicet* is repugnant to the precedent matter, it is void; for example, when a declaration in trover states that the plaintiff on the *third* day of May was possessed of certain goods which on the fourth day of May came to the defendant's hands, who afterwards, to wit, on the *first* day of May converted them, the *scilicet* was rejected as surplusage. Cro. Jac. 428; and vide 6 Binn. 15; 3 Saund. 291, note 1, and

the cases there cited. This word is sometimes abbreviated, *ss.* or *ssf.*

SCINTILLA JURIS, *estates.* A spark of right. A legal fiction, resorted to for the purpose of enabling feoffees to uses to support contingent uses when they come into existence, thereby to enable the statutes of uses, 27 Henry VIII., to execute them. 4 Kent's Com. 238, et seq., and the authorities there cited, for the learning upon this subject.

SCIRE FACIAS, *remedies, practice.* The name of a judicial writ, founded upon some record, and requiring the defendant to *show cause* why the plaintiff should not have the advantage of such record; or, when it is issued to repeal letters-patent, why the record should not be annulled and vacated. 3 Sell. Pr. 187; Grah. Pr. 649; 2 Tidd's Pr. 982; 2 Arch. Pr. 76; Bac. Abr. h. t.

2. It is, however, considered as an action, and in the nature of a new original. Skin. 682; Com. 455.

3. The *scire facias* against a bail, against pledges in replevin, to repeal letters-patent, or the like, is an original proceeding; but when brought to revive a judgment after a year and a day, or upon the death or marriage of the parties, when in the latter case one of them is a woman; or when brought on a judgment *quando, &c.*, against an executor, it is but a continuation of the original action. Vide 1 T. R. 388. Vide generally, 11 Vin. Ab. 1; 19 Vin. Ab. 280; Bac. Ab. Execution, H; Bac. Ab. h. t.; 2 Saund. 72 e, note 3; Doct. Pl. 486; Bouv. Inst. Index, h. t.

SCIRE FACIAS AD AUDIENDUM ERRORES. The name of a writ which is sued out after the plaintiff in error has assigned his errors. F. N. B. 20; Bac. Ab. Error F.

SCIRE FACIAS AD DISPROBANDUM DEBITUM. The name of a writ in use in Pennsylvania, which lies by a defendant in foreign attachment against the plaintiff, in order to enable him, within a year and a day next ensuing the time of payment to the plaintiff in the attachment, to disprove or avoid the debt recovered against him. Act relating to the commencement of actions, s. 61, passed June 13th, 1836.

SCIRE FECI, *practice.* The return of the sheriff, or other proper officer, to the writ of *scire facias*, when it has been served; *scire feci*, "I have made known."

SCIRE FIERI INQUIRY, *Eng. law.* The name of a writ, the history of the origin of which is as follows: when on an execution

de bonis testatoris against an executor the sheriff returned *nulla bona* and also a *devastavit*, a *fieri facias*, *de bonis propriis*, might formerly have been issued against the executor, without a previous inquisition finding a *devastavit* and a *scire facias*. But the most usual practice upon the sheriff's return of *nulla bona* to a *fieri facias de bonis testatoris*, was to sue out a special writ of *fieri facias de bonis testatoris*, with a clause in it, "et si tibi constare, poterit," that the executor had wasted the goods, then to levy *de bonis propriis*. This was the practice in the king's bench till the time of Charles I.

2. In the common pleas a practice had prevailed in early times upon a suggestion in the special writ of *fieri facias* of a *devastavit* by the executor, to direct the sheriff to inquire by a jury, whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued out against him, and unless he made a good defence thereto, an execution *de bonis propriis* was awarded against him.

3. The practice of the two courts being different, several cases were brought into the king's bench on error, and at last it became the practice of both courts, for the sake of expedition, to incorporate the *fieri facias* inquiry, and *scire facias*, into one writ, thence called a *scire fieri inquiry*, a name compounded of the first words of the two writs of *scire facias* and *fieri facias*, and that of inquiry, of which it consists.

4. This writ recites the *fieri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nulla bona* by the sheriff, and then suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator in the hands of the executor, if they could be levied thereof, but if it should appear to him by the inquisition of a jury that the executor had wasted the goods of the testator, then the sheriff is to warn the executor to appear, &c. If the judgment had been either by or against the testator or intestate, or both, the writ of *fieri facias* recites that fact, and also that the court had adjudged, upon a *scire facias* to revive the judgment, that the executor or administrator should have execution for the debt, &c. Clift's Entr. 659; Lilly's Entr. 664; 3 Rich. Pr. K. B. 523.

5. Although this practice is sometimes adopted, yet the most usual proceeding is

by action of debt on the judgment, suggesting a *devastavit*, because in the proceeding by *scire fieri inquiry* the plaintiff is not entitled to costs, unless the executor appears and pleads to the *scire facias*. 1 Saund. 219, n. 8. See 2 Archb. Pr. 934.

SCITE. The setting or standing of any place. The seat or situation of a capital messuage, or the ground on which it stood. Jacob, L. D. h. t.

SCOLD. A woman who by her habit of scolding becomes a nuisance to the neighborhood, is called a common scold. Vide *Common Scold*.

SCOT AND LOT, *Eng. law*. The name of a customary contribution, laid upon all the subjects according to their ability.

SCOUNDREL. An opprobrious title given to a person of bad character. General damages will not lie for calling a man a scoundrel, but special damages may be recovered when there has been an actual loss. 2 Bouv. Inst. n. 2250; 1 Chit. Pr. 44.

SCRIPT, *conv.* The original or principal instrument, where there are part and counterpart. Vide *Chirograph*; *Part*, *Rescript*.

SCRIVENER. A person whose business it is to write deeds and other instruments for others; a conveyancer.

2. Money scriveners are those who are engaged in procuring money to be lent on mortgages and other securities, and lending such money accordingly. They act also as agents for the purchase and sale of real estates.

3. To be considered a money scrivener, a person must be concerned in carrying on the trade or profession as a means of making a livelihood. He must in the course of his occupation receive other men's moneys into his trust and custody, to lay out for them as occasion offers. 3 Camp. R. 538; 2 Esp. Cas. 555.

SCROLL. A mark which is to supply the place of a seal, made with a pen or other instrument on a writing.

2. In some of the states this has all the efficacy of a seal. 1 S. & R. 72; 1 Wash. 42; 2 McCord, 380; 4 McCord, 267; 3 Blackf. 161; 3 Gill & John. 234; 2 Halst. 272. Vide *Seal*; 2 Serg. & Rawle, 504; 2 Rep. 5. a; Perk. § 129. In others, a scroll has no such effect; and when a suit is brought on an instrument sealed with a scroll, the act of limitations may be pleaded to it, as to a simple contract. 2 Rand. 446; 6 Halst. 174; 5 John. 239; 1 Blackf. 241; Griff. Law Reg., answers to question No 110.

SCUTAGE, *old Eng. law*. The name of a tax or contribution raised for the use of the king's armies by those who held lands by knight's service.

SCYREGEMOTE. The name of a court among the Saxons. It was the court of the shire, in Latin called *curia comitatus*, and the principal court among the Saxons. It was holden twice a year for determining all causes both ecclesiastical and secular.

SE DEFENDENDO, *criminal law*. Defending himself.

2. Homicide, *se defendendo*, is that which takes place upon a sudden rencounter, where two persons upon a sudden quarrel, without premeditation or malice, fight upon equal terms, and one, before a mortal stroke has been given, declines any further combat, and retreats as far as he can with safety, and kills his adversary, through necessity, to avoid immediate death. 2 Swift's Dig. 289; Pamphl. Rep. of Selfridge's Trial in 1805; Hawk. bk. 1, c. 11, s. 13; 1 Russ. on Cr. 543; Bac. Ab. Murder, &c. F 2.

SEA. The ocean; the great mass of waters which surrounds the land, and which probably extends from pole to pole, covering nearly three quarters of the globe. Waters within the ebb and flow of the tide, are to be considered the sea. Gilp. R. 526.

2. The sea is public and common to all people, and every person has an equal right to navigate it, or to fish there; Ang. on Tide Wat. 44 to 49; Dane's Abr. c. 68, a. 3, 4; Inst. 2, 1, 1; and to land upon the *sea shore*. (q. v.)

3. Every nation has jurisdiction to the distance of a *cannon shot*, (q. v.) or marine league, over the water adjacent to its shore. 2 Cranch, 187, 234; 1 Circuit Rep. 62; Bynk. Qu. Pub. Juris. 61; 1 Azuni Mar. Law, 204; Id. 185; Vattel, 207.

SEA LETTER OR SEA BRIEF, *maritime law*. A document which should be found on board of every neutral ship; it specifies the nature and quantity of the cargo, the place from whence it comes, and its destination. Chit. Law of Nat. 197; 1 John. 192.

SEA SHORE, *property*. That space of land, on the border of the sea, which is alternately covered and left dry, by the rising and falling of the tide; or, in other words, that space of land between high and low water mark. Hargr. Tr. 12; 6 Mass. 435, 439; 1 Pick. 180, 182; 5 Day, 22.

2. Generally, the sea shore belongs to the public. Angell on Tide Wat. 34, 5; 3 Kent's Com. 347.

3. By the Roman law, the shore included the land as far as the greatest wave extended in winter; *est autem littus maris, quatenus hibernus, fluctus maximus excurrit*. Inst. lib. 2, t. 1, s. 3. *Littus publicum est eatenus qua maxime fluctus exæstuat*. Dig. lib. 50, t. 16, s. 112.

4. The Civil Code of Louisiana seems to have followed the law of the Institutes and the Digest, for it enacts, art. 442, that the "sea shore is that space of land over which the waters of the sea are spread in the highest water, during the winter season." Vide 5 Rob. Adm. R. 182; Dougl. 425; 1 Halst. R. 1; 2 Roll. Ab. 170; Dyer, 326; 5 Co. 107; Bac. Ab. Courts of Admiralty, A; 1 Am. Law Mag. 76; 16 Pet. R. 234, 367; Ang. on Tide Waters, Index, tit. Shore; 2 Bligh's N. S. 146; 5 M. & W. 327; Merl. Quest. de Droit, mots Rivage de la Mer; Inst. 2, 1, 1; 22 Maine, R. 350. For the law of Mass. vide Dane's Ab. c. 68, a. 3, 4.

SEA WEED. A species of grass which grows in the sea.

2. When cast upon land, it belongs to the owner of the land adjoining the sea shore; upon the grounds, that it increases gradually, that it is useful as manure and a protection to the ground, and that it is some compensation for the encroachments of the sea upon the land. 2 John. R. 313, 323. Vide 5 Verm. R. 223.

3. The French differs from our law in this respect, as sea weeds there, when cast on the beach, belong to the first occupant. Dall. Dict. Propriété, art. 3, § 2, n. 128.

SEA WORTHINESS, *mer. law*. The ability of a ship or other vessel to make a sea voyage with probable safety: there is, in every insurance, whether on ship or goods, an implied warranty that the ship shall be worthy when she sails on the voyage insured; that is, that she shall be, "tight, staunch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage." Marsh. Ins. 153; 2 Phil. Ev. 60; 10 Johns. R. 58.

2. The following rules have been established in regard to the warranty of seaworthiness.

3.—1. That it is of no consequence whether the insured was aware of the condition of the ship, or not. His innocence or ignorance is no answer to the fact that the ship was not sea-worthy.

4.—2. The opinion of carpenters who have repaired the vessel, however they may

strengthen the presumption that the ship is sea-worthy, when it is favorable, is not conclusive of the fact of sea-worthiness. 4 Dow's Rep. 269.

5.—3. The presumption, *prima facie*, is for sea-worthiness. 1 Dow's R. 336. And it is presumed that a vessel continues sea-worthy, if she was so at the inception of the risk. 20 Pick. 389. See 1 Brev. 252.

6.—4. Any sort of disrepair left in the ship, by which she or the cargo may suffer, is a breach of the warranty of sea-worthiness.

7.—5. A deficiency of force in the crew, or of skill in the master, mate, &c., is a want of sea-worthiness. 1 Campb. 1; 14 East, R. 481. But if there was once a sufficient crew, their temporary absence will not be considered a breach of the warranty. 2 Barn. & Ald. 73; 1 John. Cas. 184; 1 Pet. 183.

8.—6. A vessel may be rendered not sea-worthy by being overloaded. 2 Barn. & Ald. 320.

9.—7. When the sea-worthiness arises from justifiable ignorance of the cause of the defect, and is discovered and remedied before any injury occurs, it is not to be considered as a defect. *Ib.* See, generally, 2 John. 124, 129; 3 John. Cas. 76; 1 John. 241; 1 Caines, 217; 3 S. & R. 25; 1 Whart. 399.

10. By an act of congress, approved July 20, 1840, as amended by the act of July 29, 1850, it is provided, that if the first officer, (or a second and third officer,) and a majority of the crew of any vessel, shall make complaint in writing that she is in an unsuitable condition to go to sea, because she is leaky, or insufficiently supplied with sails, rigging, anchors, or any other equipment, or that the crew is insufficient to man her, or that her provisions, stores, and supplies are not, or have not been, during the voyage, sufficient and wholesome, thereupon, in any of these or like cases, the consul or commercial agent who may discharge any duties of a consul shall appoint two disinterested, competent, practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall, in their report, state what defects and deficiencies, if any, they find to be well founded, as well as what, in their judgment ought to be done, to put the vessel in order for the continuance of her voyage.

SEAL, conveyancing, contracts. A seal is an impression upon wax, wafer, or some other tenacious substance capable of being

impressed. 5 Johns. R. 239. Lord Coke defines a seal to be wax, with an impression. 3 Inst. 169. "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum*." This is the common law definition of a seal. Perk. 129, 134; Bro. tit. Faits, 17, 30; 2 Leon. 21; 5 John. 289; 2 Caines, R. 362; 21 Pick. R. 417.

2. But in Pennsylvania, New Jersey, and the southern and western states generally, the impression upon wax has been disused, and a circular, oval, or square mark, opposite the name of the signer, has the same effect as a seal; the shape of it however is indifferent; and it is usually written with a pen. 2 Serg. & Rawle, 503; 1 Dall. 63; 1 Serg. & Rawle, 72; 1 Watts, R. 322; 2 Halst. R. 272.

3. A notary must use his official seal, to authenticate his official acts, and a scroll will not answer. 4 Blackf. R. 185. As to the effects of a seal, vide Phil. Ev. Index, h. t. Vide, generally, 13 Vin. Ab. 19; 4 Kent, Com. 444; 7 Caines' Cas. 1; Com. Dig. Fait, A 2.

4. Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince or nation, or private individual, or other device, with which an impression may be made on wax or other substance on paper or parchment, in order to authenticate them: the impression thus made is also called a seal. Répert. mot Sceau; 3 McCord's R. 583; 5 Whart. R. 563.

5. When a seal is affixed to an instrument, it makes it a specialty, (q. v.) and whether the seal be affixed by a corporation or an individual the effect is the same. 15 Wend. 256.

6. Where an instrument concludes with the words, "witness our hands and seals," and is signed by two persons, with only one seal, the jury may infer, from the face of the paper, that the person who signed last, adopted the seal of the first. 6 Penn. St. Rep. 302. Vide 9 Am Jur. 290-297; 1 Ohio Rep. 368; 3 John. 470; 12 John. 76; as to the origin and use of seals, Addis. on Cont. 6; *Scroll*.

7. The public seal of a foreign state, proves itself; and public acts, decrees and judgments, exemplified under this seal, are received as true and genuine. 2 Cranch, 187, 238; 4 Dall. 416; 7 Wheat. 273, 335; 1 Denio, 376; 2 Conn. 85, 90; 6 Wend. 475; 9 Mod. 66. But to entitle its

seal to such authority, the foreign state must have been acknowledged by the government, within whose jurisdiction the forum is located. 3 Wheat. 610; 9 Ves. 347.

SEAL-OFFICE, *English practice*. The office at which certain judicial writs are sealed with the prerogative seal, and without which they are of no authority. The officer whose duty it is to seal such writs is called "sealer of writs."

SEAL OF THE UNITED STATES, *government*. The seal used by the United States in congress assembled, shall be the seal of the United States, viz.: ARMS, paleways of thirteen pieces argent and gules; a chief azure; the escutcheon on the breast of the American eagle displayer proper, holding in his dexter talon, an olive branch, and in his sinister, a bundle of thirteen arrows, all proper, and in his beak a scroll, inscribed with this motto, "*E pluribus unum*." For the CREST: over the head of the eagle which appears above the escutcheon, a glory, or breaking through a cloud, proper, and surrounding thirteen stars, forming a constellation argent on an azure field. REVERSE, a pyramid unfinished. In the zenith an eye in a triangle, surrounded with a glory proper: over the eye, these words, "*Annuit cœptis*." On the base of the pyramid, the numerical letters, MDCCLXXVI; and underneath, the following motto, "*Novus ordo sectorum*." Resolution of Congress, June 20, 1782; Gordon's Dig. art. 207.

SEALING OF A VERDICT, *practice*. The putting a verdict in writing, and placing it in an envelop, which is sealed. To relieve jurors after they have agreed, it is not unusual for the counsel to agree that the jury shall seal their verdict, and then separate. When the court is again in session, the jury come in and give their verdict, in all respects as if it had not been sealed, and a juror may dissent from it, if, since the sealing, he has honestly changed his mind. 8 Ham. 405; Gilm. 333; 3 Bouv. Inst. n. 3257.

SEALS, *matters of succession*. On the death of a person, according to the laws of Louisiana, if the heir wishes to obtain the benefit of inventory, and the delays for deliberating, he is bound as soon as he knows of the death of the deceased to whose succession he is called, and before committing any act of heirship, to cause the seals to be affixed on the effects of the succession, by any judge or justice of the peace. Civ. Code, of Lo. art. 1027.

2. In ten days after this affixing of the seals, the heir is bound to present a petition to the judge of the place in which the succession is opened, praying for the removal of the seals, and that a true and faithful inventory of the effects of the succession be made. Id. art. 1028.

8. In case of vacant estates, and estates of which the heirs are absent and not represented, the seals, after the decease, must be affixed by a judge or justice of the peace within the limits of his jurisdiction, and may be fixed by him, either *ex officio*, or at the request of the parties. Civ. Code of Lo. art. 1070. The seals are affixed at the request of the parties, when a widow, a testamentary executor, or any other person who pretends to have an interest in a succession or community of property, requires it. Id. art. 1071. They are affixed *ex officio*, when the presumptive heirs of the deceased do not all reside in the place where he died, or if any of them happen to be absent. Id. art. 1072.

4. The object of placing the seals on the effects of a succession, is for the purpose of preserving them, and for the interest of third persons. Id. art. 1068.

5. The seals must be placed on the bureaux, coffers, armoires, and other things, which contain the effects and papers of the deceased, and on the doors of the apartments which contain these things, so that they cannot be opened without tearing off, breaking, or altering the seals. Id. art. 1069.

6. The judge or justice of the peace, who affixes the seals, is bound to appoint a guardian, at the expense of the succession, to take care of the seals and of the effects, of which an account is taken at the end of the procès-verbal of the affixing of the seals; the guardian must be domiciliated in the place where the inventory is taken. Id. art. 1079. And the judge, when he retires, must take with him the keys of all things and apartments upon which the seals have been affixed. Ib.

7. The raising of the seals is done by the judge of the place, or justice of the peace appointed by him to that effect, in the presence of the witnesses of the vicinage, in the same manner as for the affixing of the seals. Id. art. 1084.

See, generally, *Benefit of Inventory, Succession*; Code de Pro. Civ. 2e part. lib. 1, t. 1, 2, 3; Dict. de Jurisp. Scellé.

SEAMAN. A sailor; a mariner; one

whose business is navigation. 2 Boulay-Paty, Dr. Com. 232; Code de Commerce, art. 262; Laws of Oleron, art. 7; Laws of Wisbuy, art. 19. The term seamen, in its most enlarged sense, includes the captain as well as other persons of the crew; in a more confined signification, it extends only to the common sailors; 3 Pardes. n. 667; the mate; 1 Pet. Adm. Dec. 246; the cook and steward; 2 Id. 268; are considered, as to their rights to sue in the admiralty, as common seamen; and persons employed on board of steamboats and lighters, engaged in trade or commerce, on tide water, are within the admiralty jurisdiction, while those employed in ferry boats are not. Gilp. R. 203, 532. Persons who do not contribute their aid in navigating the vessel or to its preservation in the course of their occupation, as musicians, are not to be considered as seamen with a right to sue in the admiralty for their wages. Gilp. R. 516. See 1 Bell's Com. 509, 5th ed.; 2 Rob. Adm. R. 232; Dunl. Adm. Pr. h. t.

2. Seamen are employed either in merchant vessels for private service, or in public vessels for the service of the United States.

3.—1. Seamen in the merchant vessels are required to enter into a contract in writing commonly called shipping articles. (q. v.) This contract being entered into, they are bound under severe penalties, to render themselves on board the vessel according to the agreement: they are not at liberty to leave the ship without the consent of the captain or commanding officer, and for such absence, when less than forty-eight hours, they forfeit three days' wages for every day of absence; and when the absence is more than forty-eight hours, at one time, they forfeit all the wages due to them, and all their goods and chattels which were on board the vessel, or in any store where they may have been lodged at the time of their desertion, to the use of the owners of the vessel, and they are liable for damages for hiring other hands. They may be imprisoned for desertion until the ship is ready to sail.

4. On board, a seaman is bound to do his duty to the utmost of his ability; and when his services are required for extraordinary exertions, either in consequence of the death of other seamen, or on account of unforeseen perils, he is not entitled to an increase of wages, although it may have been promised to him. 2 Campb. 317;

Peake's N. P. Rep. 72; 1 T. R. 73. For disobedience of orders he may be imprisoned or punished with stripes, but the correction (q. v.) must be reasonable; 4 Mason, 508; Bee, 161; 2 Day, 294; 1 Wash. C. C. R. 316; and, for just cause, may be put ashore in a foreign country. 1 Pet. Adm. R. 186; 2 Ibid. 268; 2 East, Rep. 145. By act of Congress, September 28, 1850, Minot's Stat. at Large, U. S. p. 515, it is provided, that flogging in the navy and on board vessels of commerce, be, and the same is hereby abolished from and after the passage of this act.

5. Seamen are entitled to their wages, of which one-third is due at every port at which the vessel shall unlade and deliver her cargo, before the voyage be ended; and at the end of the voyage an easy and speedy remedy is given them to recover all unpaid wages. When taken sick a seaman is entitled to medical advice and aid at the expense of the ship: such expense being considered in the nature of additional wages, and as constituting a just remuneration for his labor and services. Gilp. 435, 447; 2 Mason, 541; 2 Mass. R. 541.

6. The right of seamen to wages is founded not in the shipping articles, but in the services performed; Bee, 395; and to recover such wages the seaman has a triple remedy, against the vessel, the owner, and the master. Gilp. 592; Bee, 254.

7. When destitute in foreign ports, American consuls and commercial agents are required to provide for them, and for their passages to some port of the United States, in a reasonable manner, at the expense of the United States; and American vessels are bound to take such seamen on board at the request of the consul, but not exceeding two men for every hundred tons of the ship, and transport them to the United States, on such terms, not exceeding ten dollars for each person, as may be agreed on. Vide, generally, Story's Laws U. S. Index, h. t.; 3 Kent, Com, 136 to 156; Marsh. Ins. 90; Poth. Mar. Contr. translated by Cushing, Index, h. t.; 2 Bro. Civ. and Adm. Law, 155.

8.—2. Seamen in the public service are governed by particular laws.

SEAMEN'S FUND. By the act of July 16, 1798, a provision is made for raising a fund for the relief of disabled and sick seamen: the master of every vessel arriving from a foreign port into the United States is required to pay to the collector of cus-

toms at the rate of twenty cents per month for every seaman employed on board of his vessel, which sum he may retain out of the wages of such seaman: vessels engaged in the coasting trade, and boats, rafts or flats navigating the Mississippi, with intention to proceed to New Orleans, are also laid under similar obligations. The fund thus raised is to be employed by the president of the United States as circumstances shall require, for the benefit and convenience of sick and disabled American seamen. Act of March 3, 1802, s. 1.

2. By the act of congress, passed February 28, 1803, c. 62, 2 Story's L. U. S. 884, it is provided, that when a seaman is discharged in a foreign country with his own consent, or when the ship is sold there, he shall, in addition to his usual wages, be paid three months' wages into the hands of the American consul, two-thirds of which are to be paid to such seaman, on his engagement on board any vessel to return home, and the remaining one-third is retained in aid of a fund for the relief of distressed American seamen in foreign ports. See 11 John. R. 66; 12 John. Rep. 143; 1 Mason, R. 45; 4 Mason, R. 541; Edw. Adm. R. 239.

SEARCH, crim. law. An examination of a man's house, premises or person, for the purpose of discovering proof of his guilt in relation to some crime or misdemeanor of which he is accused.

2. The constitution of the United States, amendments, art. 4, protects the people from unreasonable searches and seizures. 3 Story, Const. § 1895; Rawle, Const. ch. 10, p. 127; 10 John. R. 268; 11 John. R. 500; 3 Cranch, 447.

3. By the act of March 2, 1799, s. 68, 1 Story's L. U. S. 632, it is enacted, that every collector, naval officer, and surveyor, or other person specially appointed, by either of them, for that purpose, shall have full power and authority to enter any ship or vessel, in which they shall have reason to suspect any goods, wares, or merchandise, subject to duty, are concealed, and therein to search for, seize, and secure any such goods, wares, or merchandise; and if they shall have cause to suspect a concealment thereof in any particular dwelling house, store, building, or other place, they or either of them shall, upon proper application, on oath, to any justice of the peace, be entitled to a warrant to enter such house, store, or other place, (in the day time only,) and there to search for such goods; and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid, or secured to be paid, shall be forfeited.

SEARCH, practice. An examination made in the proper lien office for mortgages, liens, judgments, or other encumbrances, against real estate. The certificate given by the officer as to the result of such examination is also called a search.

2. Conveyancers and others who cause searches to be made ought to be very careful that they should be correct, with regard, 1. To the time during which the person against whom the search has been made owned the premises. 2. To the property searched against, which ought to be properly described. 3. To the form of the certificate of search.

SEARCH, RIGHT OF, mar. law. The right existing in a belligerent to examine and inspect the papers of a neutral vessel at sea. On the continent of Europe, this is called the right of visit. Dalloz, Dict. mots Prises Maritimes, n. 104-111.

2. The right does not extend to examine the cargo; nor does it extend to a ship of war, it being strictly confined to the searching of merchant vessels. The exercise of the right is to prevent the commerce of contraband goods. Although frequently resisted by powerful neutral nations, yet this right appears now to be fixed beyond contravention. The penalty for violently resisting this right is the confiscation of the property so withheld from visitation. Unless in extreme cases of gross abuse of his right by a belligerent, the neutral has no right to resist a search. 1 Kent, Com. 154; 2 Bro. Civ. and Adm. Law, 319; Mann. Comm. B. 3, c. 11.

SEARCH WARRANT, crim. law, practice. A warrant (q. v.) requiring the officer to whom it is addressed, to search a house or other place therein specified, for property therein alleged to have been stolen; and if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace, or other lawfully authorized officer. It should be given under the hand and seal of the justice, and dated.

2. The constitution of the United States,

amendments, art. 4, declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

3. Lord Hale, 2 P. C. 149, 150, recommends great caution in granting such warrants. 1. That they be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect they are in such a house or place, and his reasons for such suspicion. 2. That such warrants express that the search shall be made in day time. 3. That they ought to be directed to a constable or other proper officer, and not to a private person. 4. A search warrant ought to command the officer to bring the stolen goods and the person in whose custody they are, before some justice of the peace. Vide 1 Chit. Cr. Law, 57, 64; 4 Inst. 176; Hawk. B. 2, c. 13, s. 17, n. 6; 11 St. Tr. 321; 2 Wils. 149, 291; Burn's Just. h. t.; Williams' Just. h. t.

SEARCHER, Eng. law. An officer of the customs, whose duty it is to examine and search all ships outward bound, to ascertain whether they have any prohibited or uncustomed goods on board.

SECK. This word has two significations. 1. It means a warrant of remedy by distress. Litt. s. 218; and vide *Rent*. 2. It imports want of present fruit or profit, as in the case of the reversion without rent or other service, except fealty. Co. Litt. 151 b, note 5.

SECOND. A measure equal to one sixtieth part of a minute. Vide *Measure*.

SECOND DELIVERANCE, practice. The name of a writ given by statute of Westminster the second, 13 Edw. I. c. 2, founded on the record of a former action of replevin. 2 Inst. 341. It commands the sheriff, if the plaintiff make him secure of prosecuting his claim, and returning the chattels which were adjudged to the defendant by reason of the plaintiff's default, to make deliverance. On being nonsuited, the plaintiff in replevin might, at common law, have brought another replevin, and so in *infinitum*, to the intolerable vexation of the defendant. The statute of Westminster restrains the plaintiff when nonsuited from so doing, but allows him this writ, issuing out of the original record, in order to have the same distress delivered

again to him, on his giving the like security as before. 3 Bl. Com. 150; Hamm. N. P. 495; F. N. B. 68; 19 Vin. Ab. 1.

SECOND SURCHARGE, writ of. The name of a writ issued in England against a commoner who has a second time surcharged the common. 3 Bl. Com. 239.

SECONDARY, construction. That which comes after the first, which is primary; as, the primary law of nations, the secondary law of nations.

SECONDARY, English law. An officer who is second or next to the chief officer; as secondaries to the prothonotaries of the courts of king's bench, or common pleas; secondary of the remembrancer in the exchequer, &c. Jacob, L. D. h. t.

SECONDARY EVIDENCE. That species of proof which is admissible on the loss of primary evidence, and which becomes, by that event, the best evidence. 3 Bouv. Inst. n. 3055.

SECONDS, crim. law. Those persons who assist, direct and support others engaged in fighting a duel.

2. As they are often much to blame in inciting the duellists to their rash act, and as they are always assisting in the commission of the crime, the laws generally punish them with severity; but, in consequence of the false ideas too generally entertained on the subject of honor, they are too seldom enforced.

SECRET. That which is not to be revealed.

2. Attorneys and counsellors, who have been trusted professionally with the secrets of their clients, are not allowed to reveal them in a court of justice. The right of secrecy belongs to the client, and not to the attorney and counsellor.

3. As to the matter communicated, it extends to all cases where the client applies for professional advice or assistance; and it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. Story, Eq. Pl. § 600; 1 Milne & K. 104; 3 Sim. R. 467.

3. Documents confided professionally to the counsel cannot be demanded, unless indeed the party would himself be bound to produce them. Hare on Discov. 171. Grand jurors are sworn the commonwealth's secrets, their fellows and their own to keep. Vide *Confidential communications; Witness*.

SECRET, rights. A knowledge of something which is unknown to others, out of which a profit may be made; for example,

an invention of a machine, or the discovery of the effect of the combination of certain matters.

2. Instances have occurred of secrets of that kind being kept for many years, but they are liable to constant detection. As such secrets are not property, the possessors of them in general prefer making them public, and securing the exclusive right for years, under the patent laws, to keeping them in an insecure manner, without them. See Phil. on Pat. ch. 15; Gods. on Pat. 171; Dav. Pat. Cas. 429; 8 Ves. 215; 2 Ves. & B. 218; 2 Mer. 446; 3 Mer. 157; 1 Jac. & W. 394; 1 Pick. 443; 4 Mason, 15; 3 B. & P. 630.

SECRETARY. An officer who, by order of his superior, writes letters and other instruments. He is so called because he is possessed of the *secrets* of his employer. This term was used in France in 1843, and in England the term secretary was first applied to the clerks of the king, who being always near his person were called *clerks of the secret*, and in the reign of Henry VIII. the term secretary of state came into it.

SECRETARY OF EMBASSY or OF LEGATION. An officer appointed by the sovereign power, to accompany a minister of first or second rank, and sometimes, though not often, of an inferior rank. He is, in fact, a species of public minister; for independently of his protection as attached to an ambassador's suite, he enjoys, in his own rights, the same protection of the law of nations, and the same immunities as an ambassador. But *private secretaries* of a minister must not be confounded with secretaries of embassy or of legation. Such private secretaries are entitled to protection only as belonging to the suite of the ambassador.

2. The functions of a secretary of legation consist in his employment by his minister for objects of ceremony; in making verbal reports to the secretary of state, or other foreign ministers; in taking care of the archives of the mission; in ciphering and deciphering despatches; in sometimes making rough draughts of the notes or letters which the minister writes to his colleagues or to the local authorities; in draw-up *procès verbaux*; in presenting passports to the minister for his signature, and delivering them to the persons for whom they are intended; and, finally, in assisting the minister, under whom he is placed, in everything concerning the affairs of the mission. In the absence of the minister he is admit-

ted to conferences and to present notes signed by the minister. Vide *Ambassador; Minister; Suite*.

SECRETARY OF LEGATION. An officer employed to attend a foreign mission, and to perform certain duties as clerk.

2. His salary is fixed by the act of congress of May 1, 1810, s. 1, at such a sum as the president of the United States may allow, not exceeding two thousand dollars.

8. The salary of a secretary of embassy, or the secretary of a minister plenipotentiary, is the same as that of a secretary of legation.

SECRETARY OF THE NAVY, government. This officer is appointed by the president. His duties are to execute all such orders as he shall receive from the president, relative to the procurement of naval stores and materials, and the construction, armament, equipment and employment of vessels of war; as well as all other matters connected with the naval establishment of the United States; act of 30th April, 1798, s. 1, 1 Story's Laws, 498; he appoints his own clerks and subordinate officers. Various other duties are imposed upon him by sundry acts of congress. Vide Gordon's Dig. art. 370 to 375.

2. His salary is six thousand dollars. Act of 20th Feb. 1819, 3 Story's Laws, 1720.

SECRETARY OF STATE OF THE UNITED STATES, government. The principal officer in the *Department of State*. (q. v.) He shall perform such duties as shall be enjoined on or entrusted to him by the president, agreeably to the constitution, relative to the correspondences, commissions or instructions to or with public ministers or consuls from the United States, or to negotiations with foreign states or princes, or to memorials or other applications from foreign public ministers or foreigners, or to such other matters respecting foreign affairs as the president of the United States shall assign to such department. The secretary shall conduct the business of his department in such manner as the president shall, from time to time, order or instruct. Act of 27th July, 1789 act of 15th Sept. 1789, s. 1. Besides these general laws, there are various others which impose upon him inferior and less important duties.

2. His salary is six thousand dollars per annum. Act of 20th Feb. 1819.

SECRETARY OF THE TREASURY OF THE UNITED STATES, government. An officer

appointed by the president. His principal duties are, 1. To superintend the collection of the revenue. 2. To digest, prepare, and lay before congress at the commencement of every session, a report on the subject of finance. 3. To annex to the annual estimates of the appropriations required for the public service, a statement of the appropriations for the service of the year, which may have been made by former acts. 4. To give information to either house of congress, respecting all matters connected with his office. Besides these, there are other minor duties imposed upon him by various acts of congress.

2. His salary is six thousand dollars. Gord. Dig. art. 249 to 262.

SECRETARY FOR THE DEPARTMENT OF WAR, government. This officer is appointed by the president. He is required to perform and execute such duties as shall, from time to time, be enjoined on or entrusted to him by the president, agreeably to the constitution, relative to military commissions or to the land forces, or warlike stores of the United States, or to such other matters respecting military affairs as the president shall assign to the *department of war*, (q. v.) or relative to granting of lands to persons entitled thereto for military services rendered to the United States, or relative to Indian affairs. Act of 27th Aug., 1789, 1 Story's Laws, 31.

2. His salary is six thousand dollars per annum. Act of 20th Feb. 1819, 3 Story's Laws, 1720.

3. Various other duties are imposed upon the secretary by sundry acts of congress. Vide Story's Laws, Index, Departments, &c.; Gordon's Dig. art. 368 to 382.

SECTA, pleading. In ancient times the plaintiff was required to establish the truth of his declaration in the first instance, and before it was called in question upon the pleading, by the simultaneous production of his *secta*, that is, a number of persons prepared to confirm his allegations. Bract. 214, a.

2. The practice of thus producing a *secta*, gave rise to the very ancient formula almost invariably used at the conclusion of a declaration, as entered on the record, *et inde producit sectam*; and, though the actual production has, for many centuries, fallen into disuse, the formula still remains. Accordingly, except the count on a writ of right, and in dower, all declarations constantly conclude thus, "And therefore he

brings his suit," &c. The count on a writ of right, did not, in ancient times, conclude with the ordinary production of suit, but with the following formula peculiar to itself, "*Et quod tale sit jus suum offert disrationare per corpus talis liberi hominis*," &c., and it concludes, at the present day, with an abbreviated translation of the same phrase: "And that such is his right, he offers," &c. The count in dower is an exception to the rule in question, and concludes without any production of suit, a peculiarity which appears always to have belonged to that action. Steph. Pl. 427, 8; 3 Bl. Com. 395; Gilb. C. P. 48; 1 Chit. Pl. 399.

SECTION OF LAND. The lands of the United States are surveyed into parcels of six hundred and forty acres; each such parcel is called a section. 1 Story's L. U. S. 422.

2. These sections are divided into half sections, each of which contains three hundred and twenty acres, and into quarter sections of one hundred and sixty acres each.

SECTORES. Among the Romans the bidders at an auction were so called. Bab. on Auct. 2.

TO SECURE. To protect, insure, or save a right.

2. The constitution of the United States, art. 1, s. 8, gives power to congress "to promote the progress of science and the useful arts by *securing*, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries." The inventor of a machine has the right to it exclusively, at common law, and the author a right to his manuscript. But they may abandon the right by publishing the book without having secured a copyright, (q. v.) or by using publicly the machine, and suffering others to use it, without having obtained a patent. (q. v.) Vide *Secret*.

SECURITY. That which renders a matter sure; an instrument which renders certain the performance of a contract. The term is also sometimes applied to designate a person who becomes the surety for another, or who engages himself for the performance of another's contract. See 3 Blackf. R. 431.

SECURITY FOR COSTS, practice. In some courts there is a rule that when the plaintiff resides abroad he shall give security for costs, and until that has been done, when

demand, he cannot proceed in his action.

2. This is a right which the defendant must claim in proper time, for if he once waives it, he cannot afterwards claim it; the waiver is seldom, or perhaps never expressly made, but is generally implied from the acts of the defendant. When the defendant had undertaken to accept short notice of trial; 2 Hen. Bl. 573; 3 Taunt. 272; or after issue joined, and when he knew of plaintiff's residence abroad; or, with such knowledge, when the defendant takes any step in the cause; these several acts will amount to a waiver. 5 Barn. & Ald. 702; S. C. 1 Dow. & Ry. 348; 1 M. & P. 30; S. C. 17 E. C. L. R. 164. Vide 3 John. Ch. R. 520; 1 John. Ch. Rep. 202; 1 Ves. jun. 896.

3. The fact that the defendant is out of the jurisdiction of the court, will not, alone, authorize the requisition of security for costs; he must have his domicile abroad. 1 Ves. jr. 396. When the defendant resides abroad, he will be required to give such security, although he is a foreign prince. 33 E. C. L. Rep. 214. Vide 11 S. & Rawle, 121; 1 Miles, R. 321; 2 Miles, 402.

SECUS. Otherwise.

SEDITION, *crimes*. The raising commotions or disturbances in the state; it is a revolt against legitimate authority, Ersk. Princ. Laws Scotl. b. 4, t. 4, s. 14; Dig. Lib. 49, t. 16, l. 3, § 19.

2. The distinction between sedition and treason consists in this, that though its ultimate object is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws, or the subversion of the constitution. Alis. Crim. Law of Scotl. 580.

3. The obnoxious and obsolete act of July 14, 1798, 1 Story's Laws U. S. 543, was called the *sedition law*, because its professed object was to prevent disturbances.

4. In the Scotch law, sedition is either verbal or real. Verbal is inferred from the uttering of words tending to create discord between the king and his people; real sedition is generally committed by convoking together any considerable number of people, without lawful authority, under the pretence of redressing some public grievance, to the disturbing of the public peace. Ersk. ut supra.

SEDUCTION. The offence of a man

who abuses the simplicity and confidence of a woman to obtain by false promises what she ought not to grant.

2. The woman being *particeps criminis*, has no remedy for the mere seduction, nor is there, to the discredit of the law, a direct remedy in her parents. The seducer may be sued, though not directly or ostensibly for the seduction; but for the consequent inability to perform those services for which she was accountable to her master, or to her parent, who, for this purpose, is obliged to assume that less endearing relation; and if it cannot be proved that she filled that office, the action cannot be sustained. 7 Mann. & Gr. 1033. It follows, therefore, that when the daughter is of full age, and the father is not entitled to her services, and actually, she is not in his service, the father can maintain no action for the seduction. 5 Harr. & J. 27; 1 Wend. 447; 3 Pennsylv. 49; 10 John. 115. Vide 2 Watts, 474; 9 John. 387; 2 Wend. 459; 5 Cowen, 106; 2 Penn. 588; 6 Munf. 587; 2 A. K. Marsh. 128; 2 Overt. 93; 9 John. R. 387; 2 New Reports, 476; 6 East, 387; Peake's Rep. 253; 11 East, 24; 5 East, 45; 2 T. R. 4; 2 Selw. N. P. 1001; 2 Phil. Ev. 156; 3 Chitt. Bl. Com. 140, n.; 7 Com. Dig. 318; 6 M. & W. 55.

SEEDS. The substance which nature prepares for the reproduction of plants or animals.

2. Seeds which have been sown in the earth immediately become a part of the land in which they have been sown; *quæ sata solo cedere intelliguntur*. Inst. 2, l. 32.

SEIGNIOR or SEIGNEUR. Among the feudists, this name signified lord of the fee. F. N. B. 23. The most extended signification of this word includes not only a lord or peer of parliament, but is applied to the owner or proprietor of a thing; hence, the owner of a hawk, and the master of a fishing vessel, is called a seigneur. 37 Edw. III. c. 19; Barr. on the Stat. 258.

SEIGNIORY, *Eng. law*. The rights of a lord as such, in lands. Swinb. 174.

SEISIN, *estates*. The possession of an estate of freehold. 8 N. H. Rep. 57; 3 Hamm. 220; 3 Litt. 134; 4 Mass. 408. Seisin was used in contradistinction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be the possession of their lords in whom the freehold continued.

2. Seisin is either in *fact* or in *law*.

3. Where a freehold estate is conveyed

to a person by feoffment, with livery of seisin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seisin in deed or in fact, and a freehold in deed: but where the freehold comes to a person by act of law, as by descent, he only acquires a seisin in law, that is, a right of possession, and his estate is called a freehold in law.

4. The seisin in law, which the heir acquires on the death of his ancestor, may be defeated by the entry of a stranger, claiming a right to the land, which is called an abatement. (q. v.)

5. The actual seisin of an estate may be lost by the forcible entry of a stranger who thereby ousts or dispossesses the owner: this act is called a disseisin. (q. v.)

6. According to Lord Mansfield, the various alterations which have been made in the law for the last three centuries, "have left us but the name of feoffment, *seisin*, tenure, and freeholder, without any precise knowledge of the thing originally signified by these sounds."

7. In the United States, a conveyance by deed executed and acknowledged, and properly recorded according to law, and the descent cast upon the heir, are, in general, considered as a seisin in deed without entry; and a grant by letters-patent from the commonwealth has the same effect. 4 Mass. R. 546; 7 Mass. R. 494; 15 Mass. R. 214; 1 Munf. R. 170. The recording of a deed is equivalent to livery of seisin. 4 Mass. 546.

8. In Pennsylvania, Connecticut, Massachusetts and Ohio, seisin means merely ownership, and the distinction between seisin in deed and in law is not known in practice. Walk. Intr. 324, 330; 1 Hill. Abr. 24; 4 Day, R. 305; 4 Mass. R. 489; 14 Pick. R. 224. A patent by the commonwealth, in Kentucky, gives a right of entry, but not actual seisin. 3 Bibb, Rep. 57. Vide 1 Inst. 31; 19 Vin. Ab. 306; Dane's Abr. c. 104, a. 3; 4 Kent, Com. 2, 381; Cruise's Dig. t. 1, § 23; Toull. Dr. Civ. Fr. liv. 3, t. 1, c. 1, n. 80; Poth. Traité des Fiefs, part 1, c. 2; 3 Sumn. R. 170. Vide *Livery of Seisin*.

SEIZURE, practice. The act of taking possession of the property of a person condemned by the judgment of a competent tribunal, to pay a certain sum of money, by a sheriff, constable, or other officer, lawfully authorized thereto, by virtue of an execution, for the purpose of having such pro-

perty sold according to law to satisfy the judgment. By seizure is also meant the taking possession of goods for a violation of a public law; as the taking possession of a ship for attempting an illicit trade. 2 Cranch, 187; 6 Cowen, 404; 4 Wheat. 100; 1 Gallis. 75; 2 Wash. C. C. 127, 567.

2. The seizure is complete as soon as the goods are within the power of the officer. 8 Rawle's Rep. 401; 16 Johns. Rep. 287; 2 Nott & McCord, 392; 2 Rawle's Rep. 142; Wats. on Sher. 172; Com. Dig. Execution, C 5.

3. The taking of part of the goods in a house, however, by virtue of a *feri facias* in the name of the whole, is a good seizure of all. 8 East, R. 474. As the seizure must be made by virtue of an execution, it is evident that it cannot be made after the return day. 2 Caine's Rep. 243; 4 John. R. 450. Vide *Door; House; Search Warrant*.

SELECTI JUDICES. Judges among the Romans who were selected very much like our juries. They were returned by the prætor, drawn by lot, subject to be challenged and sworn. 3 Bl. Com. 366.

SELF-DEFENCE, crim. law. The right to protect one's person and property from injury.

2. It will be proper to consider, 1. The extent of the right of self-defence. 2. By whom it may be exercised. 3. Against whom. 4. For what causes.

3.—1. As to the extent of the right, it may be laid down, first, that when threatened violence exists, it is the duty of the person threatened to use all prudent and precautionary measures to prevent the attack; for example, if by closing a door which was usually left open, one could prevent an attack, it would be prudent, and perhaps the law might require, that it should be closed, in order to preserve the peace, and the aggressor might in such case be held to bail for his good behaviour; secondly, if, after having taken such proper precautions, a party should be assailed, he may undoubtedly repel force by force, but in most instances he cannot, under the pretext that he has been attacked, use force enough to kill the assailant or hurt him after he has secured himself from danger; as, if a person unarmed enters a house to commit a larceny, while there he does not threaten any one, nor does any act which manifests an intention to hurt any one, and there are a number of persons present, who may easily

secure him, no one will be justifiable to do him any injury, much less to kill him; he ought to be secured and delivered to the public authorities. But when an attack is made by a thief under such circumstances, and it is impossible to ascertain to what extent he may push it, the law does not require the party assailed to weigh with great nicety the probable extent of the attack, and he may use the most violent means against his assailant, even to the taking of his life. For homicide may be excused, *se defendendo*, where a man has no other probable means of preserving his life from one who attacks him, while in the commission of a felony, or even on a sudden quarrel, he beats him, so that he is reduced to this inevitable necessity. Hawk. bk. 2, c. 11, s. 13. And the reason is that when so reduced, he cannot call to his aid the power of society or of the commonwealth, and, being unprotected by law, he reassumes his natural rights, which the law sanctions, of killing his adversary to protect himself. Toull. Dr. Civ. Fr. liv. 1, tit. 1, n. 210. See Pamph. Rep. of Selfridge's Trial in 1806; 2 Swift's Ev. 283.

4.—2. The party attacked may undoubtedly defend himself, and the law further sanctions the mutual and reciprocal defence of such as stand in the near relations of husband and wife, parent and child, and master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in their person or property, it is lawful for him to repel force by force, for the law in these cases respects the passions of the human mind, and makes it lawful in him, when external violence is offered to himself, or to those to whom he bears so near a connexion, to do that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. 2 Roll. Ab. 546; 1 Chit. Pr. 592.

5.—3. The party making the attack may be resisted, and if several persons join in such attack they may all be resisted, and one may be killed although he may not himself have given the immediate cause for such killing, if by his presence and his acts, he has aided the assailant. See *Conspiracy*.

6.—4. The cases for which a man may defend himself are of two kinds; first, when a felony is attempted, and, secondly, when no felony is attempted or apprehended.

7.—1st. A man may defend himself, and

even commit a homicide for the prevention of any forcible and atrocious crime, which if completed would amount to a felony; and of course under the like circumstances, mayhem, wounding and battery would be excusable at common law. 1 East, P. C. 271; 4 Bl. Com. 180. A man may repel force by force in defence of his person, property or habitation, against any one who manifests, intends, attempts, or endeavors, by violence or surprise, to commit a forcible felony, such as murder, rape, robbery, arson, burglary and the like. In these cases he is not required to retreat, but he may resist, and even pursue his adversary, until he has secured himself from all danger.

8.—2d. A man may defend himself when no felony has been threatened or attempted; 1. When the assailant attempts to beat another and there is no mutual combat; as, where one meets another and attempts to commit or does commit an assault and battery on him, the person attacked may defend himself; and an offer or attempt to strike another, when sufficiently near, so that that there is danger, the person assailed may strike first, and is not required to wait until he has been struck. Bull. N. P. 18; 2 Roll. Ab. 547. 2. When there is a mutual combat upon a sudden quarrel. In these cases both parties are the aggressors; and if in the fight one is killed, it will be manslaughter at least, unless the survivor can prove two things: 1st. That before the mortal stroke was given he had refused any further combat, and had retreated as far as he could with safety; and 2d. That he killed his adversary from necessity, to avoid his own destruction.

9. A man may defend himself against animals, and he may during the attack kill them, but not afterwards. 1 Car. & P. 106; 13 John. 312; 10 John. 365.

10. As a general rule no man is allowed to defend himself with force if he can apply to the law for redress, and the law gives him a complete remedy. See *Assault; Battery; Necessity; Trespass*.

SELECTMEN. The name of certain officers in several of the United States, who are invested by the statutes of the several states with various powers.

SELLER, contracts. One who disposes of a thing in consideration of money; a vendor.

2. This term is more usually applied in the sale of chattels, that of vendor in the sale of estates.

3. The duties of the seller are, 1. To deal with fairness. 2. To deliver the thing sold at the time and place appointed, and to take care of it until delivery; but when everything the seller has to do with the goods is complete, the property and the risk of accident to the goods, rests in the buyer, even before delivery or payment. Noy's Max. ch. 24; 7 East, 571; 2 Bl. Com. 448. 3. To warrant the title of personal property when he sells it as his own, when it is in his possession. 2 Kent, Com. 374; 1 Lord Raym. 593; 1 Salk. 210.

4. The rights of the seller are, 1. To be paid the price agreed upon. 2. To be indemnified for any expenses he may have incurred to preserve the thing sold for the buyer, after the title to it has passed to the latter. 3. To stop the thing in transitu, when the buyer has failed and the price has not been paid. See *Stoppage in transitu*. Vide *Purchaser*, and the authorities there cited; Bouv. Inst. Index, h. t.

SEMBLE. A French word which signifies, *if seems*. It is commonly used before the statement of a point of law which has not been directly settled; but about which the court have expressed an opinion, and intimated what it is.

SEMI-PROOF, civ. law. Presumptions of fact are so called. This degree of proof is thus defined: "Non est ignorandum, probationem semiplenam eam esse, per quam rei gestæ fides aliqua fit iudici; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi." Mascardus, De Prob. vol. 1, Quæst. 11, n. 1, 4.

SEMINAUFRAGIUM. A term used by Italian lawyers, which literally signifies *half-shipwreck*, and by which they understand the jetsam, or casting merchandise into the sea to prevent shipwreck. Loaré, Esp. du Code de Com. art. 409. It also signifies the state of a vessel which has been so much injured by tempest or accident, that to repair the damages, after being brought into port, and prepare her for sea, would cost more than her worth. 4 Law Rep. 120.

SEMPER PARATUS. The name of a plea by which the defendant alleges that he has always been ready to perform what is demanded of him. 3 Bl. Com. 303. The same as *Tout temps prist*. (q. v.)

SEN. This is said to be an ancient word which signified justice. Co. Litt. 61 a.

SENATE, government. The less numerous branch of the legislature.

2. The constitution of the United States, article 1, s. 3, cl. 1, directs that "the senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall have one vote." "The vice president of the United States," to use the language of the constitution, art. 1, s. 3, cl. 4, "shall be president of the senate, but shall have no vote unless they be equally divided." In the senate each state in its political capacity, is represented upon a footing of perfect equality, like a congress of sovereigns or ambassadors, or like an assembly of peers. It is unlike the house of representatives where the people are represented. Story, Const. ch. 10.

3. The senate of the United States is invested with legislative, executive and judicial powers.

4.—1. It is a legislative body whose concurrence is requisite to the passage of every law. It may originate any bill, except those for raising revenue, which shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. Const. art. 1, s. 7, cl. 1.

5.—2. The senate is invested with executive authority in concluding treaties and making appointments. Vide *President of the United States of America*.

6.—3. It is invested with judicial power when it is formed into a court for the trial of impeachments. See *Courts of the United States*.

7. In most of the states the less numerous branch of the legislature bears the title of senate. In such a body the people are represented as well as in the other house. Vide article *Congress*; and, for the senates of the several states, the name of each state. See, also, articles *Courts of the United States*, I; *House of Representatives*; *Vice-President of the United States*.

SENATOR, government. One who is a member of a senate.

2. "No person shall be a senator [of the national senate] who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not when elected, be an inhabitant of that state for which he shall be chosen." Const. U. S. art. 1, s. 3, cl. 5. Vide 1 Kent, Com. 224; Story on the Const. § 726 to 730.

SENATUS CONSULTUM, civ. law.

A decree or decision of the Roman senate, which had the force of law.

2. When the Roman people had so increased that there was no place where they could meet, it was found necessary to consult the senate instead of the people, both on public affairs and those which related to individuals. The opinion which was rendered on such an occasion was called *senatus consultum*. Inst. 1, 2, 5; 'Clef des Lois Rom. h. t.; Merl. Répert. h. t. These decrees frequently derived their titles from the names of the consuls or magistrates who proposed them; as, *senatus-consultum Claudianum*, *Libonianum*, *Velleianum*, &c. from Claudius, Libonius, Velleius. Ail. Pand. 30.

SENESCHALLUS. A steward. Co. Litt. 61 a.

SENILITY. The state of being old.

2. Sometimes in this state it is exceedingly difficult to know whether the individual is or is not so deprived of the powers of his mind as to be unable to manage his affairs. In general, senility is merely a loss of energy in some of the intellectual operations, while the affections remain natural and unperverted; such a state may, however, be followed by actual dementia or idiocy.

3. When on account of senility the party is unable to manage his affairs, a committee will be appointed as in case of lunacy. 1 Coll. on Lunacy, 66; 2 John. Ch. R. 282; 12 Ves. 446; 4 Call's R. 423; 5 John. Ch. R. 158; 8 Mass. 129; 2 Ves. sen. 407; 19 Ves. 285; 2 Cyclop. of Pract. Med. 872. See *Aged Witness*.

SENIOR. The elder. This addition is sometimes made to a man's name, when two persons bear the same, in order to distinguish them. In practice when nothing is mentioned, the senior is intended. 3 Miss. R. 59. See *Junior*.

SENTENCE. A judgment, or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil, and sentence to criminal proceedings.

2. Sentences are final, when they put an end to the case; or interlocutory, when they settle only some incidental matter which has arisen in the course of its progress. Vide Aso & Man. Inst. B. 3, t. 8, c. 1.

SEPARALITER. Separately.

2. This word is sometimes used in indictments to show that the defendants are charged separately with offences, which,

without the addition of this word, would seem, from the form of the indictment, to be charged jointly; as, for example, when two persons are indicted together for perjury, and the indictment states that A and B came before a commissioner, &c., this is alleging that they were both guilty of the same crime, when by law their crimes are distinct, and the indictment is vicious; but if the word *separaliter* is used, then the affirmation is that each was guilty of a separate offence. 2 Hale, P. C. 174.

SEPARATE ESTATE. That which belongs to one only of several persons; as, the separate estate of a partner, which does not belong to the partnership. 2 Bouv. Inst. n. 1519.

2. The separate estate of a married woman, is that which belongs to her, and over which her husband has no right in equity. It may consist of lands or chattels. 4 Barb. S. C. Rep. 407; 1 Const. R. 452; 4 Bouv. Inst. n. 3996.

SEPARATE MAINTENANCE, contracts. An allowance made by a husband to his wife for her separate support and maintenance.

2. When this allowance is regularly paid, and notice of it has been given, no person who has received such notice will be entitled to recover against the husband for necessities furnished to the wife, because the liability of the husband, depends on a presumption of authority delegated by him to the wife, which is negatived by the facts of the case. 2 Stark. Ev. 699.

SEPARATE TRIAL, practice. The trial of one person by himself, when he is jointly indicted with others, for an alleged offence.

2. On a joint indictment against two or more defendants for a crime of misdemeanor, it is in the discretion of the court whether to allow a separate trial for each prisoner, or to order the whole of them to be tried together. 1 Baldw. Rep. 81; 12 Wheat. 480; 5 Serg. & Rawle, 60; but see 1 Pet. C. C. Rep. 118.

SEPARATION, contracts. When the husband and wife agree to live apart they are said to have made a separation.

2. Contracts of this kind are generally made by the husband for himself and by the wife with trustees. 4 Paige's R. 516; 3 Paige's R. 483; 5 Bligh, N. S. 339; 1 Dow & Clark, 519. This contract does not affect the marriage, and the parties may at any time agree to live together as husband and wife. The husband who has agreed to a total separation cannot bring an action for.

criminal conversation with the wife. Roper, Husband and Wife, *passim*; 4 Vin. Ab. 173; 2 Stark. Ev. 698; Shelf. on Mar. & Div. ch. 6, p. 608.

3. Reconciliation after separation supercedes special articles of separation in courts of law and equity. 1 Dowl. P. C. 245; 2 Cox, R. 105; 3 Bro. C. C. 619, n.; 11 Ves. 532. Public policy forbids that parties should be permitted to make agreements for themselves to hold good whenever they choose to live separate. 5 Bligh, N. S. 367, 375; and see 1 Carr. & P. 36. See 5 Bligh, N. S. 339; 2 Dowl. P. C. 332; 2 C. & M. 388; 3 John. Ch. R. 521; 2 Sim. & Stu. 372; 1 Edw. R. 380; Desaus. R. 45, 198; 1 Y. & C. 28; 11 Ves. 526; 2 East, R. 283; 8 N. H. Rep. 350; 1 Hoff. R. 1.

SEPULCHRE. The place where a corpse is buried. The violation of sepulchres is a misdemeanor at common law. Vide *Dead bodies*.

TO SEQUESTER, civil and eccles. law. To renounce. Example, when a widow comes into court and disclaims having anything to do, or to intermeddle with her deceased husband's estate, she is said to sequester. Jacob, L. D. h. t.

SEQUESTRATION, chancery practice. The process of sequestration is a writ of commission, sometimes directed to the sheriff, but most usually, to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real or personal estate of the defendant, and to take the rents, issues and profits into their own hands, and keep possession of, or pay the same as the court shall order and direct, until the party who is in contempt shall do that which he is enjoined to do, and which is specially mentioned in the writ. 1 Harr. Ch. 191; Newl. Ch. Pr. 18; Blake's Ch. Pr. 103.

2. Upon the return of *non est inventus* to a commission of rebellion, a sergeant-at-arms may be moved for; and if he certifies that the defendant cannot be taken, a motion may be made upon his certificate, for an order for a sequestration. 2 Madd. Chan. 203; Newl. Ch. Pr. 18; Blake's Ch. Pr. 103.

3. Under a sequestration upon mesne process, as in respect of a contempt for want of appearance or answer, the sequestrators may take possession of the party's personal property and keep him out of possession; but no sale can take place, unless

perhaps to pay expenses; for this process is only to form the foundation of taking the bill *pro confesso*. After a decree it may be sold. See 3 Bro. C. C. 72; 2 Cox, 224; 1 Ves. jr. 86; 3 Bro. C. C. 372; 2 Madd. Ch. Pr. 206.

See, generally, as to this species of sequestration, 19 Vin. Abr. 325; Bac. Ab. h. t.; Com. Dig. Chancery, D 7, Y 4; 1 Hov. Supp. to Ves. jr. 25 to 29; 1 Vern. by Raith. 58, note 1; Id. 421, note 1.

SEQUESTRATION, contracts. A species of deposit, which two or more persons, engaged in litigation about anything, make of the thing in contest to an indifferent person, who binds himself to restore it when the issue is decided, to the party to whom it is adjudged to belong. Louis. Code, art. 2942; Story on Bailm. § 45. Vide 19 Vin. Ab. 325; 1 Supp. to Ves. jr. 29; 1 Vern. 58, 420; 2 Ves. jr. 23; Bac. Ab. h. t.

2. This is called a conventional sequestration, to distinguish it from a judicial sequestration, which is considered in the preceding article. See Dalloz, Dict. mot Sequestre.

SEQUESTRATION, Louisiana practice. The Code of Practice in civil cases in Louisiana, defines and makes the following provisions on the subject of sequestration.

Art. 269. Sequestration is a mandate of the court, ordering the sheriff, in certain cases, to take in his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is what is properly called a judicial sequestration. Vide 1 Mart. R. 79; 1 L. R. 439; Civil Code of Lo. 2941, 2948.

2.—Art. 270. In this acceptance, the word sequestration does not mean a *judicial deposit*, because sequestration may exist together with the right of administration, while mere deposit does not admit it.

3.—Art. 271. All species of property, real or personal, as well as the revenue proceeding from the same, may be sequestered.

4.—Art. 272. Obligations and titles may also be sequestered, when their ownership is in dispute.

5.—Art. 273. Judicial sequestration is generally ordered only at the request of one of the parties to a suit; there are cases, nevertheless, where it is decreed by the court without such request, or is the consequence of the execution of judgments.

6.—Art. 274. The court may order, ex officio, the sequestration of real property in suits, where the ownership of such property is in dispute, and when one of the contending parties does not seem to have a more apparent right to the possession than the other. In such cases, sequestration may be ordered to continue, until the question of ownership shall have been decided.

7.—Art. 275. Sequestration may be ordered, at the request of one of the parties in a suit, in the following cases:

1. When one, who had possessed for more than one year, has been evicted through violence, and sues to be restored to his possession. 2. When one sues for the possession of movable property, or of a slave, and fears that the party having possession, may ill treat the slave, or send either that slave, or the property in dispute, out of the jurisdiction of the court, during the pendency of the suit. 3. When one claims the ownership, or the possession of real property, and has good ground to apprehend, that the defendant may make use of his possession, to dilapidate, or to waste the fruits or revenues produced by such property, or convert them to his own use. 4. When a woman sues for a separation from bed and board, or only for a separation of property from her husband, and has reason to apprehend that he will ruin her dotal property, or waste the fruits or revenues produced by the same during the pendency of the action. 5. When one has petitioned for a stay of proceedings, and a meeting of his creditors, and such creditors fear that he may avail himself of such stay of proceedings, to place the whole, or a part of his property, out of their reach. 6. A creditor by special mortgage shall have the power of sequestering the mortgaged property, when he apprehends that it will be removed out of the state before he can have the benefit of his mortgage, and will make oath of the facts which induced his apprehension.

8.—Art. 276. A plaintiff, wishing to obtain an order of sequestration in any one of the cases above provided, must annex to the petition in which he prays for such an order, an affidavit, setting forth the cause for which he claims such order: he must, besides, execute his obligation in favor of the defendant, for such sum as the court shall determine, with the surety of one good and solvent person, residing within the jurisdiction of the court, to be responsible

for such damages as the defendant may sustain, in case such sequestration should have been wrongfully obtained.

9.—Art. 277. When security is given in order to obtain the sequestration of real property which brings a revenue, the judge must require that it be given for an amount sufficient to compensate the defendant, not only for all damage which he may sustain, but also for the privation of such revenue, during the pendency of the action.

10.—Art. 278. The plaintiff, when he prays for a sequestration of the property of one who has failed, is not required to give such security, though that property bring in a revenue.

11.—Art. 279. A defendant, against whom a mandate of sequestration has been obtained, except in cases of failure, may have the same set aside, by executing his obligation in favor of the sheriff, with one good and solvent surety, for whatever amount the judge may determine, as being equal to the value of the property to be left in his possession.

12.—Art. 280. The security thus given by the defendant, when the property sequestered consists in movables or in slaves, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them; and that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff.

13.—Art. 281. As regards landed property, this security is given to prevent the defendant, while in possession, from wasting the property, and for the faithful restitution of the fruits that he may have received since the demand, or of their value in the event of his being cast in the suit.

14.—Art. 282. When the sheriff has sequestered property pursuant to an order of the court, he shall, after serving the petition and the copy of the order of sequestration on the defendant, send his return in writing to the clerk of the court which gave the order, stating in the same in what manner the order was executed, and annex to such return a true and minute inventory of the property sequestered, drawn by him, in the presence of two witnesses.

15.—Art. 283. The sheriff, while he retains possession of sequestered property, is bound to take proper care of the same, and to administer the same, if it be of such nature as to admit of it, as a prudent father

of a family administers his own affairs. He may confide them to the care of guardians or overseers, for whose acts he remains responsible, and he will be entitled to receive a just compensation for his administration, to be determined by the court, to be paid to him out of the proceeds of the property sequestered, if judgment be given in favor of the plaintiff.

SEQUESTERATOR. One to whom a sequestration is made.

2. A depositary of this kind cannot exonerate himself from the care of the thing sequestered, in his hands, unless for some cause rendering it indispensable that he should resign his trust. *Louis. Code, art. 2947. See Stakeholder.* Sequestrators are also officers appointed by a court of chancery, and named in a writ of sequestration. As to their powers and duties, see 2 *Madd. Ch. Pr.* 205, 6; *Blake's Ch. Pr.* 103; *Newl. Ch. Pr.* 18, 19; 1 *Harr. Ch.* 191.

SERF. During the feudal times certain persons who were bound to perform very onerous duties towards others, were so called. *Poth. Des Personnes*, p. 1, t. 1, a. 6, s. 4. There is this essential difference between a serf and a slave; the serf was bound simply to labor on the soil where he was born, without any right to go elsewhere without the consent of his lord; but he was free to act as he pleased in his daily action: the slave on the contrary is the property of his master, who may require him to act as he pleases in every respect, and who may sell him as a chattel. *Lepage, Science du Droit*, c. 3, art. 2, § 2.

SERGEANT or SERJEANT, Eng. law. An officer in the courts of the highest grade among the practitioners of the law.

SERGEANT or SERJEANT, in the army. An inferior officer of a company of foot, or troop of dragoons, appointed to see discipline observed, to teach the soldiers the exercise of their arms, and to order, straighten and form ranks, files, &c.

SERGEANT AT ARMS. An officer appointed by a legislative body, whose duties are to enforce the orders given by such bodies, generally under the warrant of its presiding officer.

SERIATIM. In a series, severally; as, the judges delivered their opinions *seriatim*.

SERJEANTY, Eng. law. A species of service which cannot be due or performed from a tenant to any lord but the king; and is either grand or petit serjeanty.

SERVANTS, (negro or mulatto,) in

Pennsylvania. By the fourth section of the act for the gradual abolition of slavery, passed the first day of March, 1780, 1 *Smith's Laws of Penn.* 492, it is "provided that every negro or mulatto child, born within this state after the passing of this act, (who would in case this act had not been made, have been a servant for years, or life, or a slave) shall be by virtue of this act the servant of such person, or his assigns who would in such case have been entitled to the service of such child, until such child attain unto the age of twenty-eight years, in the manner and on the conditions, whereon servants bound by indenture for four years are or may be retained or holden; and shall be liable to like correction and punishment, and entitled to like relief, in case he be evilly treated by his master, and to like freedom dues and privileges, as servants bound by indenture for four years are entitled, unless the person to whom such services belong shall abandon his claim to the same; in which case the overseers of the poor where such child shall be abandoned shall by indenture bind out every such child so abandoned as an apprentice for a time not exceeding the age hereinbefore limited for the service of such children." And by the thirteenth section it is enacted, "that no covenant of personal servitude or apprenticeship whatsoever shall be valid or binding on a negro or mulatto for a longer time than seven years, unless such servant or apprentice were at the commencement of such servitude or apprenticeship, under the age of twenty-one years, in which case such negro or mulatto may be holden as a servant or apprentice, respectively, according to the covenant, as the case shall be, until he shall attain the age of twenty-eight years, but no longer." See 6 *Binn.* 204; 1 *Browne's R.* 369, n.

2. The act requires that a register of such children as would have been slaves shall be kept by a public officer therein designated. The want of registry entitles such child to freedom.

SERVANTS. In *Louisiana* they are divided into free servants and slaves. See *Slaves; Slavery.*

2. Free servants are, in general, all free persons who let, hire, or engage their services to another in the state, to be employed therein at any work, commerce, or occupation whatever, for the benefit of him who has contracted with them, for a certain sum or retribution, or upon certain conditions.

3. There are three kinds of free servants in the state, to wit:

4.—1. Those who only hire out their services by the day, week, month, or year, in consideration of certain wages.

5.—2. Those who engage to serve for a fixed time for a certain consideration, and who are therefore considered not as having hired out, but as having sold their services.

6.—3. Apprentices; that is, those who engage to serve any one, in order to learn some art, trade, or profession. Civ. Code of Lo. art. 155, 156, 157.

SERVANTS, menial. Domestics; those who receive wages, and who are lodged and fed in the house of another, and who are employed in his services. Such servants are not particularly recognized by law. They are called menial servants, or domestics, from living *infra moenia*, within the walls of the house. 1 Bl. Com. 324; Wood's Inst. 53; 1 Sw. Syst. 218. The right of the master to their services in every respect is grounded on the contract between them.

2. Laborers, or persons hired by the day's work, or any longer time, are not considered servants. 1 Sw. Syst. 218; 5 Binn. 167; 3 Serg. & Rawle, 351. Vide 12 Ves. 114; 2 Vern. 546; 16 Ves. 486; 1 Rop. on Leg. 121; 3 Deac. & Chit. 332; 1 Mont. & Bligh. 413; 2 Mart. N. S. 652; Poth. Proc. Civ. sect. 2, art. 5, § 5; Poth. Ob. n. 710, 828, French ed.; 9 Toull. n. 314; *Domestic; Operative*.

SERVI. This name was given by the Romans to their slaves; they were so called from *servare*, to preserve, from the ancient practice of the generals of the army, who were accustomed to sell their captives, and preserved them rather than kill them: *servi autem ex eo appellati sunt, quod imperatores captivos vendere, ac per hoc servare, nec occidere solent.* Inst. 1, 3, 3.

SERVICE, contracts. The being employed to serve another.

2. In cases of seduction, the gist of the action is not injury which the seducer has inflicted on the parent by destroying his peace of mind, and the reputation of his child, but for the consequent inability to perform those services for which she was accountable to her master or her parent, who assumes this character for the purpose. Vide *Seduction*, and 2 Mees. & W. 539; 7 Car. & P. 528.

SERVICE, feudal law. That duty which the tenant owes to his lord, by reason of his fee or estate.

2. The services, in respect of their quality, were either free or base, and in respect of their quantity and the time of exacting them, were either certain or uncertain. 2 Bl. Com. 62.

3. In the civil law by service is sometimes understood servitude. (q. v.)

SERVICE, practice. To execute a writ or process; as, to serve a writ of *capias* signifies to arrest a defendant under the process; Kirby, 48; 2 Aik. R. 338; 11 Mass. 181; to serve a summons, is to deliver a copy of it at the house of the party, or to deliver it to him personally, or to read it to him; notices and other papers are served by delivering the same at the house of the party, or to him in person.

2. When the service of a writ is prevented by the act of the party on whom it is to be served, it will, in general, be sufficient if the officer do everything in his power to serve it. 39 Eng. C. L. R. 431; 1 M. & G. 238.

SERVIENT, civil law. A term applied to an estate or tenement by which a servitude is due to another estate or tenement. See *Dominant; Servitude*.

SERVITUDE, civil law. A term which indicates the subjection of one person to another person, or of a person to a thing, or of a thing to a person, or of a thing to a thing.

2. Hence servitudes are divided into real, personal, and mixed. *Lois des Bât. P. 1, c. 1.*

3. A real or predial servitude is a charge laid on an estate for the use and utility of another estate belonging to another proprietor. *Louis. Code*, art. 643. When used without any adjunct, the word servitude means a real or predial servitude. *Lois des Bât. P. 1, c. 1.*

4. The subjection of one person to another is a purely personal servitude; if it exists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do, or not to do; this right arises from all kinds of contracts or quasi contracts. *Lois des Bât. P. 1, c. 1, art. 1.*

5. The subjection of persons to things or of things to persons, are mixed servitudes. *Lois des Bât. P. 1, c. 1, art. 2.*

6. Real servitudes are divided into rural and urban. Rural servitudes are those which are due by an estate to another

estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime and wood from it, and the like. Urban servitudes are those which are established over a building for the convenience of another, such as the right of resting the joists in the wall of the serving building, of opening windows which overlook the serving estate, and the like. Dict. de Jurisp. tit. Servitudes.

See, generally, Lois des Bât. Part 1; Louis. Code, tit. 4; Code Civil, B. 2, tit. 4; This Dict. tit. *Ancient Lights*; *Easements*; *Ways*; Lalaure, Des Servitudes, *passim*.

SERVITUDES, NATURAL, civil law. Those servitudes which arise in consequence of the nature of the soil.

2. By law the inferior heritages are submitted in relation to the natural flow of waters, and the like, to the superior. An inferior field is, therefore, subject to the injury or prejudice which the situation of the ground, in its natural state, may cause it.

SERVITUDES, personal. Those by which the property of a subject, in Scotland, is burdened in favor, not of a tenement, but of a person. Ersk. Pr. L. Scot. B. 2, t. 9, s. 23. Life-rent is the only personal servitude there.

SERVITUS, civil law. A service or servitude; a burden imposed by law, or the agreement of parties upon certain persons, for the benefit of others; or upon one estate for the advantage of another, or for the benefit of another person than the owner.

SERVITUS. Servitude; slavery; a state of bondage. "Servitus autem est constitutio," say the Institutes of Justinian, 1, 3, 2, "qua quis dominio alieno contra naturam subicitur." Servitude is a disposition of the law of nations, by which, against common right, one man has been subjected to the dominion of another. See Bract. 4 b; Co. Litt. 116.

SERVITUS LUMINUM, civil law. The name of a servitude by which an obligation is imposed on the owner of a house to allow windows or lights to be put in his wall by the owner of the adjoining house. Dig. 4, 14, 40.

SERVITUS STILLICIDII, civil law. The name of a servitude which obliges the owner of an estate to receive, or his right to turn aside, the droppings or stream from his neighbor's house. Dig. 8, 2, 20 and

21, 41; Voet, h. t. n. 18. Vide *Stillicidium*.

SERVITUS TIGNI IMMITTENDI, civil law. The name of a servitude which consists in requiring him who owes it, to permit his neighbor to place his joists on his wall. It differs from the servitude *Oneris ferendi*, (q. v.) in this, that in the former the owner of the servient building is bound to repair and rebuild the wall; whereas, in the latter he is not. Dig. lib. 8, § 2.

SESSION. The time during which a legislative body, a court or other assembly sits for the transaction of business; as, a session of congress, which commences on the day appointed by the constitution, and ends when congress finally adjourns before the commencement of the next session; the session of a court, which commences at the day appointed by law, and ends when the court finally rises; a term.

SESSION COURT, or COURT OF SESSION. The highest civil court in the kingdom of Scotland. The judges, called lords of the session, are fifteen in number.

2. It has extensive original jurisdiction, and its powers of review as a court of appeal have no limits. In 1808, it was divided into two chambers, called the first and second division; the lord president and seven judges constituting the former, and the lord justice clerk, who is head of the court of justiciary, with six judges, the latter. These divisions have independent but co-ordinate jurisdiction.

3. The high court of justiciary, or supreme criminal jurisdiction for Scotland, consists of six judges, who are lords of the session, the lord justice clerk presiding. In this court the number of the jury is fifteen, and a majority decides. The court of session is divided into the inner house and outer house, with appeal from the latter to the former, and from the former to the house of lords of the United Kingdom. Encycl. Amer.

SET, contracts. Foreign bills of exchange are generally drawn in parts; as, "pay this my first bill of exchange, second and third of the same tenor and date not paid;" the whole of these parts, which make but one bill, are called a set. Chit. Bills, 175, 6, (edition of 1836); 2 Pardess. n. 342.

TO SET ASIDE. To annul; to make void; as to set aside an award.

2. When proceedings are irregular they may be set aside on motion of the party whom they injuriously affect.

SET-OFF, contracts, practice. Defalcation; (q. v.) a demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim.

2. A set-off was unknown to the common law, according to which mutual debts were distinct and inextinguishable except by actual payment or release. 1 Rawle's R. 293; Babb. on Set-off, 1.

3. The statute 2 Geo. II., c. 22, which has been generally adopted in the United States, with some modifications, however, allowed, in cases of mutual debts, the defendant to set his debt against the other, either by pleading it in bar, or giving it in evidence, when proper notice had been given of such intention, under the general issue. The statute being made for the benefit of the defendant, is not compulsory; 8 Watts, R. 39; the defendant may waive his right, and bring a cross action against the plaintiff. 2 Campb. 594; 5 Taunt. 148; 9 Watts, R. 179.

4. It seems, however, that in some cases of intestate estates, and of insolvent estates, perhaps owing to the peculiar wording of the law, the statute has been held to operate on the rights of the parties before action brought, or an act done by either of them. 2 Rawle's R. 293; 3 Binn. Rep. 135; Bac. Ab. Bankrupt K.

5. Set-off takes place only in actions on contracts for the payment of money, as assumpsit, debt and covenant. A set-off is not allowed in actions arising *ex delicto*, as, upon the case, trespass, replevin or detinue. Bull. N. P. 181.

6. The matters which may be set off, may be mutual liquidated debts or damages, but unliquidated damages cannot be set off. 1 Black. R. 394; 2 John. 150; 8 Conn. 325; 1 M'Cord, 7; 3 Wend. 400; 1 Stew. & Port. 19; 2 Yeates, 208; 1 Sumn. 471; 2 Blackf. 31; 1 A. K. Marsh. 41; 6 Halst. 397; 5 Wash. C. C. 232; 3 Bibb, 49; 2 Caines, 33. The statutes refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction or dealings necessarily constitute an account consisting of receipts and payments, debts and credits, the balance only is considered to be the debt, and therefore in an action, it is not necessary in such cases either to plead or give notice of set-off. 4 Burr. 2221.

7. In general, when the government is plaintiff, no set-off will be allowed. 9 Pet.

319; 4 Dall. 303. See 9 Cranch, 313; Paine, 156. But when an act of congress authorizes such set-off, it may be made. 9 Cranch, 213.

8. Judgments in the same rights may be set off against each other, at the discretion of the court. 3 Bibb, 233; 3 Watts, 78; 3 Halst. 172; 4 Hamm. 90; 1 Stew. & Port. 24; 7 Mass. 140, 144; 8 Cowen, 126. Vide *Compensation*; and also Montagu on Set-off; Babington on Set-off; 3 Stark. Ev. h. t.; Amer. Dig. h. t.; Whart. Dig. h. t.; 3 Chit. Bl. Com. 304, n.; 1 Chit. Pl. Index, h. t.; 8 Vin. Ab. 556; Bac. Ab. h. t.; 1 Sell. Pr. 321; 5 Com. Dig. 595; 6 Id. 335; 7 Id. 336; 8 Id. 927; Chit. Pr. Index, h. t.; Bouv. Inst. Index, h. t. Vide *Factor*.

TO SETTLE. To adjust or ascertain; to pay.

2. Two contracting parties are said to settle an account, when they ascertain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle such debt or balance. 11 Alab. R. 419.

SETTLEMENT, domicile. The right which a person has of being considered as resident of a particular place.

2. It is obtained in various ways, to wit: 1. By birth. 2. By the legal settlement of the father, in the case of minor children. 3. By marriage. 4. By continued residence. 5. By the payment of requisite taxes. 6. By the lawful exercise of a public office. 7. By hiring and service for a year. 8. By serving an apprenticeship; and perhaps some others which depend upon the local statutes of the different states. Vide 1 Bl. Com. 363; 1 Dougl. 9; 2 Watts' Rep. 44, 342; 2 Penna. R. 432; 5 Serg. & Rawle, 417; 2 Yeates' R. 51; 5 Binn. R. 81; 3 Binn. R. 22; 6 Serg. & Rawle, 103, 565; 10 Serg. & Rawle, 179. Vide *Domicil*.

SETTLEMENT, contracts. The conveyance of an estate, for the benefit of some person or persons.

2. It is usually made on the prospect of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other persons, as their children. Such settlements vest the property in trustees upon specified terms, usually for the benefit of the husband and wife during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children.

3. Ante-nuptial agreements of this kind

will be enforced in equity by a specific performance of them, provided they are fair and valid, and the intention of the parties is consistent with the principles and policy of law. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against creditors and purchasers.

4. When made without consideration, after marriage, and the property of the husband is settled upon his wife and children, the settlement will be valid against subsequent creditors, if, at the time of the settlement being made, he was not indebted; but, if he was then indebted, it will be void as to the creditors existing at the time of the settlement; 3 John. Ch. R. 481; 8 Wheat. R. 229; unless in cases where the husband received a fair consideration in value of the thing settled, so as to repel the presumption of fraud. 2 Ves. 16; 10 Ves. 139. Vide 1 Madd. Ch. 459; 1 Chit. Pr. 57; 2 Kent, Com. 145; 2 Supp. to Ves. jr. 80, 375; Rob. Fr. Conv. 188. See Atherl. on Mar. *passim*.

5. The term settlement is also applied to an agreement by which two or more persons, who have dealings together, so far arrange their accounts, as to ascertain the balance due from one to the other; and settlement sometimes signifies a payment in full.

TO SEVER, practice. When defendants who are sued jointly have separate defences, they may in general sever, that is, each one rely on his own separate defence; each may plead severally and insist on his own separate plea. See *Severance*.

SEVERAL. A state of separation or partition. A several agreement or covenant, is one entered into by two or more persons separately, each binding himself for the whole; a several action is one in which two or more persons are separately charged; a several inheritance, is one conveyed so as to descend, or come to two persons separately by moieties. Several is usually opposed to joint. Vide 8 Rawle, 306. See *Contract; Joint Contract; Parties to action*.

SEVERALTY, title to an estate. An estate in severalty is one which is held by the tenant in his own right only, without any other being joined or connected with him in point of interest, during the continuance of his estate. 2 Bl. Com. 179. Cruise, Dig. 479, 480.

SEVERANCE, pleading. When an action is brought in the name of several

plaintiffs, in which the plaintiffs must of necessity join, and one or more of the persons so named do not appear, or make default after appearance, the other may have judgment of severance, or, as it is technically called, judgment *ad sequendum solum*.

2. But in personal actions, with the exception of those by executors, and of detinue for charters, there can be no summons and severance. Co. Lit. 139.

3. After severance, the party severed can never be mentioned in the suit, nor derive any advantage from it.

4. When there are several defendants, each of them may use such plea as he may think proper for his own defence; and they may join in the same plea, or sever at their discretion; Co. Litt. 303, a; except perhaps, in the case of dilatory pleas. Hob. 245, 250. But when the defendants have once united in the plea, they cannot afterwards sever at the rejoinder, or other later stage of the pleading. Vide, generally, Bro. Summ. and Sev.; 2 Rolle, 488; Archb. Civ. Pl. 59.

SEVERANCE, estates. The act by which any one of the unities of a joint tenancy is effected, is so called; because the estate is no longer a joint tenancy, but is severed.

2. A severance may be effected in various ways, namely: 1. By partition, which is either voluntary or compulsory. 2. By alienation of one of the joint tenants, which turns the estate into a tenancy in common. 3. By the purchase or descent of all the shares of the joint tenants, so that the whole estate becomes vested in one only. Com. Dig. Estates by Grant, K 5; 1 Binn. R. 175.

3. In another and a less technical sense, severance is the separation of a part of a thing from another; for example, the separation of machinery from a mill, is a severance, and, in that case, the machinery which while annexed to the mill was real estate, becomes by the severance, personalty, unless such severance be merely temporary. 8 Wend. R. 587.

SEWER. Properly a trench artificially made for the purpose of carrying water into the sea, river, or some other place of reception. Public sewers are, in general, made at the public expense. Crabb, R. P. § 113.

SEX. The physical difference between male and female in animals.

2. In the human species the male is called *man*, (q. v.) and the female *woman*.

(q. v.) Some human beings whose sexual organs are somewhat imperfect, have acquired the name of *hermaphrodite*. (q. v.)

8. In the civil state the sex creates a difference among individuals. Women cannot generally be elected or appointed to offices, or service in public capacities. In this our law agrees with that of other nations. The civil law excluded women from all offices civil or public: *Feminae ab omnibus officiis civilibus vel publicis remotae sunt*. Dig. 50, 17, 2. The principal reason of this exclusion is to encourage that modesty which is natural to the female sex, and which renders them unqualified to mix and contend with men; the pretended weakness of the sex is not probably the true reason. Poth. Des Personnes, tit. 5; Wood's Inst. 12; Civ. Code of Louis. art. 24; 1 Beck's Med. Juris. 94. Vide *Gender*; *Male*; *Man*; *Women*; *Worthiest of blood*.

SHAM PLEA. One entered for the mere purpose of delay; it must be of a matter which the pleader knows to be false; as judgment recovered, that is, that judgment has already been recovered by the plaintiff for the same cause of action.

2. These sham pleas are generally discouraged, and in some cases are treated as a nullity. Barn. & Ald. 197, 199; 5 Id. 750; 1 Barn. & Cr. 286; Archb. Civ. Pl. 249; 1 Chit. Pl. 401.

SHARE. A portion of anything. Sometimes shares are equal, at other times they are unequal.

2. In companies and corporations the whole of the capital stock is usually divided into equal proportions called shares. Shares in public companies have sometimes been held to be real estate, but most usually they are considered as personal property. Wordsw. Jo. Sto. Co. § ch. 1 P, p. 288.

3. The proportion which descends to one of several children from his ancestor, is called a share. The term share and share alike, signifies in equal proportions. See *Purpart*.

SHEEP. A wether more than a year old. 4 Car. & Payne, 216; 19 Engl. Com. Law Rep. 331, S. C.

SHELLEY'S CASE. This case, reported in 1 Rep. 93, contains a rule usually known as the rule in Shelley's case, which has caused more commentaries perhaps than any other case. It has been expressed with great precision, though not with much elegance, to be "in any instrument, if a freehold be limited to the

ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple." Co. Litt. 376, b; and Mr. Butler's note, 1; 3 Binn. R. 139; 1 Day, Rep. 299; 1 Prest. on Estates, ch. 3; 4 Kent, Com. 206; Cruise, Dig. tit. 32, c. 22; 2 Yeates, R. 410; 1 Hargr. Law Tracts, article "Observations concerning the rule in Shelley's case, chiefly with a view to the application of that rule in Last Wills;" 5 Ohio R. 465.

SHERIFF. The name of the chief officer of the county. In Latin he is called *vice comes*, because in England he represented the *comes* or earl. His name is said to be derived from the Saxon *seyre*, shire or county, and *reve*, keeper, bailiff, or guardian.

2. The general duties of the sheriff are, 1st. To keep the peace within the county; he may apprehend, and commit to prison all persons who break the peace or attempt to break it, and bind any one in a recognizance to keep the peace. He is required *ex officio*, to pursue and take all traitors, murderers, felons and rioters. He has the keeping of the county gaol, and he is bound to defend it against all attacks. He may command the *posse comitatus*. (q. v.)

3.—2d. In his ministerial capacity, the sheriff is bound to execute within his county or bailiwick, all process issuing from the courts of the commonwealth.

4.—3d. The sheriff also possesses a judicial capacity, but this is very much circumscribed to what it was at common law in England. It is now generally confined to ascertain damages on writs of inquiry and the like.

5. Generally speaking the sheriff has no authority out of his county. 2 Rolle's Rep. 163; Plewd. 37 a. He may, however, do mere ministerial acts out of his county, as making a return. Dalt. Sh. 22. Vide, generally, the various Digests and Abridgments, h. t.; Dalt. Sher.; Wats. Off. and Duty of Sheriff; Wood's Inst. 75; 18 Engl. Com. Law Rep. 177; 2 Phil. Ev. 213; Chit. Pr. Index, h. t.; Chit. Pr. Law, Index, h. t.

SHERIFFALTY. The office of sheriff, the time during which a sheriff is to remain in office.

SHIFTING USE, estates. One which takes effect in derogation of some other

estate, and is either limited by the deed creating it, or authorized to be created by some person named in it. This is sometimes called a secondary use.

2. The following is an example: If an estate be limited to A and his heirs, with a proviso that if B pay to A one hundred dollars by a time named, the use to A shall cease, and the estate go to B in fee; the estate is vested in A subject to the shifting or secondary use in fee in B. Again, if the proviso be that C may revoke the use to A, and limit it to B, then A is seised in fee, with a power in C of revocation and limitation of a new use. These shifting uses must be confined within proper limits, so as not to create a perpetuity. 4 Kent, Com. 291; Cornish on Uses, 91; Bac. Ab. Uses and Trusts, K; Co. Litt. 327, a, note; Worth on Wills, 419; 2 Bouv. Inst. n. 1890. *Vide Use.*

SHILLING, Eng. law. The name of an English coin, of the value of one twentieth part of a pound. In the United States, while they were colonies, there were coins of this denomination, but they greatly varied in their value.

SHIP. This word, in its most enlarged sense, signifies a vessel employed in navigation; for example, the terms the ship's papers, the ship's husband, shipwreck, and the like, are employed whether the vessel referred to be a brig, a sloop, or a three-masted vessel.

2. In a more confined sense, it means such a vessel with three masts; 4 Wash. C. C. Rep. 530; Wesk. Inst. h. t. p. 514; the boats and rigging; 2 Marsh. Ins. 727; together with the anchors, masts, cables, pulleys, and such like objects, are considered as part of the ship. Pard. n. 599; Dig. 22, 2, 44.

3. The capacity of a ship is ascertained by its tonnage, or the space which may be occupied by its cargo. *Vide* Story's Laws U. S. Index, h. t.; Gordon's Dig. h. t.; Abbott on Ship. Index, h. t.; Park. Ins. Index, h. t.; Phil. Ev. Index, h. t.; Bac. Ab. Merchant, N; 3 Kent, Com. 93; Molloy, Jure Mar. Index, h. t.; 1 Chit. Pr. 91; Whart. Dig. h. t.; 1 Bell's Com. 496, 624; and see *General Ships; Names of Ships.*

SHIP BROKER. One who transacts business between the owners of vessels and merchants who send cargoes.

SHIP DAMAGES. In the charter parties with the English East India Company, these

words occur; their meaning is damage from negligence, insufficiency or bad stowage in the ship. Dougl. 272; Abbott on Ship. 204.

SHIP'S HUSBAND, mar. law. An agent appointed by the owner of a ship, and invested with authority to make the requisite repairs, and attend to the management, equipment, and other concerns of the ship; he is usually authorized to act as the general agent of the owners, in relation to the ship in her home port.

2. By virtue of his agency, he is authorized to direct all proper repairs, equipments and outfits of the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper to prepare and despatch her for and on her intended voyage. 1 Liverm. on Ag. 72, 73; Story on Ag. § 35.

3. By some authors, it is said the ship's husband must be a part owner. Hall on Mar. Loans, 142, n.; Abbott on Ship. part 1, c. 3, s. 2.

4. Mr. Bell, Comm. 410, § 428, 5th ed. p. 503, points out the duties of the ship's husband, as follows, namely:

1. To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a sea-worthy ship.

5.—2. To have, a proper master, mate, and crew, for the ship, so that, in this respect, it shall be sea-worthy.

6.—3. To see the due furnishing of provisions and stores, according to the necessities of the voyage.

7.—4. To see to the regularity of the clearances from the custom-house, and the regularity of the registry.

8.—5. To settle the contracts, and provide for the payment of the furnishings, which are requisite to the performance of those duties.

9.—6. To enter into proper charter parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight, and adjust averages with the merchant; and,

10.—7. To preserve the proper certificates, surveys and documents, in case of future disputes with insurers and freighters; and to keep regular books of the ship.

11. These are his general powers, but of course, they may be limited or enlarged by the owners; and it may be observed, that without special authority, he cannot, in

general, exercise the following enumerated acts:

1. He cannot borrow money generally for the use of the ship; though, as above observed, he may settle the accounts for furnishings, or grant bills for them, which form debts against the concern, whether or not he has funds in his hands with which he might have paid them. 1 Bell, Com. 411, § 499.

12.—2. Although he may, in general, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem that he would not have power to take bills for the freight, and give up the possession of the lien over the cargo, unless it has been so settled by the charter party. Id.

13.—3. He cannot insure, or bind the owners for premiums. Id.; 5 Burr. 2627; Paley on Ag. by Lloyd, 28, note 8; Abb. on Ship. part 1, c. 3, s. 2; Marsh. Ins. b. 1, c. 8, s. 2; Liv. on Ag. 72, 73.

14. As the power of the master to enter into contracts of affreightments, is superseded in the port of the owners, so it is by the presence of the ship's husband, or the knowledge of the contracting parties that a ship's husband has been appointed. Bell's Com. *ut supra*.

SHIP'S PAPERS. Those documents which are required on board of neutral ships, as evidence of their neutrality. These are the passports, sea-letter, muster-roll, charter party, bill of lading, invoices, log book, bill of health, register, and papers containing proofs of property. 1 Chit. Com. Law, 487.

2. The want of these papers, or either of them, renders the character of a vessel suspicious. Vide *Clearance*, and 2 Boulay Paty, Dr. Com. 14.

SHIPPER. One who ships or puts goods on board of a vessel, to be carried to another place during her voyage. In general, the shipper is bound to pay for the hire of the vessel, or the freight of the goods. 1 Bouv. Inst. n. 1030.

SHIPPING ARTICLES, *contr. mar. law*. The act of congress of July 20, 1790, s. 1, directs that the master of any vessel bound from a port in the United States to any foreign port, or of any vessel of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on

board such vessel, (except such as shall be apprenticed or servant to himself or owners,) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped.

2. And by sect. 2, it is required that at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner who shall so ship and subscribe, shall render himself on board to begin the voyage agreed upon.

3. This instrument is called the shipping articles. For want of which, the seaman is entitled to the highest wages which have been given at the port or place where such seaman or mariner shall have been shipped for a similar voyage, within three months next before the time of such shipping, on his performing the service, or during the time he shall continue to do duty on board such vessel, without being bound by the regulations, nor subject to the penalties and forfeitures contained in the said act of congress; and the master is further liable to a penalty of twenty dollars.

4. The shipping articles ought not to contain any clause which derogates from the general rights and privileges of seamen, and if they do, such clause will be declared void. 2 Sumner, 443; 2 Mason, 541.

5. A seaman who signs shipping articles, is bound to perform the voyage, and he has no right to elect to pay damages for non-performance of the contract. 2 Virg. Cas. 276.

Vide, generally, Gilp. 147, 219, 452; 1 Pet. Ad. Dec. 212; Bee, 48; 1 Mason, 443; 5 Mason, 272; 14 John. 260.

SHIPWRECK. The loss of a vessel at sea, either by being swallowed up by the waves, by running against another vessel or thing at sea, or on the coast. Vide *Naufrage*; *Wreck*.

SHIRE, *Eng. law*. A district or division of country. Co. Lit. 50 a.

SHOP BOOK. This name is given to a book in which a merchant, mechanic, or other person, makes original entries of goods sold or work done.

2. In general, such a book is *prima facie* evidence of the sale of the goods and of the work done, but not of their value. Vide *Original entry*.

SHORE. Land on the side of the sea, a lake, or a river, is called the shore. Strictly speaking, however, when the water does not ebb and flow, in a river, there is no

shore. See 4 Hill, N. Y. Rep. 375; 6 Cowen, 547; and *Sea shore*.

SHORT ENTRY. A term used among bankers, which takes place when a note has been sent to a bank for collection, and an entry of it is made in the customer's bank book, stating the amount in an inner column, and carrying it out into the accounts between the parties when it has been paid.

2. A bill of this kind remains the property of the depositor. 1 Bell's Com. 271; 9 East, 12; 1 Rose, 153; 2 Rose, 163; 2 B. & Cr. 422; Pull. Mer. Acc. 56.

SI FACERIT TE SECUREM. If he make you secure. These words occur in the form of writs, which originally required, or still require, that the plaintiff should give security to the sheriff that he will prosecute his claim, before the sheriff can be required to execute such writ.

SICKNESS. By sickness is understood any affection of the body which deprives it temporarily of the power to fulfil its usual functions.

2. Sickness is either such as affects the body generally, or only some parts of it. Of the former class, a fever is an example; of the latter, blindness. When a process has been issued against an individual for his arrest, the sheriff or other officer is authorized, after he has arrested him, if he be so dangerously sick, that to remove him would endanger his life or health, to let him remain where he found him, and to return the facts at large, or simply *languidus*. (q. v.)

SIDE BAR RULES, *Eng practice.* Rules which were formerly moved for by attorneys on the side bar of the court; but now may be had of the clerk of the rules, upon a *præcipe*. These rules are, that the sheriff return his writ; that he bring in the body; for special imparlance; to be present at the taxing of costs, and the like.

SIENS. An obsolete word, formerly used for scion, which figuratively signified a person who descended from another. "The sien," says Lord Coke, "takes all his nourishment from the stocke, and yet it produceth his own fruit." Co. Lit. 128 a. Vide *Branch*.

SIGILLUM. A seal. (q. v.) Vide *Scroll*.

SIGHT, *contracts.* Bills of exchange are frequently made payable at sight, that is, on presentment, which might be taken naturally to mean that the bill should then be paid without further delay; but although the point be not clearly settled, it seems the

drawee is entitled to the days of grace. Beaw. Lex Mer. pl. 256; Kyd on Bills, 10; Chit. on Bills, 343-4; Bayley on Bills, 42, 109, 110; Selw. N. P. 339.

2. The holder of a bill payable at sight, is required to use due diligence to put it into circulation, or have it presented for acceptance within a reasonable time. 20 John. 146; 7 Cowen, 705; 12 Pick. 399; 13 Mass. 137; 4 Mason, 336; 5 Mason, 118; 1 McCord, 322; 1 Hawks, 195.

3. When the bill is payable any number of days after sight, the time begins to run from the period of presentment and acceptance, and not from the time of mere presentment. 1 Mason, 176; 20 John. 176.

SIGN, *contracts, evidence.* A token of anything; a note or token given without words.

2. Contracts are express or implied. The express are manifested *viva voce*, or by writing; the implied are shown by silence, by acts, or by *signs*.

3. Among all nations and at all times, certain signs have been considered as proof of assent or dissent; for example, the nodding of the head, and the shaking of hands; 2 Bl. Com. 448; 6 Toull. n. 33; Heinnecc., Antiq. lib. 3, t. 23, n. 19; silence and inaction, facts and signs are sometimes very strong evidence of cool reflection, when following a question. I ask you to lend me one hundred dollars; without saying a word you put your hand in your pocket, and deliver me the money. I go into a hotel, and I ask the landlord if he can accommodate me and take care of my trunk; without speaking he takes it out of my hands and sends it into his chamber. By this act he doubtless becomes responsible to me as a bailee. At the expiration of a lease, the tenant remains in possession, without any objection from the landlord; this may be fairly interpreted as a sign of a consent that the lease shall be renewed. 13 Serg. & Rawle, 60.

4. The learned author of the *Decline and Fall of the Roman Empire*, in his 44th chapter, remarks, "Among savage nations, the want of letters is imperfectly supplied by the use of visible signs, which awaken attention, and perpetuate the remembrance of any public or private transaction. The jurisprudence of the first Romans exhibited the scenes of a pantomine; the words were adapted to the gestures, and the slightest error or neglect in the *forms* of proceeding, was sufficient to annul the *substance* of the

fairest claim. The communion of the marriage-life was denoted by the necessary elements of fire and water: and the divorced wife resigned the bunch of keys, by the delivery of which she had been invested with the government of the family. The manumission of a son, or a slave, was performed by turning him round with a gentle blow on the cheek: a work was prohibited by the casting of a stone; prescription was interrupted by the breaking of a branch; the clenched fist was the symbol of a pledge or deposit; the right hand was the gift of faith and confidence. The indenture of covenants was a broken straw; weights and scales were introduced into every payment, and the heir who accepted a testament, was sometimes obliged to snap his fingers, to cast away his garments, and to leap and dance with real or affected transport. If a citizen pursued any stolen goods into a neighbor's house, he concealed his nakedness with a linen towel, and hid his face with a mask or basin, lest he should encounter the eyes of a virgin or a matron. In a civil action, the plaintiff touched the ear of his witness, seized his reluctant adversary by the neck, and implored, in solemn lamentation, the aid of his fellow-citizens. The two competitors grasped each other's hand, as if they stood prepared for combat before the tribunal of the prætor: he commanded them to produce the object of the dispute; they went, they returned with measured steps, and a clod of earth was cast at his feet to represent the field for which they contended. This occult science of the words and actions of law, was the inheritance of the pontiffs and patricians. Like the Chaldean astrologers, they announced to their clients the days of business and repose; these important trifles were interwoven with the religion of Numa; and, after the publication of the Twelve Tables, the Roman people were still enslaved by the ignorance of judicial proceedings. The treachery of some plebeian officers at length revealed the profitable mystery: in a more enlightened age, the legal actions were derided and observed; and the same antiquity which sanctified the practice, obliterated the use and meaning, of this primitive language."

SIGN, measures. In angular measures, a sign is equal to thirty degrees. Vide *Measure*.

SIGN, mer. law. A board, tin or other substance, on which is painted the name and business of a merchant or tradesman.

2. Every man has a right to adopt such a sign as he may please to select, but he has no right to use another's name, without his consent. See *Dall. Dict. mot Propriété Industrielle*, and the article *Trade marks*.

TO SIGN. To write one's name to an instrument of writing in order to give the effect intended; the name thus written is called a signature.

2. The signature is usually made at the bottom of the instrument, but in wills it has been held that when a testator commenced his will with these words, "I, A B, make this my will," it was a sufficient signing. 3 *Lev.* 1; and vide *Rob. on Wills*, 122; 1 *Will. on Wills*, 49, 50; *Chit. Cont.* 212; *Newl. Contr.* 173; *Sugd. Vend.* 71; 2 *Stark. Ev.* 605, 618; *Rob. on Fr.* 121; but this decision is said to be absurd. 1 *Bro. Civ. Law*, 278, n. 16. Vide *Merl. Répert. mot Signature*, for a history of the origin of signatures; and also 4 *Cruise, Dig. h. t.* 32, c. 2, s. 78, et seq.; see, generally, 8 *Toull. n.* 94-96; 1 *Dall.* 64; 5 *Whart. R.* 386; 2 *B. & P.* 238; 2 *M. & S.* 286.

3. To sign a judgment, is to enter a judgment for want of something which was required to be done; as, for example, in the English practice, if he who is bound to give oyer does not give it within the time required, in such cases, the adverse party may sign judgment against him. 2 *T. R.* 40; *Com. Dig. Pleader*, P 1; *Barnes*, 245.

SIGNA, civil law. Those species of indicia (q. v.) which come more immediately under the cognizance of the senses, such as stains of blood on the person of one accused of murder, indications of terror at being charged with the offence, and the like.

2. *Signa*, although not to be rejected as instruments of evidence, cannot always be relied upon as conclusive evidence, for they are frequently explained away; in the instance mentioned the blood may have been that of a beast, and expressions of terror have been frequently manifested by innocent persons who did not possess much firmness. See *Best on Pres.* 13, n. f; *Denisart*, h. v.

SIGNATURE, eccl. law. The name of a sort of rescript, without seal, containing the supplication, the signature of the pope or his delegate, and the grant of a pardon. *Dict. Dr. Can. h. v.*

SIGNATURE, pract. contr. By signature is understood the act of putting down a man's name, at the end of an instrument, to attest its validity. The name thus written is also called a signature.

2. It is not necessary that a party should write his name himself, to constitute a signature; his mark is now held sufficient though he was able to write. 8 Ad. & El. 94; 3 N. & Per. 228; 3 Curt. 752; 5 John. 144. A signature made by a party, another person guiding his hand with his consent, is sufficient. 4 Wash. C. C. 262, 269. *Vide to Sign.*

SIGNIFICATION, *French law.* The notice given of a decree, sentence or other judicial act.

SIGNIFICAVIT, *eccl. law.* When this word is used alone, it means the bishop's certificate to the court of chancery, in order to obtain the writ of excommunication; but where the words *writ of significavit* are used, the meaning is the same as *writ de excommunicato capiendo*. 2 Burn's Eccl. L. 248; Shelf. on Mar. & Div. 502.

SILENCE. The state of a person who does not speak, or of one who refrains from speaking.

2. Pure and simple silence cannot be considered as a consent to a contract, except in cases when the silent person is bound in good faith to explain himself, in which case, silence gives consent. 6 Toull. liv. 3, t. 3, n. 32, note; 14 Serg. & Rawle, 393; 2 Supp. to Ves. jr. 442; 1 Dane's Ab. c. 1, art. 4, § 3; 8 T. R. 483; 6 Penn. St. R. 336; 1 Greenl. Ev. 201; 2 Bouv. Inst. n. 1313. But no assent will be inferred from a man's silence, unless, 1st. He knows his rights, and knows what he is doing; and, 2d. His silence is voluntary.

3. When any person is accused of a crime, or charged with any fact, and he does not deny it, in general, the presumption is very strong that the charge is correct. 7 C. & P. 832; 5 C. & P. 332; Joy on Conf. s. 10, p. 77.

4. The rule does not extend to the silence of a prisoner, when on his examination before a magistrate he is charged by another prisoner with having joined him in the commission of an offence. 3 Stark. C. 33.

5. When an oath is administered to a witness, instead of expressly promising to keep it, he gives his assent by his silence, and kissing the book.

6. The person to be affected by the silence must be one not disqualified to act, as non compos, an infant, or the like, for even the express promise of such a person would not bind him to the performance of any contract.

7. The rule of the civil law is, that silence is not an acknowledgment or denial in every case, *qui tacet, non utique fatetur; sed tamen verum est, eum non negare*. Dig. 50, 17, 142.

SILVA CÆDUA. By these words in England is understood every sort of wood, except gross wood of the age of twenty years. Bac. Ab. Tythes, C.

SIMILITER, *pleading.* When the defendant's plea contains a direct contradiction of the declaration, and concludes with referring the matter to be tried by a jury of the country, the plaintiff must do so too; that is, he must also submit the matter to be tried by a jury, without offering any new answer to it, and must stand or fall by his declaration. Co. Litt. 126 a. In such case, he merely replies that as the defendant has put himself upon the country, that is, has submitted his cause to be tried by a jury of the country, he, the plaintiff, does so likewise, or the like. Hence this sort of replication is called a *similiter*, that having been the effective word when the proceedings were in Latin. 1 Chit. Pl. 549; Arch. Civ. Pl. 250. See Steph. Pl. 255; 2 Saund. 319, b; Cowp. 407; 1 Str. Rep. 551; 11 S. & R. 32.

SIMONY, *eccl. law.* The selling and buying of holy orders, or an ecclesiastical benefice. Bac. Ab. h. t.; 1 Harr. Dig. 556. By simony is also understood an unlawful agreement to receive a temporal reward for something holy or spiritual. Code, 1, 3, 31; Ayl. Parerg. 496.

SIMPLE. Not compounded, alone; as, simple interest, which is interest on the principal sum lent only, and not interest on the interest; simple contract, &c.

SIMPLE CONTRACT. One, the evidence of which is merely oral, or in writing, not under seal, nor of record. 1 Chit. Contr. 1; 1 Chit. Pl. 88; and vide 11 Mass. R. 30; 11 East, R. 312; 4 Barn. & Ald. 588; 3 Stark. Ev. 995; 2 Bl. Com. 472.

2. As contracts of this nature are frequently entered into without thought, or proper deliberation, the law requires that there be some good cause, consideration or motive, before they can be enforced in the courts. The party making the promise must have obtained some advantage, or the party to whom it is made must have sustained some injury or inconvenience in consequence of such promise; this rule has been established for the purpose of protecting weak and thoughtless persons from the con-

sequences of rash, improvident, and inconsiderate engagements. See *Nudum pactum*. But it must be recollected this rule does not apply to promissory notes, bills of exchange or commercial papers. 3 M. & S. 352.

SIMPLE LARCENY. The felonious taking and carrying away the personal goods of another, unattended by acts of violence; it is distinguished from compound larceny, which is the stealing from the person or with violence.

SIMPLE OBLIGATION. An unconditional obligation, one which is to be performed without depending upon any event provided by the parties to it.

SIMPLE TRUST. A simple trust corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law. It differs from a *special trust*. (q. v.) 2 Bouv. Inst. n. 1896.

SIMPLEX. Simple or single; as, *charta simplex*, is a deed-poll, or single deed. Jacob's L. Dict. h. t.

SIMPLICITER. Simply, without ceremony; in a summary manner.

SIMUL CUM, pleading. Together with. These words are used in indictments and declarations of trespass against several persons, when some of them are known and others are unknown.

2. In cases of riots it is usual to charge that A B, together with others unknown, did the act complained of. 2 Chit. Cr. Law, 488; 2 Salk. R. 593.

3. When a party sued with another pleads separately, the plea is generally entitled in the name of the person pleading, adding "sued with —," naming the other party. When this occurred, it was, in the old phraseology, called pleading with a *simul cum*.

SIMULATION, French law. This word is derived from the Latin *simul*, together. It indicates, agreeably to its etymology, the concert or agreement of two or more persons to give to one thing the appearance of another, for the purpose of fraud. Merl. Répert. h. t.

2. With us such act might be punished by indictment for a conspiracy; by avoiding the pretended contract; or by action to recover back the money or property which may have been thus fraudulently obtained.

SINE DIE. Without day. A judgment

for a defendant in many cases is *quod eat sine die*, that he may go without day. While the cause is pending and undetermined, it may be continued from term to term by *dies datus*. (q. v.) See Huxley's Judgments & Rastal's Entries, *passim*; Co. Litt. 362 b & 363 a. When the court or other body rise at the end of a session or term they adjourn *sine die*.

SINECURE. In the ecclesiastical law, this term is used to signify that an ecclesiastical officer is without a charge or cure.

2. In common parlance it means the receipt of a salary for an office when there are no duties to be performed.

SINGLE. By itself, unconnected.

2. A single bill is one without any condition, and does not depend upon any future event to give it validity. Single is also applied to an unmarried person; as, A B, single woman. Vide *Simplex*.

SINGLE ENTRY. A term used among merchants signifying that the entry is made to charge or to credit an individual or thing, without, at the same time, presenting any other part of the operation; it is used in contradistinction to *double entry*. (q. v.) For example, a single entry is made, A B debtor, or A B creditor, without designating what are the connexions between the entry and the objects which composed the fortune of the merchant.

SINGULAR, construction. In grammar the singular is used to express only one, not plural. Johnson.

2. In law, the singular frequently includes the plural. A bequest to "*my nearest relation*," for example, will be considered as a bequest to all the relations in the same degree, who are nearest to the testator. 1 Ves. sen. 337; 1 Bro. C. C. 293. A bequest made to "*my heir*," by a person who had three heirs, will be construed in the plural. 4 Russ. C. C. 384.

3. The same rule obtains in the civil law: *In usu juris frequenter uti nos singulari appellatione, cum plura significari vellemus*. Dig. 50, 16, 158.

SINKING FUND. A fund arising from particular taxes, imposts, or duties, which is appropriated towards the payment of the interest due on a public loan and for the gradual payment of the principal. See *Funding System*.

SIRE. A title of honor given to kings or emperors in speaking or writing to them.

SISTER. A woman who has the same father and mother with another, or has one

of them only. In the first case she is called sister, simply; in the second, half sister. *Vide Brother; Children; Descent; Father; Mother.*

SITUS. Situation; location. 5 Pet. R. 524.

2. Real estate has always a fixed situs, while personal estate has no such fixed situs; the law *rei sitæ* regulates real but not the personal estate. Story, Conf. of Laws, § 379.

SKELETON BILL, *com. law.* A blank paper, properly stamped, in those countries where stamps are required, with the name of a person signed at the bottom.

2. In such case the person signing the paper will be held as the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name to the sum of which the stamp is applicable. 1 Bell's Com. 390, 5th ed.

SKILL, *contracts.* The art of doing a thing as it ought to be done.

2. Every person who purports to have skill in a business, and undertakes for hire to perform it, is bound to do it with ordinary skill, and is responsible civilly in damages for the want of it; 11 M. & W. 483; and sometimes he is responsible criminally. *Vide Mala Praxis;* 2 Russ. on Cr. 288.

3. The degree of skill and diligence required, rises in proportion to the value of the article, and the delicacy of the operation: more skill is required, for example, to repair a very delicate mathematical instrument, than upon a common instrument. Jones' Bailm. 91; 2 Kent, Com. 458, 463; 1 Bell's Com. 459; 2 Ld. Raym. 909, 918; Domat, liv. 1, t. 4, § 8, n. 1; Poth. Louage, n. 425; Pardess. n. 528; Ayl. Pand. B. 4, t. 7, p. 466; Ersk. Inst. B. 3, t. 3, § 16; 1 Rolle, Ab. 10; Story's Bailm. § 431, et seq.; 2 Greenl. Ev. § 144.

SLANDER, *torts.* The defaming a man in his reputation by speaking or writing words which affect his life, office, or trade, or which tend to his loss of preferment in marriage or service, or in his inheritance, or which occasion any other particular damage. Law of Nisi Prius, 3. In England, if slander be spoken of a peer, or other great man, it is called *Scandalum Magnatum*. Falsity and malice are ingredients of slander. Bac. Abr. Slander. Written or printed slanders are libels; see that word.

2. Here it is proposed to treat of verbal

slander, only, which may be considered with reference to, 1st. The nature of the accusation. 2d. The falsity of the charge. 3d. The mode of publication. 4th. The occasion; and 5th. The malice or motive of the slander.

3.—§ 1. Actionable words are of two descriptions; first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in respect of some actual consequential damages.

4.—1. Words of the first description must impute:

1st. The guilt of some offence for which the party, if guilty, might be indicted and punished by the criminal courts; as to call a person a "traitor," "thief," "highwayman;" or to say that he is guilty of "perjury," "forgery," "murder," and the like. And although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable. Cro. Jac. 114, 142; 6 T. R. 674; 3 Wils. 186; 2 Vent. 266; 2 New Rep. 335. See 3 Serg. & Rawle, 255; 7 Serg. & Rawle, 451; 1 Binn. 452; 5 Binn. 218; 3 Serg. & Rawle, 261; 2 Binn. 34; 4 Yeates, 423; 10 Serg. & Rawle, 44; Stark. on Slander, 13 to 42; 8 Mass. 248; 13 Johns. 124; Id. 275.

5.—2d. That the party has a disease or distemper which renders him unfit for society. Bac. Abr. Slander, B 2. An action can therefore be sustained for calling a man a leper. Cro. Jac. 144; Stark. on Slander, 97. But charging another with *having had* a contagious disease is not actionable, as he will not, on that account, be excluded from society. 2 T. R. 473, 4; 2 Str. 1189; Bac. Abr. tit. Slander, B 2. A charge which renders a man ridiculous, and impairs the enjoyment of general society, and injures those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man, is also actionable. Holt on Libels, 221.

6.—3d. Unfitness in an officer, who holds an office to which profit or emolument is attached, either in respect of morals or inability to discharge the duties of the office; in such a case an action lies. 1 Salk. 695, 698; Rolle, Ab. 65; 2 Esp. R. 500; 5 Co. 125; 4 Co. 16 a; 1 Str. 617; 2 Ld. Raym. 1369; Bull. N. P. 4; Holt on Libels, 207; Stark. on Slander, 100.

7.—4th. The want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business,

in which the party is engaged, is actionable; 1 Mal. Entr. 244; as to accuse an attorney or artist of inability, inattention, or want of integrity; 3 Wils. 187; 2 Bl. Rep. 750; or a clergyman of being a drunkard; 1 Binn. 178; is actionable. See Holt on Libels, 210; Id. 217.

8.—2. Of the second class are words which are actionable only in respect of special damages sustained by the party slandered. Though the law will not permit in these cases the inference of damage, yet when the damage has actually been sustained, the party aggrieved may support an action for the publication of an untruth; 1 Lev. 53; 1 Sid. 79, 80; 3 Wood. 210; 2 Leon. 111; unless the assertion be made for the assertion of a supposed claim; Com. Dig. tit. Action upon the case for Defamation, D 30; Bac. Ab. Slander, B; but it lies if maliciously spoken. See 1 Rolle, Ab. 36; 1 Saund. 243; Bac. Abr. Slander, C; 8 T. R. 130; 8 East, R. 1; Stark. on Slander, 157.

9.—§ 2. The charge must be false; 5 Co. 125, 6; Hob. 253; the falsity of the accusation is to be implied till the contrary is shown. 2 East, R. 436; 1 Saund. 242. The instance of a master making an unfavorable representation of his servant, upon an application for his character, seems to be an exception, in that case there being a presumption from the occasion of the speaking, that the words were true. 1 T. R. 111; 8 B. & P. 587; Stark. on Slander, 44, 175, 223.

10.—§ 3. The slander must, of course, be published, that is, communicated to a third person; and if verbal, then in a language which he understands, otherwise the plaintiff's reputation is not impaired. 1 Rolle, Ab. 74; Cro. Eliz. 857; 1 Saund. 242, n. 8; Bac. Abr. Slander, D 3. A letter addressed to the party, containing libelous matter, is not sufficient to maintain a civil action, though it may subject the libeler to an indictment, as tending to a breach of the peace; 2 Bl. R. 1083; 1 T. R. 110; 1 Saund. 132, n. 2; 4 Esp. N. P. R. 117; 2 Esp. N. P. R. 623; 2 East, R. 361; the slander must be published respecting the plaintiff; a mother cannot maintain an action for calling her daughter a bastard. 11 Serg. & Rawle, 348. As to the case of a man who repeats the slander invented by another, see Stark. on Slander, 213; 2 P. A. Bro. R. 89; 3 Yeates, 508; 3 Binn. 546.

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11.—§ 4. To render words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another, in others it is excusable, provided it be uttered without express malice. Bac. Ab. Slander, D 4; Rolle, Ab. 87; 1 Vin. Ab. 540. It is justifiable for an attorney to use scandalizing expressions in support of his client's cause and pertinent thereto. 1 M. & S. 280; 1 Holt's R. 531; 1 B. & A. 232; see 2 Serg. & Rawle, 469; 1 Binn. 178; 4 Yeates, 322; 1 P. A. Browne's R. 40; 11 Verm. R. 536; Stark. on Slander, 182. Members of congress and other legislative assemblies cannot be called to account for anything said in debate.

12.—§ 5. Malice is essential to the support of an action for slanderous words. But malice is in general to be presumed until the contrary be proved; 4 B. & C. 247; 1 Saund. 242, n. 2; 1 T. R. 111, 544; 1 East, R. 563; 2 East, R. 436; 2 New Rep. 335; Bull. N. P. 8; except in those cases where the occasion *prima facie* excuses the publication. 4 B. & C. 247. See 14 Serg. & Rawle, 359; Stark. on Slander, 201.

See, generally, Com. Dig. tit. Action upon the case for Defamation; Bac. Abr. Slander; 1 Vin. Abr. 187; 1 Phill. Ev. ch. 8; Yelv. 28, n.; Doctr. Plac. 53; Holt's Law of Libels; Starkie on Slander; Ham. N. P. ch. 2, s. 3.

SLANDERER. A calumniator, who maliciously and without reason imputes a crime or fault to another, of which he is innocent.

2. For this offence, when the slander is merely verbal, the remedy is an action on the case for damages; when it is reduced to writing or printing, it is a *libel*. (q. v.)

SLAVE. A man who is by law deprived of his liberty for life, and becomes the property of another.

2. A slave has no political rights, and generally has no civil rights. He can enter into no contract, unless specially authorized by law; what he acquires generally, belongs to his master. The children of female slaves follow the condition of their mothers, and are themselves slaves.

3.—In Maryland, Missouri and Virginia slaves are declared by statute to be personal estate, or treated as such. Anth. Shep. To. 428, 494; Misso. Laws, 558. In Kentucky, the rule is different, and they are considered real estate. 1 Kty. Rev. Laws, 566; 1 Dana's R. 94.

4. In general a slave is considered a thing and not a person; but sometimes he is considered as a person; as when he commits a crime; for example, two white persons and a slave can commit a riot. 1 McCord, 534. See *Person*.

5. A slave may acquire his freedom in various ways: 1. By manumission, by deed or writing, which must be made according to the laws of the state where the master then acts. 1 Penn. 10; 1 Rand. 15. The deed may be absolute which gives immediate freedom to the slave, or conditional giving him immediate freedom, and reserving a right of service for a time to come; 6 Rand. 652; or giving him his freedom as soon as a certain condition shall have been fulfilled. 2 Root, 364; Coxe, 4. 2. By manumission by will. When there is an express emancipation by will, the slave will be free, and the testator's real estate shall be charged with the payment of his debts, if there be not enough personal property without the sale of the slaves. 9 Pet. 461. See Harper, R. 20. The manumission by will may be implied, as, where the master devises property real or personal to his slave. 2 Pet. 670; 5 Har. & J. 190. 3. By the removal of the slave with the consent of the master, *animo morandi*, into one of the United States where slavery is forbidden by law; 2 Mart. Lo. Rep. N. J. 401; or when he sojourns there longer than is allowed by the law of the state. 7 S. & R. 378; 1 Wash. C. C. Rep. 499. Vide Stroud on Slavery; Bouv. Inst. Index, h. t.; and as to the rights of one who, being free, is held as a slave, 2 Gilman, 1; 3 Yeates, 240.

SLAVE TRADE, criminal law. The infamous traffic in human flesh, which though not prohibited by the law of nations, is now forbidden by the laws and treaties of most civilized states.

2. By the constitution of the United States, art. 1, s. 9, it is provided, that the "migration or importation of such persons as any of the states now existing (in 1789,) shall think proper to admit, shall not be prohibited by the congress, prior to the year one thousand eight hundred and eight." Previously to that date several laws were enacted, which it is not within the plan of this work to cite at large or to analyze; they are here referred to, namely; act of 1794, c. 11, 1 Story's Laws U. S. 319; act of 1800, c. 51, 1 Story's Laws U. S. 780; act of 1803, c. 63, 2 Story's Laws U. S.

886; act of 1807, c. 77, 2 Story's Laws U. S. 1050; these several acts forbid citizens of the United States, under certain circumstances, to equip or build vessels for the purpose of carrying on the slave trade, and the last mentioned act makes it highly penal to import slaves into the United States after the first day of January, 1808. The act of 1818, c. 86, 3 Story's Laws U. S. 1698; the act of 1819, c. 224, 3 Story's Laws U. S. 1752; and the act of 1820, c. 113, 3 Story's Laws U. S. 1798, contain further prohibition of the slave trade, and punish the violation of their several provisions with the highest penalties of the law. Vide, generally, 10 Wheat. R. 66; 2 Mason, R. 409, 1 Acton, 240; 1 Dodson, 81, 91, 95; 2 Dodson, 238; 6 Mass. R. 358; 2 Cranch, 336; 3 Dall. R. 297; 1 Wash. C. C. Rep. 522; 4 Id. 91; 3 Mason, R. 175; 9 Wheat. R. 391; 6 Cranch, 330; 5 Wheat. R. 338; 8 Id. 380; 10 Id. 312; 1 Kent, Com. 191.

SLAVERY. The state or condition of a slave.

2. Slavery exists in most of the southern states. In Pennsylvania, by the act of March, 1780, for the gradual abolition of slavery, it has been almost entirely removed; in Massachusetts it was held, soon after the Revolution, that slavery had been abolished by their constitution; 4 Mass. 128; in Connecticut, slavery has been totally extinguished by legislative provisions; Reeve's Dom. Rel. 340; the states north of Delaware, Maryland and the river Ohio, may be considered as free states, where slavery is not tolerated. Vide Stroud on Slavery; 2 Kent, Com. 201; Rutherf. Inst. 238.

SMUGGLING. The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited. Bac. Ab. h. t.

SO HELP YOU GOD. The formula at the end of a common oath, as administered to a witness who testifies in chief.

SOCAGE, Eng. law. A tenure of lands by certain inferior services in husbandry, and not knight's service, in lieu of all other services. Litt. sect. 117.

SOCER. The father of one's wife; a father-in-law.

SOCIDA, civ. law. This is the name of a contract by which one man delivers to another, either for a small recompense, or for a part of the profits, certain animals, on condition that if any of them perish they

shall be replaced by the bailer, or he shall pay their value.

2. This is a contract of hiring, with this condition, that the bailee takes upon him the risk of the loss of the thing hired. Wolff, § 638.

SOCIETAS LEONINA. Among the Roman lawyers this term signified that kind of society or partnership by which the entire profits should belong to some of the partners in exclusion of the rest.

2. It was so called in allusion to the fable of the lion and other animals, who having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself. Dig. 17, 2, 29, 2; Poth. *Traité de Sociétés*, n. 12. See 2 McCord's R. 421; 6 Pick. 372.

SOCIETE EN COMMENDITE. This term is borrowed from the laws of France, and is used in Louisiana; the *société en commendite*, or partnership in *commendam*, is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more. Civ. Code of Lo. art. 2810; Code de Comm. 26, 33; 4 Pard. Dr. Com. n. 1027; Dall. Dict. mots *Société Commerciale*, n. 166. Vide *Commendam*; *Partnership*.

SOCIETY. A society is a number of persons united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose.

2. Societies are either incorporated and known to the law, or unincorporated, of which the law does not generally take notice.

3. By *civil society* is usually understood a state, (q. v.) a nation, (q. v.) or a body politic. (q. v.) Rutherf. Inst. c. 1 and 2.

4. In the civil law, by society is meant a partnership. Inst. 3, 26; Dig. 17, 2; Code, 4, 37.

SODOMITE. One who has been guilty of sodomy. Formerly such offender was punished with great severity, and was deprived of the power of making a will.

SODOMY, crim. law. The crime against nature, committed either with man or beast.

2. It is a crime not fit to be named; peccatum illud horribile, inter christianos

non nominandum. 4 Bl. Com. 215; 1 East, P. C. 480, 487; Bac. Ab. h. t.; Hawk. b. 1, c. 4; 1 Hale, 669; Com. Dig. Justices, S 4; Russ. & Ry. 331.

3. This crime was punished with great severity by the civil law. Nov. 141; Nov. 77; Inst. 4, 18, 4. See 1 Russ. on Cr. 568; R. & R. C. C. 331, 412; 1 East, P. C. 437.

SOIL. The superficies of the earth on which buildings are erected, or may be erected.

2. The soil is the principal, and the building, when erected, is the accessory. Vide Dig. 6, 1, 49.

SOIT DROIT FAIT AL PARTIE, Eng. law. Let right be done to the party. This phrase is written on a petition of right, and subscribed by the king. See *Petition of right*.

SOKEMANS, Eng. law. Those who held their land in socage. 2 Bl. Com. 100.

SOLARES, Spanish law. Lots of ground. This term is frequently found in grants from the Spanish government of lands in America. 2 White's Coll. 474.

SOLD NOTE, contracts. The name of an instrument in writing, given by a broker to a buyer of merchandise, in which it is stated that the goods therein mentioned have been sold to him. 1 Bell's Com. 5th ed. 435; Story on Ag. § 28. Some confusion may be found in the books as to the name of these notes; they are sometimes called *bought notes*. (q. v.)

SOLDIER. A military man; a private in the army.

2. The constitution of the United States, amendm. art. 3, directs that no soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

SOLE. Alone, single; used in contradistinction to *joint* or *married*. A sole tenant, therefore, is one who holds lands in his own right, without being joined with any other. A feme sole is a single woman; a sole corporation is one composed of only one natural person.

SOLEMNITY. The formality established by law to render a contract, agreement, or other act valid.

2. A marriage, for example, would not be valid if made in jest, and without solemnity. Vide *Marriage*, and Dig. 4, 1, 7; Id. 45, 1, 30.

SOLICITATION OF CHASTITY. The asking a person to commit adultery or fornication.

2. This, of itself, is not an indictable offence. Salk. 382; 2 Chit. Pr. 478. The contrary doctrine, however, has been held in Connecticut. 7 Conn. Rep. 267.

3. In England, the bare solicitation of chastity is punished in the ecclesiastical courts. 2 Chit. Pr. 478. Vide Str. 1100; 10 Mod. 384; Sayer, 33; 1 Hawk. ch. 74; 2 Ld. Raym. 809.

4. The civil law punished arbitrarily the person who solicited the chastity of another. Dig. 47, 11, 1. Vide *To persuade*; 3 Phill. R. 508.

SOLICITOR. A person whose business is to be employed in the care and management of suits depending in courts of chancery.

2. A solicitor, like an attorney, (q. v.) will be required to act with perfect good faith towards his clients. He must conform to the authority given him. It is said that to institute a suit he must have a special authority, although a general authority will be sufficient to defend one. The want of a written authority may subject him to the expenses incurred in a suit. 3 Mer. R. 12; Hov. Fr. ch. 2, p. 28 to 61. Vide 1 Phil. Ev. 102; 19 Vin. Ab. 482; 7 Com. Dig. 357; 8 Com. Dig. 985; 2 Chit. Pr. 2. See *Attorney at law*; *Counsellor at law*; *Proctor*.

SOLICITOR OF THE TREASURY. The title of one of the officers of the United States, created by the act of May 29, 1880, 4 Sharsw. cont. of Story, L. U. S. 2206, which prescribes his duties and his rights.

2.—1. His powers and duties are, 1. Those which were by law vested and required from the agent of the treasury of the United States. 2. Those which theretofore belonged to the commissioner, or acting commissioner of the revenue, as relate to the superintendence of the collection of outstanding direct and internal duties. 3. To take charge of all lands which shall be conveyed to the United States, or set off to them in payment of debts, or which are vested in them by mortgage or other security; and to release such lands which had, at the passage of the act, become vested in the United States, on payment of the debt for which they were received. 4. Generally to superintend the collection of debts due to the United States, and receive statements from different officers in relation to suits or actions commenced for the recovery of the same. 5. To instruct the district

attorneys, marshals, and clerks of the circuit and district courts of the United States, in all matters and proceedings appertaining to suits in which the United States are a party or interested, and to cause them to report to him any information he may require in relation to the same. 6. To report to the proper officer from whom the evidence of debt was received, the fact of its having been paid to him, and also all credits which have by due course of law been allowed on the same. 7. To make rules for the government of collectors, district attorneys and marshals, as may be requisite. 8. To obtain from the district attorneys full accounts of all suits in their hands, and submit abstracts of the same to congress.

3.—2. His rights are, 1. To call upon the attorney-general of the United States for advice and direction as to the manner of conducting the suits, proceedings and prosecutions aforesaid. 2. To receive a salary of three thousand five hundred dollars per annum. 3. To employ, with the approbation of the secretary of the treasury, a clerk, with a salary of one thousand five hundred dollars; and a messenger, with a salary of five hundred dollars. To receive and send all letters, relating to the business of his office, free of postage.

SOLIDO, IN, civil law. In solido, is a term used to designate those contracts in which the obligors are bound, jointly and severally, or in which several obligees are each entitled to demand the whole of what is due.

2.—1. There is an obligation in solido on the part of debtors, when they are all obliged to the same thing, so that each may be compelled to pay the whole, and when the payment which is made by one of them, exonerates the others towards the creditor.

3.—2. The obligation is in solido, or joint and several between several creditors, when the title expressly gives to each of them the right of demanding payment of the total of what is due, and when the payment to any one of them discharges the debtor. Civ. Code of La. 2083, 2086; Merl. Répér. h. t.; Domat, Index, h. t. See *In solido*.

SOLITARY IMPRISONMENT. The punishment of separate confinement. This has been adopted in Pennsylvania, with complete success. Vide *Penitentiary*.

SOLUTION, civil law. Payment.

2. By this term, is understood, every species of discharge or liberation, which is called satisfaction, and with which the creditor is satisfied. Dig. 46, 3, 54; Code 8,

43, 17; Inst. 3, 30. This term has rather a reference to the substance of the obligation, than to the numeration or counting of the money. Dig. 50, 16, 176. Vide *Discharge of a contract*.

SOLVENCY. The state of a person who is able to pay all his debts; the opposite of *insolvency*. (q. v.)

SOLVENT. One who has sufficient to pay his debts, and all obligations. Dig. 50, 16, 114.

SOLVERE. To unbind; to untie; to release; to pay; *solvere dicimus eum qui fecit quod facere promisit*. 1 Bouv. Inst. n. 807.

SOLVIT AD DIEM, pleading. The name of a plea to an action on a bond, or other obligation to pay money, by which the defendant pleads that he paid the money on the day it was due. Vide 1 Stra. 652; Rep. Temp. Hardw. 133; Com. Dig. Pleader, 2 W 29.

2. This plea ought to conclude with an averment, and not to the country. 1 Sid. 215; 12 John. R. 253; vide 2 Phil. Ev. 92; Coxe, R. 467.

SOLVIT POST DIEM, pleading. The name of a special plea in bar to an action of debt on a bond, by which the defendant asserts that he paid the money after the day it became due. 1 Chit. Pl. 480, 555; 2 Phil. Ev. 93.

SOMNAMBULISM, med. juris. Sleep walking.

2. This is sometimes an inferior species of insanity, the patient being unconscious of what he is doing. A case is mentioned of a monk who was remarkable for simplicity, candor and probity, while awake, but who during his sleep in the night, would steal, rob, and even plunder the dead. Another case is related of a pious clergyman, who during his sleep, would plunder even his own church. And a case occurred in Maine, where the somnambulist attempted to hang himself, but fortunately tied the rope to his feet, instead of his neck. Ray. Med. Jur. § 294.

3. It is evident, that if an act should be done by a sleep walker, while totally unconscious of his act, he would not be liable to punishment, because the intention (q. v.) and will (q. v.) would be wanting. Take, for example, the following singular case: A monk late one evening, in the presence of the prior of the convent, while in a state of somnambulism, entered the room of the prior, his eyes open but fixed, his features contracted into a

frown, and with a knife in his hand. He walked straight up to the bed, as if to ascertain if the prior were there, and then gave three stabs, which penetrated the bed clothes, and a mat which served for the purpose of a mattress; he returned with an air of satisfaction, and his features relaxed. On being questioned the next day by the prior as to what he had dreamed the preceding night, the monk confessed he had dreamed that his mother had been murdered by the prior, and that her spirit had appeared to him and cried for vengeance, that he was transported with fury at the sight, and ran directly to stab the assassin; that shortly after he awoke covered with perspiration, and rejoiced to find it was only a dream. Georget, Des Maladies Mentales, 127.

4. A similar case occurred in England, in the last century. Two persons, who had been hunting in the day, slept together at night; one of them was renewing the chase in his dream, and, imagining himself present at the death of the stag, cried out aloud, "I'll kill him! I'll kill him!" The other, awakened by the noise, got out of bed, and, by the light of the moon, saw the sleeper give several deadly stabs, with a knife, on the part of the bed his companion had just quitted. Hervey's Meditations on the Night, note 35; Guy, Med. Jur. 265.

SON, kindred. An immediate male descendant. In its technical meaning in devises, this is a word of purchase, but the testator may make it a word of descent. Sometimes it is extended to more remote descendants.

SON ASSAULT DEMESNE, pleading. His own first assault. A form of a plea to justify an assault and battery, by which the defendant asserts that the plaintiff committed an assault upon him, and the defendant merely defended himself.

2. When the plea is supported by evidence, it is a sufficient justification, unless the retaliation by the defendant were excessive, and bore no proportion to the necessity, or to the provocation received. 1 East, P. C. 406; 1 Chit. Pr. 595.

SON-IN-LAW, in Latin called gener. The husband of one's daughter.

SOUND MIND. That state of a man's mind which is adequate to reason and comes to a judgment upon ordinary subjects, like other rational men.

2. The law presumes that every person who has acquired his full age is of sound mind, and consequently competent to make

contracts and perform all his civil duties; and he who asserts to the contrary must prove the affirmation of his position by explicit evidence, and not by conjectural proof. 2 Hagg Eccl. R. 434; 3 Addams' R. 86; 8 Watts, R. 66; Ray, Med. Jur. § 92; 3 Curt. Eccl. R. 671. Vide *Unsound mind*.

SOUNDING IN DAMAGES. When an action is brought, not for the recovery of lands, goods, or sums of money, (as is the case in real or mixed actions, or the personal action of debt or detinue,) but for damages only, as in covenant, trespass, &c., the action is said to be *sounding in damages*. Steph. Pl. 126, 127.

SOUNDNESS. In usual health; without any permanent disease. 1 Carr. & Marsh. 291. To create unsoundness, it is requisite that the animal should not be useful for the purpose for which he is bought, and that inability to be so useful should arise from disease or accident. 2 M. & Rob. 137; 9 M. & W. 670; 2 M. & Rob. 113.

2. In the sale of slaves and animals they are sometimes warranted by the seller to be sound, and it becomes important to ascertain what is soundness. Roaring; (q. v.) a temporary lameness, which renders a horse less fit for service; 4 Campb. 271; sed vide 2 Esp. Cas. 573; a cough, unless proved to be of a temporary nature; 2 Chit. R. 245, 416; and a nerved horse, have been held to be unsound. But crib-biting is not a breach of a general warranty of soundness. Holt, Cas. 630.

3. An action on the case is the proper remedy for a verbal warrant of soundness. 1 H. Bl. R. 17; 3 Esp. 82; 9 B. & Cr. 259; 2 Dow. & Ry. 10; 1 Bing. 344; 5 Dow. & R. 164; 1 Taunt. 566; 7 East, 274; Bac. Ab. Action on the Case, E.

SOURCES OF THE LAW. By this expression is understood the authority from which the laws derive their force.

2. The power of making all laws is in the people or their representatives, and none can have any force whatever, which is derived from any other source. But it is not required that the legislator shall expressly pass upon all laws, and give the sanction of his seal, before they can have life or existence. The laws are therefore such as have received an express sanction, and such as derive their force and effect from implication. The first, or express, are the constitution of the United States, and the

treaties and acts of the legislature which have been made by virtue of the authority vested by the constitution. To these must be added the constitution of the state and the laws made by the state legislature, or by other subordinate legislative bodies, by virtue of the authority conveyed by such constitution. The latter, or *tacit*, received their effect by the general use of them by the people, when they assume the name of customs; by the adoption of rules by the courts from systems of foreign laws.

3. The *express* laws, are first, the constitution of the United States; secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the laws made by the several state legislatures; sixthly, laws made by inferior legislative bodies, such as the councils of municipal corporations, and general rules made by the courts.

4.—1. The constitution is an act of the people themselves, made by their representatives elected for that purpose. It is the supreme law of the land, and is binding on all future legislative bodies, until it shall be altered by the authority of the people, in the manner provided for in the instrument itself, and if an act be passed contrary to the provisions of the constitution, it is, *ipso facto*, void. 2 Pet. 522; 12 Wheat. 270; 2 Dall. 309; 3 Dall. 386; 4 Dall. 18; 6 Cranch, 128.

5.—2. Treaties made under the authority of the constitution are declared to be the supreme law of the land, and therefore obligatory on courts. 1 Cranch, 103. See *Treaty*.

6.—3. The acts and resolutions of congress enacted constitutionally, are of course binding as laws, and require no other explanation.

7.—4. The constitutions of the respective states, if not opposed to the provisions of the constitution of the United States, are of binding force in the states respectively, and no act of the state legislature has any force which is made in contravention of the state constitution.

8.—5. The laws of the several states, constitutionally made by the state legislatures, have full and complete authority in the respective states.

9.—6. Laws are frequently made by inferior legislative bodies which are authorized by the legislature; such are the municipal councils of cities or boroughs. Their laws are generally known by the name of

ordinances, and, when lawfully ordained, they are binding on the people. The courts, perhaps by a necessary usurpation, have been in the practice of making general rules and orders, which sometimes affect suitors and parties as much as the most regular laws enacted by congress. These apply to all future cases. There are also rules made in particular cases as they arise, but these are rather decrees or judgments than laws.

10. The *tacit* laws, which derive their authority from the consent of the people, without any legislative enactment, may be subdivided into

1st. The *common law*, which is derived from two sources, the common law of England, and the practice and decisions of our own courts. It is very difficult, in many cases, to ascertain what is this common law, and it is always embarrassing to the courts. Kirl. Rep. Pref. In some states, it has been enacted that the common law of England shall be the law, except where the same is inconsistent with our constitutions and laws. See *Law*.

2d. *Customs* which have been generally adopted by the people, have the force of law.

3d. The principles of the *Roman law*, being generally founded in superior wisdom, have insinuated themselves into every part of the law. Many of the refined rules which now adorn the common law appear there without any acknowledgment of their paternity, and it is at this source that some judges dipt to get the wisdom which adorns their judgments. The proceedings of the courts of equity and many of the admirable distinctions which manifest their wisdom are derived from this source. To this fountain of wisdom the courts of admiralty owe most of the law which governs in admiralty cases.

4th. The *canon law*, which was adopted by the ecclesiastical courts, figures in our laws respecting marriage, divorces, wills and testaments, executors and administrators and many other subjects.

5th. The *jurisprudence*, or decisions of the various courts, have contributed their full share of what makes the law. These decisions are made by following precedents, by borrowing from the sources already mentioned, and, sometimes by the less excusable disposition of the judges to legislate on the bench.

11. The monuments where the common law is to be found, are the records, reports

of cases adjudicated by the courts, and the treatises of learned men. The books of reports are the best proof of what is the common law, but owing to the difficulty of finding out any systematic arrangement, recourse is had to treatises upon the various branches of the law. The records, owing to their being kept in one particular place, and therefore not generally accessible, are seldom used.

SOUS SEING PRIVE. An act *sous seing privé*, in Louisiana and by the French law, is an act or contract evidenced by writing under the *private signature* of the parties to it. The term is used in opposition to the *authentic act*, which is an agreement entered into in the presence of a notary or other public officer.

2. The form of the instrument does not give it its character so much as the fact that it appears or does not appear to have been executed before the officer. 7 N. S. 548; 5 N. S. 196.

3. The effect of a *sous seing privé* is not the same as that of the *authentic act*. The former cannot be given in evidence until proved, and, unless accompanied by possession, it does not, in general, affect third persons; 6 N. S. 429, 432; the latter, or authentic acts, are full evidence against the parties and those who claim under them. 8 N. S. 132. See *Act; Authentic act*.

SOUTH CAROLINA. The name of one of the original states of the United States of America. For an account of its colonial history, see article *North Carolina*.

2. The constitution of this state was adopted the third day of June, 1790, to which two amendments have been made, one, ratified December 17, 1808, and the other, December 19, 1816. The powers of the government are distributed into three branches, the legislative, the executive, and the judicial.

3.—1st. The *legislative* authority is vested in a general assembly, which consists of a senate and house of representatives.

4.—1. The *senate* will be considered with reference to the qualifications of the electors; the qualifications of the members; the number of members; the duration of their office, and the time of their election. 1. Every free white man, of the age of twenty-one years, being a citizen of this state, and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot, of which he hath been legally seised and pos-

ceased, at least six months before such election, or, not having such freehold or town lot, hath been a resident in the election district, in which he offers to give his vote, six months before the said election, and hath paid a tax the preceding year of three shillings sterling towards the support of this government, shall have a right to vote for a member or members, to serve in either branch of the legislature, for the election district in which he holds such property, or is so resident. 2. No person shall be eligible to a seat in the senate, unless he is a free white man, of the age of thirty years, and hath been a citizen and resident in this state five years previous to his election. If a resident in the election district, he shall not be eligible unless he be legally seised and possessed in his own right, of a settled freehold estate of the value of three hundred pounds sterling, clear of debt. If a non-resident in the election district, he shall not be eligible unless he be legally seised and possessed in his own right, of a settled freehold estate in the said district, of the value of one thousand pounds sterling, clear of debt. 3. The senate is composed of one member from each district as now established for the election of the house of representatives, except the district formed by the districts of the parishes of St. Philip and St. Michael, to which shall be allowed two senators as heretofore. Amend. of Dec. 17, 1808. 4. They are elected for four years. Ibid. 5. The election takes place on the second Monday in October. Art. 1, s. 10.

5.—2. The *house of representatives* will be considered in the same order which has been observed in considering the senate. 1. The qualification of electors are the same as those of electors of senators. 2. No person shall be eligible to a seat in the house of representatives, unless he is a free white man, of the age of twenty-one years, and hath been a citizen and resident in this state three years previous to his election. If a resident in the election district, he shall not be eligible to a seat in the house of representatives, unless he be legally seised and possessed in his own right, of a settled freehold estate of five hundred acres of land, and ten negroes; or of a real estate, of the value of one hundred and fifty pounds sterling, clear of debt. If a non-resident, he shall be legally seised and possessed of a settled freehold estate therein, of the value of five hundred pounds sterling, clear of debt.

3. The house consists of one hundred and twenty-four members. Amend. of Dec. 17, 1808. 4. The members are elected for two years. Art. 1, s. 2. 5. The election is at the same time that the election of senators is held.

6.—2. The *executive authority* is vested in a governor, and in certain cases, a lieutenant-governor.

7.—1. Of the *governor*. It will be proper to consider his qualifications; by whom he is to be elected; when to be elected; duration of office; and his powers and duties. 1. No person shall be eligible to the office of governor, unless he hath attained the age of thirty years, and hath resided within this state, and been a citizen thereof, ten years, and unless he be seised and possessed of a settled estate within the same, in his own right, of the value of fifteen hundred pounds sterling, clear of debt. Art. 2, s. 2. 2. He is elected by the senate and house of representatives jointly, in the house of representatives. Art. 2, sect. 1. 3. He is to be elected whenever a majority of both houses shall be present. *Ib.* 4. He is elected for two years, and until a new election shall be made. *Ibid.* 5. The governor is commander-in-chief of the army and navy of the state, and of the militia, except when they shall be called into the actual service of the United States. He may grant reprieves and pardons, after conviction, except in cases of impeachment, and remit fines and forfeitures, unless otherwise directed by law—shall cause the laws to be faithfully executed in mercy—may prohibit the exportation of provisions, for any time not exceeding thirty days—may require information from the executive departments—shall recommend such measures as he may deem necessary, and give the assembly information as to the condition of the state—may on extraordinary occasions convene the assembly, and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the fourth Monday in the month of November then next ensuing.

8.—2. A *lieutenant-governor* is to be chosen at the same time, in the same manner, continue in office for the same period, and be possessed of the same qualifications as the governor. Art. 2, sect. 3. In case of the impeachment of the governor, or his removal from office, death, resignation, or absence from the state, the lieutenant-governor

nor shall succeed to his office. And in case of the impeachment of the lieutenant-governor, or his removal from office, death, resignation, or absence from the state, the president of the senate shall succeed to his office, till a nomination to those offices respectively shall be made by the senate and house of representatives, for the remainder of the time for which the officer so impeached, removed from office, dying, resigning, or being absent, was elected. Art. 2, s. 5.

9—3. The *judicial* power shall be vested in such superior and inferior courts of law and equity, as the legislature shall, from time to time, direct and establish. The judges of each shall hold their commissions during good behaviour; and judges of the superior courts shall, at stated times, receive a compensation for their services, which shall neither be increased nor diminished during their continuance in office: but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust, under this state, the United States, or any other power. Art. 3, sect. 1. The judges are required to meet at such times and places, as shall be prescribed by the act of the legislature, and sit for the purpose of hearing and determining all motions which may be made for new trials, and in arrest of judgment, and such points of law as may be submitted to them. Amend. of Dec. 19, 1816.

SOVEREIGN. A chief ruler with supreme power; one possessing *sovereignty*. (q. v.) It is also applied to a king or other magistrate with limited powers.

2. In the United States the sovereignty resides in the body of the people. Vide Rutherf. Inst. 282.

SOVEREIGN, Eng. law. The name of a gold coin of Great Britain of the value of one pound sterling.

SOVEREIGN STATE. One which governs itself independently of any foreign power.

SOVEREIGNTY. The union and exercise of all human power possessed in a state; it is a combination of all power; it is the power to do everything in a state without accountability; to make laws, to execute and to apply them; to impose and collect taxes, and levy contributions; to make war or peace; to form treaties of alliance or of commerce with foreign nations, and the like. Story on the Const. § 207.

2. Abstractedly, sovereignty resides in

the body of the nation and belongs to the people. But these powers are generally exercised by delegation.

3. When analysed, sovereignty is naturally divided into three great powers; namely, the legislative, the executive, and the judiciary; the first is the power to make new laws, and to correct and repeal the old; the second is the power to execute the laws both at home and abroad; and the last is the power to apply the laws to particular facts; to judge the disputes which arise among the citizens, and to punish crimes.

4. Strictly speaking, in our republican forms of government, the absolute sovereignty of the nation is in the people of the nation; (q. v.) and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state. (q. v.) 2 Dall. 471; and vide, generally, 2 Dall. 433, 455; 3 Dall. 93; 1 Story, Const. § 208; 1 Toull. n. 20; Merl. Réper. h. t.

SPADONES, civil law. Those who, on account of their temperament, or some accident they have suffered, are unable to procreate. Inst. 1, 11, 9; Dig. 1, 7, 2, 1; and vide *Impotence*.

SPARSIM. This Latin adverb signifies scatteredly, here and there, in a scattered manner, sparsedly, dispersedly. It is sometimes used in law; for example, the plaintiff may recover the place wasted, not only where the injury has been total, but where trees, growing *sparsim* in a close, are cut. Bac. Ab. Waste, M; Brownl. 240; Co Litt. 54, a; 4 Bouv. Inst. n. 3690.

TO SPEAK. This term is used in the English law, to signify the permission given by a court to the prosecutor and defendant in some cases of misdemeanor, to agree together, after which the prosecutor comes into court and declares himself to be satisfied; when the court pass a nominal sentence. 1 Chit. Pr. 17.

SPEAKER. The presiding officer of the house of representatives of the United States is so called. The presiding officer of either branch of the state legislatures generally bears this name.

SPEAKING DEMURRER, equity pleading. One which contains an argument in the body of it; as, for instance, when a demurrer says, "in or about the year 1770," which is upwards of twenty years before the bill filed. 2 Ves. jr. 83; S. C. 4 Bro. C. C. 254.

SPECIAL. That which relates to a particular species or kind, opposed to general; as special verdict and general verdict; special imparlance and general imparlance; special jury, or one selected for a particular case, and general jury; special issue and general issue, &c.

SPECIAL AGENT. A special agent is one whose authority is confined to a particular, or an individual instance. It is a general rule, that he who is invested with a special authority, must act within the bounds of his authority, and he cannot bind his principal beyond what he is authorized to do. 2 Bouv. Inst. n. 1299; 2 John. 48; 1 Wash. C. C. 174; 5 John. 48; 15 John. 44; 8 Wend. 494.

SPECIAL ASSUMPSIT, practice. Where an action of assumpsit (q. v.) has been brought on a special contract, and the plaintiff declares upon it, setting out its particular language, or its legal effect. It is distinguished from a general assumpsit, where the plaintiff, instead of setting out the original contract, declares as for a debt, arising out of the execution of the contract, where that constitutes the debt. 3 Bouv. Inst. n. 3426.

SPECIAL BAIL. A person who becomes specially bound to answer for the appearance of another; the recognizance or act by which such person thus becomes bound, is also called special bail. Vide *Bail*.

SPECIAL CONSTABLE. One who has been appointed a constable for a particular occasion, as in the case of an actual tumult or a riot, or for the purpose of serving a particular process.

SPECIAL DAMAGES. Such as actually have been suffered, and are not implied by law. Vide *Damages, Special*; and 1 Chit. Pl. 385; Com. Dig. Action on the case for Defamation, D 30, G 11.

SPECIAL DEMURRER, pleading. One which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection, and the particular ground of the exception. 3 Bouv. Inst. n. 3022. See *Demurrer*.

SPECIAL DEPOSIT. A deposit made of a particular thing with the depositary; it is distinguished from an irregular deposit.

2. When a thing has been specially deposited with a depositary, the title to it remains with the depositor, and if it should be lost, the loss will fall upon him. When, on the contrary, the deposit is irregular, as

where money is deposited in a bank, the title to which is transferred to the bank, if it be lost, the loss will be borne by the bank. This will result from the same principle; the loss will fall, in both instances, on the owner of the thing, according to the rule *res perit domino*. See 1 Bouv. Inst. n. 1054.

SPECIAL ERRORS. Special pleas in error are those which assign for error matters in confession and avoidance, as a release of errors, the act of limitations, and the like, to which the plaintiff in error may reply or demur.

SPECIAL IMPARLANCE, pleading. One which contains the clause, "saving to himself all advantages and exceptions, as well to the writ, as to the declaration aforesaid." 2 Chit. Pl. 407, 8.

2. This imparlance admits the jurisdiction of the court, but the defendant may plead in abatement or to the action; that is, to the writ or the count. Gould. on Pl. c. 2, § 18; Lawes on Pl. 84. See *Imparlance*.

SPECIAL INJUNCTION. One obtained only on motion and petition, with notice to the other party, and is applied for, sometimes on affidavit before answer, but more frequently upon merits disclosed in the defendant's answer. 4 Bouv. Inst. n. 3756. See *Injunction*.

SPECIAL ISSUE, pleading. A plea to the action which denies some particular material allegation, which is in effect a denial of the entire right of action. It differs from the general issue which traverses or denies the whole declaration or indictment. Gould. on Pl. c. 2, § 38. See *General Issue*; *Issue*.

SPECIAL JURY. One selected in a particular way by the parties. A pannel is made out, and each party is entitled to strike from it the names of a certain number of jurors, as provided for by the local statutes, and from those who remain, the jury in that case must be selected. This is also called a *struck jury*.

SPECIAL NON EST FACTUM. The name of a plea by which the defendant says that the deed which he has executed is not his own or binding upon him, because of some circumstance which shows that it was not intended to be his deed, or because it was not binding upon him for some lawful reason; as, when the defendant delivered the deed to a third person as an escrow to be delivered upon a condition, and it has been delivered without the performance of the condition, he may plead *non est factum*,

state the fact of the conditional delivery, the non-performance of the condition, and add, "and so it is not his deed;" or if the defendant be a feme covert, she may plead *non est factum*, that she was a feme covert at the time the deed was made, "and so it is not her deed." Bac. Ab. Pleas, &c. H 3, I 2; Gould. on Pl. c. 6, part 1, § 64. See *Issint*.

SPECIAL OCCUPANT, estates. When an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee die without alienation, and while the life for which he held continues, the heir will succeed, and is called a special occupant. 2 Bl. Com. 259. In the United States the statute provisions of the different states vary considerably upon this subject. In New York and New Jersey, special occupancy is abolished. Virginia, and probably Maryland, follow the English statutes; in Massachusetts and other states, where the real and personal estates of intestates are distributed in the same way and manner, the question does not seem to be material. 4 Kent, Com. 27.

SPECIAL PARTNERSHIP. Special or limited partnerships are of two kinds; 1. Those at common law. 2. Limited partnerships, or those in commendam.

2. Special partnerships at common law, are those formed for a particular or special branch of business, as contradistinguished from the general business of the parties, or of one of them.

3. A limited or special partnership, under special acts of assembly, may be found in several states. In such partnerships some of the partners are liable as general partners, while others are responsible only to the extent of the capital they have furnished. See 2 Bouv. Inst. n. 1472, 1473, and *In Commendam; Partnership*.

SPECIAL PLEA IN BAR. One which advances new matter. It differs from the general in this, that the latter denies some material allegation, but never advances new matter. Gould on Pl. c. 2, § 38.

SPECIAL PLEADER, Engl. practice. A special pleader is a lawyer whose professional occupation is to give verbal or written opinions upon statements submitted to him, either in writing or verbally, and to draw pleadings, civil or criminal, and such practical proceedings as may be out of the general course. 2 Chit. Pr. 42.

SPECIAL PLEADING. The allegation of special or new matter, as distinguished from

a direct denial of matter previously alleged on the opposite side. Gould on Pl. c. 1, s. 18; Co. Litt. 282; 3 Wheat. R. 246; Com. Dig. Pleader, E 15.

SPECIAL PROPERTY. This term is used as synonymous with *qualified* or *limited* property. It is that property which is not perfect in the hands of the possessor, but his right is qualified or limited; as, where a person is possessed of an animal *feræ nature*, he has a property in such animal, but this is not a general right, for if the animal should escape, and be taken by another person, the latter only would have a special property in it.

2. Again, a person may have a special property in a chattel in consequence of the peculiar circumstances of the owner; a bailee, for example, has a special property in the thing bailed. 1 Bouv. Inst. n. 475 to 477.

SPECIAL REQUEST. One actually made, at a particular time and place; this term is used in contradistinction to a general request, which need not state the time when, nor place where made. 3 Bouv. Inst. n. 2843.

SPECIAL RULE. A rule or order of court made in a particular case, for a particular purpose; it is distinguished from a *general* rule, which applies to a class of cases. It differs also from a *common* rule, or rule of course.

SPECIAL TRAVERSE, pleading. A technical special traverse begins in most cases, with the words *absque hoc*, (without this,) which words in pleading form a technical form of negation. Lawes' Pl. 116 to 120.

2. A traverse commencing with these words is special, because, when it thus commences, the inducement and the negation are regularly both special; the former consisting of new matter, and the latter pursuing, in general, the words of the allegation traversed, or at least those of them which are material. For example, if the defendant pleads title to land in himself, by alleging that Peter devised the land to him, and then died seised in fee; and the plaintiff replies that Peter died seised in fee intestate, and alleges title in himself, as heir of Peter *without this*, that Peter devised the land to the defendant; the traverse is special. Here the allegation of Peter's intestacy, &c., forms the special inducement; and the *absque hoc*, with what follows it, is a special denial of the alleged devise; i. e. a denial of it in the words of the allegation. Lawes on Pl. 119, 120;

Gould, Pl. ch. 7, § 6, 7; Steph. Pl. 188. Vide *Traverse*; *General Traverse*.

SPECIAL TRUST. A special trust is one where a trustee is interposed for the execution of some purpose particularly pointed out, and is not, as in the case of a simple trust, a mere passive depository of the estate, but is required to exert himself actively in the execution of the settler's intention; as, where a conveyance is made to trustees upon trust to reconvey, or to sell for the payment of debts. 2 Bouv. Inst. n. 1896. See *Trust*.

SPECIAL VERDICT, practice. A special verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges. Vide *Verdict*; Bac. Ab. Verdict, D.

SPECIALTY, contracts. A writing sealed and delivered, containing some agreement. 2 Serg. & Rawle, 503; 1 Binn. Rep. 261; Willes, 189; 1 P. Wms. 180. In a more confined meaning, it signifies a writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified. Bac. Ab. Obligation, A.

2. Although in the body of the writing it is not said, that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty, and if it be not sealed, it is not a specialty, although the parties in the body of the writing make mention of a seal. 2 Serg. & Rawle, 504; 2 Rep. 5 a; Perk. § 129. Vide *Bond*; *Debt*; *Obligation*.

SPECIE. Metallic money issued by public authority.

2. This term is used in contradistinction to paper money, which in some countries is emitted by the government, and is a mere engagement which represents specie. Bank paper in the United States is also called paper money. Specie is the only constitutional money in this country. See 4 Monr. 483.

SPECIFIC LEGACY. A bequest of a particular thing.

2. It follows that a specific legacy may be of animals or inanimate things, provided they are specified and separated from all other things; a specific legacy may therefore be of money in a bag, or of money marked and so described; as, I give two eagles to A B, on which are engraved the initials of my name. A specific legacy may also be given out of a general fund. Touch. 433; Amb. 310; 4 Ves. 565; 3 Ves. &

Bea. 5. If the specific article given be not found among the assets of the testator, the legatee loses his legacy; but on the other hand, if there be a deficiency of assets, the specific legacy will not be liable to abate with the general legacies. 1 Vern. 31; 1 P. Wms. 422; 3 P. Wms. 365; 3 Bro. C. C. 160; vide 1 Roper on Leg. 150; 1 Supp. to Ves. jr. 209; Id. 231; 2 Id. 112; and articles *Legacy*; *Legatee*.

SPECIFIC PERFORMANCE, remedies. The actual accomplishment of a contract by the party bound to fulfil it.

2. Many contracts are entered into by parties to fulfil certain things, and then the contracting parties neglect or refuse to fulfil their engagements. In such cases the party grieved has generally a remedy at law, and he may recover damages for the breach of the contract; but, in many cases, the recovery of damages is an incompetent remedy, and the party seeks to recover a specific performance of the agreement.

3. It is a general rule, that courts of equity will entertain jurisdiction for a specific performance of agreements, whenever courts of law can give but an inadequate remedy; and it is immaterial whether the subject relate to real or personal estate. 1 Madd. Ch. Pr. 295; 2 Story on Eq. § 717; 1 Sim. & Stu. 607; 1 P. Wms. 570; 1 Sch. & Lef. 553; 1 Vern. 159.

4. But the rule is confined to cases where courts of law cannot give an adequate remedy. 2 Story on Eq. § 718; Eden on Inj. ch. 3, p. 27. Vide, generally, 2 Story on Eq. ch. 18, § 712 to 792; 1 Supp. to Ves. jr. 96, 148, 184, 211, 495; 2 Supp. to Ves. jr. 65, 164; Fonb. Eq. b. 1, c. 1, s. 5; Sugd. Vend. 145.

SPECIFICATION, civil law. A term used in the civil law, by which is meant a person's making a new species or subject from materials belonging to another. Bouv. Inst. Theolo. ps. 1, c. 1, art. 1, § 4, s. 4, p. 74.

2. When the new species can be again reduced to the matter of which it was made, the law considers the former mass as still existing, and, therefore, the new species as an accessory to the former subject; but where the thing made cannot be so reduced, as in the case of wine, which cannot be again turned into grapes, there is no place for the *factio juris*; and, there, the workmanship draws after it the property of the material. Inst. 2, 1, 25; Dig. 41, 1, 7, 7.

See *Accession*; *Confusion*; *Mixtion*; and *Azo & Man. Inst. B. 2, t. 2, c. 8.*

SPECIFICATION, practice, contracts. A particular and detailed account of a thing: example, in order to obtain a patent for an invention, it is necessary to file a specification or an instrument of writing, which must lay open and disclose to the public every part of the process by which the invention can be made useful; if the specification does not contain the whole truth relative to the discovery, or contains more than is requisite to produce the desired effect, and the concealment or addition was made for the purpose of deception, the patent would be void; for if the specification were insufficient on account of its want of clearness, exactitude or good faith, it would be a fraud on society that the patentee should obtain a monopoly without giving up his invention. 2 Kent, Com. 300; 1 Bell's Com. part 2, c. 3, s. 1, p. 112; *Perpigna* on Pat. 67; *Renouard, Des Brevets d'Inv.* 252.

2. In charges against persons accused of military offences, they must be particularly described and clearly expressed; this is called the specification. Tytl. on Courts Mart. 109.

SPECIMEN. A sample; a part of something by which the other may be known.

2. The act of congress of July 4, 1836, section 6, requires the inventor or discoverer of an invention or discovery to accompany his petition and specification for a patent with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of the composition of matter.

SPECULATION, contracts. The hope or desire of making a profit by the purchase and resale of a thing. Pard. Dr. Com. n. 12. The profit so made; as, he made a good speculation.

SPEECH. A formal discourse in public.

2. The liberty of speech is guaranteed to members of the legislature, to counsel in court in debate.

3. The reduction of a speech to writing and its publication is a libel, if the matter contained in it is libelous; and the repetition of it upon occasions not warranted by law, when the matter is slanderous, will be slander; and the character of the speaker will be no protection to him from an action. 1 M. & S. 273; 1 Esp. C. 226; *Bouv.*

Inst. Index, h. t. See *Debate*; *Liberty of Speech.*

SPELLING. The art of putting the proper letters in words.

2. It is a rule that when it appears with certainty what is meant, bad spelling will not avoid a contract; for example, where a man agreed to pay *threty* pounds, he was held bound to pay *thirty* pounds; and *seutene* was holden to be *seventeen*. Cro. Jac. 607; 10 Coke, 133, a; 2 Roll. Ab. 147.

3. Even in an indictment *undertood* has been holden as *understood*. 1 Chit. Cr. Law.

4. A misspelling of a name in a declaration, will not be sufficient to defeat the plaintiff, on the ground of variance between the writing produced, and the declaration, if such name be *idem sonans*; as *Kay* for *Key*. 16 East, 110; 2 Stark. 29; *Segrave* for *Seagrave*. 2 Str. 889. See *Idem Sonans*.

SPENDTHRIFT. By the Rev. Stat. of Vermont, tit. 16, c. 65, s. 9, spendthrift is defined to be a person who by excessive drinking, gaming, idleness or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or expose the town to charge or expense, for support of himself or family.

SPERATE. That of which there is hope.

2. In the accounts of an executor and the inventory of the personal assets, he should distinguish between those assets which are sperate, and those which are desperate; he will be *prima facie* responsible for the former, and discharged for the latter. 1 Chit. Pr. 520; 2 Williams, Ex. 644; Toll. Ex. 248. See *Desperate*.

SPES RECUPERANDI. The hope of recovery. This term is applied to cases of capture of an enemy's property as a booty or prize. As between the belligerent parties, the title to the property taken as a prize passes the moment there is no longer any hope of recovery. 2 Burr. Rep. 683. Vide *Infra præsidea*; *Jus Postliminy*; *Booty*; *Prize*.

SPINSTER. An addition given, in legal writings, to a woman who never was married. Lovel. on Wills, 269.

SPLITTING A CAUSE OF ACTION. The bringing an action for only a part of the cause of action. This is not permitted either at law nor in equity. 4 Bouv. Inst. n. 4167.

SPOLIATION, *Eng. eccl. law.* The name of a suit sued out in the spiritual court to recover for the fruits of the church, or for the church itself. F. N. B. 85.

2. It is also a waste of church property by an ecclesiastical person. 3 Bl. Com. 90.

SPOLIATION, *forts.* Destruction of a thing by the act of a stranger; as, the erasure or alteration of a writing by the act of a stranger, is called spoliation. This has not the effect to destroy its character or legal effect. 1 Greenl. Ev. § 566.

2. By spoliation is also understood the total destruction of a thing; as, the spoliation of papers, by the captured party, is generally regarded as proof of guilt, but in America it is open to explanation, except in certain cases where there is a vehement presumption of bad faith. 2 Wheat. 227, 241; 1 Dods. Adm. 480, 486. See *Alteration*.

SPONSALIA, or **STIPULATIO SPONSALITIA**. A promise lawfully made between persons capable of marrying each other, that at some future time they will marry. See *Espousals*; Ersk. Inst. B. 1, t. 6, n. 3.

SPONSIONS, *international law.* Agreements or engagements made by certain public officers, as generals or admirals, in time of war, either without authority, or by exceeding the limits of authority under which they purport to be made.

2. Before these conventions can have any binding authority on the state, they must be confirmed by express or tacit ratification. The former is given in positive terms and in the usual forms; the latter is justly implied from the fact of acting under the agreement as if bound by it, and from any other circumstance from which an assent may be fairly presumed. Wheat. Intern. Law, pt. 3, c. 2, § 3; Grotius, de Jur. Bel. ac Pac. l. 2, c. 15, § 16; Id. l. 3, c. 22, § 1-3; Vattel, Law of Nat. B. 2, c. 14, §§ 209-212; Wolff, § 1156.

SPONSOR, *civil law.* He who intervenes for another voluntarily and without being requested. The engagement which he enters into is only accessory to the principal. Vide Dig. 17, 1, 18; Nov. 4, ch. 1; Code de Com. art. 158, 159; Code Nap. 1236; Wolff, Inst. § 1556.

SPRING. A fountain.

2. The owner of the soil has the exclusive right to use a spring arising on his grounds. When another has an easement, or right to draw water from such a spring,

acquired by grant or prescription, if the spring fails the easement ceases, but if it returns, the right revives.

3. The waters which flow from the spring give rise to a variety of difficulties, the principal of which are, 1st. The owner of the inheritance in which the spring arises turns their course. The owner of the inferior estate, whose meadow they fertilized, and who is deprived of them, claims the right to them. 2d. The owner of the spring does not prevent the water from flowing on the inferior estate, but gives them a new direction injurious to it. 3d. The owner of the superior inheritance disposes of the water in such a way as to deprive the owner of the estate below him. The rights of these different owners will be separately considered.

4.—1. The owner of land on which there is a natural spring, has a right to use it for domestic and culinary purposes and for watering his cattle, and he may make an aqueduct to another part of his land, and use all the water required to keep the aqueduct in order, or to keep the water pure. 15 Conn. 366. He may also use it for irrigation, provided the volume be not materially decreased. Ang. W. C. 34. Vide *Irrigation*; and 1 Root, 535; 2 Watts. 327; 2 Hill, S. C. 634; Coxe, 460; 2 Dev. & Bat. 50; 9 Conn. 291; 3 Pick. 269; 13 Mass. 420; 8 Mass. 136; 8 Greenl. 253.

5.—2. The owner of the spring cannot lawfully turn the current or give it a new direction. He is bound to let it enter the inferior estate on the same level it has been accustomed to, and at the same place; for every man is entitled to a stream of water flowing through his land, without diminution or alteration. 6 East, 206; 2 Conn. 584. Vide 3 Rawle, 84; 12 Wend. 330; 10 Conn. 213; 14 Verm. 239.

6.—3. The owner of the superior inheritance, or of the land on which there is a spring, has no right to deprive the owner of the estate below him; 1 Yeates, 574; 5 Pick. 175; 3 Har. & John. 231; 12 Verm. 178; 13 Conn. 303; 3 Scam. 492; nor can he detain the water unreasonably. 17 John. 306; 2 B. C. 910. Vide Ham. N. P. 199; 1 Dall. 211; 8 Rawle's R. 256; *Jus Aquæductus*; *Pool*; *Stagnum*; *Back Water*; *Irrigation*; *Mill*; *Rain Water*; *Water Course*.

SPRINGING USE, *estates.* One to arise on a future event, when no preceding estate is limited, and does not take effect in derogation of any preceding interest. Ex-

ample: a grant is made to A in fee, to the use of B in fee, after the fourth of July; no use arises till the limited period. The use in the mean time results to the grantor, who has a determinable fee. A springing use differs from a resulting use, (q. v.) or a shifting use. (q. v.) 4 Kent, Com. 292; Com. Dig. Uses, K 7; Wils. on Springing Uses; Corn. on Uses, 91; 2 Bouv. Inst. n. 1889.

SPY. One who goes into a place for the purpose of ascertaining the best way of doing an injury there.

2. The term is mostly applied to an enemy who comes into the camp for the purpose of ascertaining its situation in order to make an attack upon it. The punishment for this crime is death. See Articles of War, 1 Story's Laws U. S. 992; Vattel, Droit des Gens. liv. 3, § 179.

SQUATTER. One who settles on the lands of others without any legal authority; this term is applied particularly to persons who settle on the public land. 3 Mart. N. S. 293.

TO STAB. To make a wound with a pointed instrument; a stab differs from a cut, (q. v.) or a wound. (q. v.) Russ. & Ry. 356; Russ. on Cr. 597; Bac. Ab. Maihem, B.

STAGNUM, estates. A pool. It is said to consist of land and water, and therefore by the name of stagnum, the water and the land may be passed. Co. Litt. 5.

STAKEHOLDER, contracts. A third person, chosen by two or more persons, to keep in deposit property, the right or possession of which is contested between them, and to be delivered to the one who shall establish his right to it. Thus each of them is considered as depositing the whole thing. This distinguishes this contract from that which takes place when two or more tenants in common deposit a thing with a bailee. Domat, Lois Civ. liv. 1, t. 7, s. 4; 1 Vern. R. 44, n. 1.

2. A person having in his hands money or other property claimed by several others, is considered in equity as a stakeholder. 1 Vern. R. 144.

3. The duties of a stakeholder are to deliver the thing holden by him to the person entitled to it on demand. It is frequently questionable who is entitled to it. In case of an unlawful wager, although he may be justified for delivering the thing to the winner, by the express or implied consent of the loser; 8 John. 147; yet if be-

fore the event has happened he has been required by either party to give up the thing deposited with him by such party, he is bound so to deliver it; 3 Taunt. 377; 4 Taunt. 492; or if, after the event has happened, the losing party give notice to the stakeholder not to pay the winner, a payment made to him afterwards will be made in his own wrong, and the party who deposited the money or thing may recover it from the stakeholder. 16 S. & R. 147; 7 T. R. 536; 8 T. R. 575; 4 Taunt. 474; 2 Marsh. 542. See 3 Penns. R. 468; 4 John. 426; 5 Wend. 250; 2 P. A. Browne, 182; 1 Bailey, 486, 503. See *Wagers*.

STALE DEMAND. A stale demand is a claim which has been for a long time undemanded; as, for example, where there has been a delay of twelve years, unexplained. 3 Mason, 161.

STAMP, revenue. An impression made on paper, by order of the government, which must be used in reducing certain contracts to writing, for the purpose of raising a revenue. Vide Stark. Ev. h. t.; 1 Phil. Ev. 444.

2. Maryland is the only state in the United States that has enacted a stamp.

TO STAND. To abide by a thing; to submit to a decision; to comply with an agreement; to have validity, as the judgment must stand.

STAND SEISED TO USES. This phrase is frequently used in relation to conveyances under the statute of uses. A covenant to stand seized to uses is a species of conveyance which derives its effect from the statute of uses, by which a man, seized of lands, covenants, in consideration of blood or marriage, that he will stand seized of the same, to the use of his child, wife, or kinsman, for life, in tail or in fee. 2 Bouv. Inst. n. 2080.

STANDARD, in war. An ensign or flag used in war.

STANDARD, measure. A weight or measure of certain dimensions, to which all other weights and measures must correspond; as, a standard bushel. Also the quality of certain metals, to which all others of the same kind ought to be made to conform; as, standard gold, standard silver. Vide *Dollar*; *Eagle*; *Money*.

STAPLE, intern. law. The right of staple, as exercised by a people upon foreign merchants, is defined to be, that they may not allow them to set their merchandises and wares to sale but in a certain place.

2. This practice is not in use in the United States. 1 Chit. Com. Law, 103; 4 Inst. 238; Malone, Lex Merc. 237; Bac. Ab. Execution, B 1. Vide *Statute Staple*.

STAR CHAMBER, *Eng. law*. A court which formerly had great jurisdiction and power, but which was abolished by stat. 16 C. 1., c. 10, on account of its usurpations and great unpopularity. It consisted of several of the lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of a jury. Their legal jurisdiction extended over riots, perjuries, misbehaviour of public officers, and other great misdemeanors. The judges afterwards assumed powers, and stretched those they possessed to the utmost bounds of legality. 4 Bl. Com. 264.

STARE DECISIS. To abide or adhere to decided cases.

2. It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of *stare decisis* is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary to principle. Many hundreds of such overruled cases may be found in the American and English books of reports. Mr. Greenleaf has made a collection of such cases, to which the reader is referred. Vide 1 Kent, Com. 477; Livingst. Syst. of Pen. Law, 104, 5.

STARE IN JUDICIO. The act of appearing before a tribunal, either as plaintiff or defendant. Vide *Ester en jugement*.

STATE, *government*. This word is used in various senses. In its most enlarged sense, it signifies a self-sufficient body of persons united together in one community for the defence of their rights, and to do right and justice to foreigners. In this sense, the state means the whole people united into one *body politic*; (q. v.) and the state, and the people of the state, are equivalent expressions. 1 Pet. Cond. Rep. 37 to 39; 3 Dall. 93; 2 Dall. 425; 2 Wilson's Lect. 120; Dane's Appx. § 50, p. 63; 1 Story, Const. § 361. In a more limited sense, the word state expresses merely the positive or actual organisation of the legislative, or judicial powers; thus the actual government of the state is designated by the name of the state; hence the expression, the state has passed such a law, or prohibited such an act. State also means the section

of territory occupied by a state, as the state of Pennsylvania.

2. By the word state is also meant, more particularly, one of the commonwealths which form the United States of America. The constitution of the United States makes the following provisions in relation to the states.

3.—Art. 1, s. 9, § 5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

4.—§ 6. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

5.—§ 7. No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

6.—Art. 1, s. 10, § 1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex-post-facto, or law impairing the obligation of contracts; or grant any title of nobility.

7.—§ 2. No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of congress. No state shall, without the consent of congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

8. The district of Columbia and the territorial districts of the United States, are not states within the meaning of the consti-

tution and of the judiciary act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts. 2 Cranch, 445; 1 Wheat. 91.

9. The several states composing the United States are sovereign and independent, in all things not surrendered to the national government by the constitution, and are considered, on general principles, by each other as foreign states, yet their mutual relations are rather those of domestic independence, than of foreign alienation. 7 Cranch, 481; 3 Wheat. 324; 1 Greenl. Ev. §§ 489, 504.

Vide, generally, Mr. Madison's report in the legislature of Virginia, January, 1800; 1 Story's Com. on Const. § 208; 1 Kent, Com. 189, note b; Grotius, B. 1, c. 1, s. 14; Id. B. 3, c. 3, s. 2; Burlamaqui, vol. 2, pt. 1, c. 4, s. 9; Vattel, B. 1, c. 1; 1 Toull. n. 202, note 1; *Nation*; Cicero, de Repub. l. 1, s. 25.

STATE, condition of persons. This word has various acceptations. If we inquire into its origin, it will be found to come from the Latin *status*, which is derived from the verb *stare*, *sto*, whence has been made *statio*, which signifies the place where a person is located, *stat*, to fulfil the obligations which are imposed upon him.

2. State is that quality which belongs to a person in society, and which secures to, and imposes upon him different rights and duties in consequence of the difference of that quality.

3. Although all men come from the hands of nature upon an equality, yet there are among them marked differences. It is from nature that come the distinctions of the sexes, fathers and children, of age and youth, &c.

4. The civil or municipal laws of each people, have added to these natural qualities, distinctions which are purely civil and arbitrary, founded on the manners of the people, or in the will of the legislature. Such are the differences, which these laws have established between citizens and aliens, between magistrates and subjects, and between freemen and slaves; and those which exist in some countries between nobles and plebeians, which differences are either unknown or contrary to natural law.

5. Although these latter distinctions are more particularly subject to the civil or municipal law, because to it they owe their origin, it nevertheless extends its authority over the natural qualities, not to destroy or

to weaken them, but to confirm them and to render them more inviolable by positive rules and by certain maxims. This union of the civil or municipal and natural law, form among men a third species of differences which may be called mixed, because they participate of both, and derive their principles from nature and the perfection of the law; for example, infancy or the privileges which belong to it, have their foundation in natural law; but the age and the term of these prerogatives are determined by the civil or municipal law.

6. Three sorts of different qualities which form the state or condition of men may then be distinguished: those which are purely natural, those purely civil, and those which are composed of the natural and civil or municipal law.

Vide 3 Bl. Com. 396; 1 Toull. n. 170, 171; *Civil State*.

TO STATE. To make known specifically; to explain particularly; as, to state an account, or to show the different items of an account; to state the cause of action in a declaration.

STATEMENT, pleading and in practice. In the courts of Pennsylvania, by the act to regulate arbitrations and proceedings in courts of justice, passed March 21, 1806, 4 Smith's Laws of Penn. 328, it is enacted, "that in all cases where a suit may be brought in any court of record for the recovery of any debt founded on a verbal promise, book account, note, bond, penal or single bill, or all or any of them, and which from the amount thereof may not be cognizable before a justice of the peace, it shall be the duty of the plaintiff, either by himself, his agent or attorney, to file in the office of the prothonotary a statement of his, her or their demand, on or before the third day of the term to which the process issued is returnable, particularly specifying the date of the promise, book account, note, bond, penal or single bill or all or any of them, on which the demand is founded, and the whole amount which he, she, or they believe is justly due to him, her or them from the defendant."

2. This statement stands in the place of a declaration, and is not restricted to any particular form; 3 Serg. & Rawle, 405; it is an immethodical declaration, stating in substance the time of the contract, the sum, and on what founded, with (what is an important principle in a statement, 6 Serg. & Rawle, 21,) a certificate of the belief of the

plaintiff or his agent, of what is really due. 6 Serg. & Rawle, 28. See 6 Serg. & Rawle, 53; 8 Serg. & Rawle, 567; 2 Serg. & Rawle, 537; 2 Browne's R. 40; 8 Serg. & R. 316.

STATES. By this name are understood in some countries, the assembly of the different orders of the people to regulate the affairs of the commonwealth, as, the states-general.

STATION, civil law. A place where ships may ride in safety. Dig. 49, 12, 1, 13; Id. 50, 15, 59.

STATING-PART OF A BILL, chancery practice. That part of a bill which contains a narrative of the facts and circumstances of the plaintiff's case, and the wrong or grievance of which he complains, and the names of the persons by whom done, and against whom he seeks redress, is called the *stating-part of the bill*. Bart. Suit in Eq. 27; Coop. Eq. Pl. 9; Story, Eq. Pl. § 27.

STATU LIBERI, in Louisiana. Slaves for a time, who have acquired the right of being free at a time to come, or on a condition which is not fulfilled, or in a certain event which has not happened, but who, in the mean time, remain in a state of slavery. Code, art. 37. See 8 M. R. 219; 3 L. R. 176; 6 L. R. 571; 4 N. S. 102; 7 N. S. 351. This is substantially the definition of the civil law. Hist. de la Jur. 1. 40; Dig. 40, 7, 1; Code, 7, 2, 13.

STATUS. The condition of persons. It also means estate, because it signifies the condition or circumstances in which the owner stands with regard to his property. 2 Bouv. Inst. n. 1689.

STATUTE. The written will of the legislature, solemnly expressed according to the forms prescribed in the constitution; an act of the legislature.

2. This word is used in contradistinction to the common law. Statutes acquire their force from the time of their passage unless otherwise provided. 7 Wheat. R. 104; 1 Gall. R. 62.

3. It is a general rule that when the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law; Co. Litt. 235; 2 Inst. 222; Bac. Ab. h. t. B; and when a power is given by statute, everything necessary for making it effectual is given by implication: *quando lex aliquid concedit, concedere videtur et id per quod devenitur ad aliud*. 12 Co. 130, 131; 2 Inst. 306.

4. Statutes are of several kinds; namely, *Public or private*. 1. Public statutes are those of which the judges will take notice without pleading; as, those which concern all officers in general; acts concerning trade in general or any specific trade; acts concerning all persons generally. 2. Private acts, are those of which the judges will not take notice without pleading; such as concern only a particular species, or person; as, acts relating to any particular place, or to several particular places, or to one or several particular counties. Private statutes may be rendered public by being so declared by the legislature. Bac. Ab. h. t. F; 1 Bl. Com. 85.

5. *Declaratory or remedial*. 1. A declaratory statute is one which is passed in order to put an end to a doubt as to what the common law is, and which declares what it is, and has ever been. 2. Remedial statutes are those which are made to supply such defects, and abridge such superfluities in the common law as may have been discovered. 1 Bl. Com. 86. These remedial statutes are themselves divided into *enlarging* statutes, by which the common law is made more comprehensive and extended than it was before; and into *restraining* statutes, by which it is narrowed down to that which is just and proper. The term *remedial statute* is also applied to those acts which give the party injured a remedy, and in some respects those statutes are penal. Esp. Pen. Act. 1.

6. *Temporary or perpetual*. 1. A temporary statute is one which is limited in its duration at the time of its enactment. It continues in force until the time of its limitation has expired, unless sooner repealed. 2. A perpetual statute is one for the continuance of which there is no limited time, although it be not expressly declared to be so. If, however, a statute which did not itself contain any limitation, is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter. Bac. Ab. h. t. D.

7. *Affirmative or negative*. 1. An affirmative statute is one which is enacted in affirmative terms; such a statute does not take away the common law. If, for example, a statute without negative words, declares that when certain requisites shall have been complied with, deeds shall have in evidence a certain effect, this does not prevent their being used in evidence, though the requisites have not been complied with,

in the same manner as they might have been before the statute was passed. 2 Cain. R. 169. 2. A negative statute is one expressed in negative terms, and so controls the common law, that it has no force in opposition to the statute. Bro. Parl. pl. 72; Bac. Ab. h. t. G.

8. *Penal* statutes are those which order or prohibit a thing under a certain penalty. Esp. Pen. Actions, 5; Bac. Ab. h. t. I, 9.

Vide, generally, Bac. Ab. h. t.; Com. Dig. Parliament; Vin. Ab. h. t.; Dane's Ab. Index, h. t.; Chit. Pr. Index, h. t.; 1 Kent, Com. 447-459; Barrington on the Statutes; Boscow. on Pen. Stat.; Esp. on Penal Actions and Statutes.

9. Among the civilians, the term statute is generally applied to all sorts of laws and regulations; every provision of law which ordains, permits, or prohibits anything is a statute; without considering from what source it arises. Sometimes the word is used in contradistinction to the imperial Roman law, which, by way of eminence, civilians call the common law. They divide statutes into three classes, personal, real and mixed.

10. *Personal* statutes are those which have principally for their object the person, and treat of property only incidentally; such are those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract, to make a will, to plead in person, and the like. A personal statute is universal in its operation, and in force everywhere.

11. *Real* statutes are those which have principally for their object, property, and which do not speak of persons, except in relation to property; such are those which concern the disposition, which one may make of his property either alive or by testament. A real statute, unlike a personal one, is confined in its operation to the country of its origin.

12. *Mixed* statutes, are those which concern at once both persons and property. But in this sense almost all statutes are mixed, there being scarcely any law relative to persons, which does not at the same time relate to things.

Vide Merl. Répert. mot Statut; Poth. Cout. d'Orléans, ch. 1; 17 Martin's Rep. 569-589; Story's Conf. of Laws, § 12, et seq.; Bouv. Inst. Index, h. t.

STATUTE MERCHANT, English law. A security entered before the mayor of London, or some chief warden of a city, in pur-

suance of 13 Ed. I. stat. 3, c. 1, whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them, his debt may be satisfied. Cruise, Dig. t. 14, s. 7; 2 Bl. Com. 160.

STATUTES STAPLE, English law. The statute of the staple, 27 Ed. III. stat. 2, confined the sale of all commodities to be exported to certain towns in England, called *estaple* or *staple*, where foreigners might resort. It authorized a security for money, commonly called statute staple, to be taken by traders for the benefit of commerce; the mayor of the place is entitled to take a recognizance of a debt, in proper form, which has the effect to convey the lands of the debtor to the creditor, till out of the rents and profits of them he may be satisfied. 2 Bl. Com. 160; Cruise, Dig. tit. 14, s. 10; 2 Rolle's Ab. 446; Bac. Ab. Execution, B. 1; 4 Inst. 238.

STATUTI, Rom. civ. law. From Constantine to Justinian, advocates, were arranged in two classes: viz. those called *Statuti*, and the supernumeraries. (q. v.) The *Statuti* were those advocates whose names were inscribed in the registers of matriculation, and formed a part of the college of advocates. The number of advocates of this class, was limited. See Calvini Lex *ad vocem*.

STAY OF EXECUTION, practice. A term during which no execution can issue on a judgment.

2. It is either conventional, when the parties agree that no execution shall issue for a certain period; or it is granted by law, usually on condition of entering bail or security for the money.

3. An execution issued before the expiration of the stay is irregular and will be set aside; and the plaintiff in such case may be liable to an action for damages. What is said above refers to civil cases.

4. In criminal cases when a woman is capitally convicted, and she is proved to be *enceinte*, (q. v.) there shall be a stay of execution till after her delivery. Vide *Pregnancy*.

STAYING PROCEEDINGS. The suspension of an action.

2. Proceedings are stayed absolutely or conditionally.

3.—1. They are peremptorily stayed when the plaintiff is wholly incapacitated from suing; as, for example, when the plaintiff is not the holder, nor beneficially interested in a bill on which he has brought his ac-

tion; 2 Cr. & M. 416; 2 Dowl. 386; Chitty on Bills, 385; 3 Chitty, Pr. 628; or when the plaintiff admits in writing, that he has no cause of action; 3 Chit. Prac. 370, 680; or when an action is brought contrary to good faith. Tidd's Prac. 515, 529, 1134; 3 Chit. Pr. 633.

4.—2. Proceedings are sometimes stayed until some order of the court shall have been complied with; as, when the plaintiff resides in a foreign country, or in another state, or is insolvent, and he has been ruled to give security for costs, the proceedings are stayed until such security shall be given; see *Security for Costs*; 3 Chit. Pr. 633, 635; or until the payment of costs in a former action. 1 Chit. R. 195; 18 E. C. L. R. 64.

STEALING. This term imports, *ex vi termini*, nearly the same as larceny; but in common parlance, it does not always import a felony; as, for example, you stole an acre of my land.

2. In slander cases, it seems that the term stealing takes its complexion from the subject-matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject-matter. Stark. on Slan. 80; 12 Johns. Rep. 239; 3 Binn. R. 546; Whart. Dig. tit. Slander.

STELLIONATE, *civil law*. A name given generally, to all species of frauds committed in making contracts.

3. This word is said to be derived from the Latin *stellio*, a kind of lizard remarkable for its cunning and the change of its color, because those guilty of frauds used every art and cunning to conceal them. But more particularly it was the crime of a person who fraudulently assigned, sold, or engaged the thing which he had before assigned, sold, or engaged to another, unknown to the person with whom he was dealing. Dig. 47, 20, 3; Code, 9, 34, 1; Merl. Répert. h. t.; Code Civil, art. 2069; 1 Bro. Civ. Law, 426.

3. In South Carolina and Georgia, a mortgagor who makes a second mortgage without disclosing in writing, to the second mortgagee, the existence of the first mortgage, is not allowed to redeem; and, in the former state, when a person suffers a judgment, or enters into a statute or recognition binding his land, and afterwards mortgages it, without giving notice, in writing, of the prior incumbrance, he shall not be allowed to redeem, unless, within six months from a written demand, he discharges

such incumbrance. Prin. Dig. 161; 1 Brev. Dig. 166—8.

4. In Ohio a fraudulent conveyance is punished as a crime; Walk. Intr. 350; and, in Indiana, any party to a fraudulent conveyance is subjected to a fine and to double damages. Ind. Rev. Laws, 189. See 12 Pet. 773.

STEP-DAUGHTER. In Latin *pri-vigna*, is the daughter of one's wife, or of one's husband.

STEP-FATHER. In Latin *vitricus*, is the husband of one's mother, who is not the father of the person spoken of.

STEP-MOTHER. In Latin *noverca*, is the wife of one's father, who is not the mother of the person spoken of.

STEP-SON. In Latin *privignus*, is the son of one's wife, or of one's husband.

STERE. A French measure of solidity, used in measuring wood. It is a cubic mètre. Vide *Measure*.

STERILITY. Barrenness; incapacity to produce a child. It is curable and incurable; when of the latter kind, at the time of the marriage, and arising from impotency, it is a good cause for dissolving a marriage. 1 Foderé, Méd. Lég. § 254. See *Impotency*.

STERLING. Current money of Great Britain, but anciently a small coin, worth about one penny; and so called, as some suppose, because it was stamped with the figure of a small star, or, as others suppose, because it was first stamped in England in the reign of King John, by merchants from Germany called Esterlings. *Pounds sterling* originally signified so many pounds in weight of these coins. Thus we find in Matthew Paris, A. D. 1242, the expression "Accepit a rege pro stipendio tredecim libras esterlingorum." The secondary or derived sense is a certain value in current money, whether in coins or other currency. Lowndes, 14. Watts' Gloss. *Ad verbum*.

STET PROCESSUS, *practice*. An order made, upon proper cause shown, that the *process remain stationary*. As where a defendant having become insolvent, would, by moving judgment in the case of nonsuit, compel a plaintiff to proceed, the court will, on an affidavit of the fact of insolvency, award a *stet processus*. See 7 Taunt. Rep. 180, 1 Chit. Rep. 738; 10 Wentw. Pl. 43.

STEVEDORE. A person employed in loading and unloading vessels. Dunl. Adm. Pr. 98. Vide *Arrameurs*; *Sacquiers*.

STEWARD OF ALL ENGLAND. Se-

neschallus totius Angliæ. An officer among the English who was invested with various powers, and, among others, it was his duty to preside on the trial of peers.

STEWES, Eng. law. Places formerly permitted, in England, to women of professed lewdness, and who, for hire, would prostitute their bodies to all comers.

2. These places were so called because the dissolute persons who visited them prepared themselves by bathing; the word stews being derived from the old French *estuves*, stove, or hot bath. 3 Inst. 205.

STILLICIDIUM, civ. law. The rain water that falls from the roof or eaves of a house by scattered drops. When it is gathered into a spout it is called *flumen*.

2. Without the constitution of one or other of these servitudes, no proprietor can build so as to throw the rain that falls from his house directly on his neighbor's grounds; for it is a restriction upon all property, *nemo protest immitere in alienum*; and he who in building breaks through that restraint, truly builds on another man's property; because to whomsoever the area belongs, to him also belongs whatever is above it: *cujus est solum, ejus est usque ad cælum*. 3 Burge on the Confl. of Laws, 405. Vide *Servitus Stillicidii*. Inst. 3, 2, 1; Dig. 8, 2, 2.

STINT, Eng. law. The proportionable part of a man's cattle, which he may keep upon the common.

2. To use a thing without stint, is to use it without limit.

STIPULATED DAMAGES, contracts. The sum agreed by the parties to be paid, on a breach of a contract, by the party violating his engagement to the other.

2. It is difficult to distinguish, in some cases, between stipulated damages and a penalty; (q. v.) 3 Chitty's Commer. Law, 627; 2 Bos. & Pull. 346. The effect of inserting stipulated damages, either at law or equity, appears to be, that both parties must abide by the stipulation, and the prescribed sum must be given. Holt, C. N. P. 46; Newl. Contr. 313; see 5 Taunt. Rep. 247. Vide *Damages, Liquidated*.

STIPULATION, contracts. In the Roman law, the contract of stipulation was made in the following manner, namely; the person to whom the promise was to be made, proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete.

2. It was essentially necessary that both parties should speak, (so that a dumb man could not enter into a stipulation,) that the person making the promise should answer conformably to the specific question proposed, without any material interval of time, and with the intention of contracting an obligation.

3. From the general use of this mode of contracting, the term stipulation has been introduced into common parlance, and, in modern language, frequently refers to any thing which forms a material article of an agreement; though it is applied more correctly and more conformably to its original meaning to denote the insisting upon and requiring any particular engagement. 2 Evans' Poth. on Oblig. 19.

4. In this contract the Roman law dispensed with an actual consideration. See, generally, Pothier, Oblig. P. 1, c. 1, s. 1, art. 5.

5. In the admiralty courts, the first process is frequently to arrest the defendant, and then they take the recognizances or stipulation of certain fide jussors in the nature of bail. 3 Bl. Comm. 108; vide Dunlap's Adm. Practice, Index, h. t.

6. These stipulations are of three sorts, namely: 1. *Judicatum solvi*, by which the party is absolutely bound to pay such sum as may be adjudged by the court. 2 *De judicio sisti*, by which he is bound to appear from time to time, during the pendency of the suit, and to abide the sentence. 3. *De ratio*, or *De rato*, by which he engages to ratify the acts of his proctor: this stipulation is not usual in the admiralty courts of the United States.

7. The securities are taken in the following manner, namely: 1. *Cautio fide jussoria*, by sureties. 2. *Pignoratitia*, by deposit. 3. *Juratoria*, by oath: this security is given when the party is too poor to find sureties, at the discretion of the court. 4. *Nude promissoria*, by bare promise: this security is unknown in the admiralty courts of the United States. Hall's Adm. Pr. 12; Dunl. Adm. Pr. 150, 151. See 17 Am. Jur. 51.

STIRPES, descents. The root, stem, or stock of a tree. Figuratively, it signifies, in law, that person from whom a family is descended, and also the kindred or family.

2. It is chiefly used in estimating the several interests of the different kindred, in the distribution of an intestate's estate. 2 Bl. Com. 517; and vide *Descent; Line*.

STOCK, mer. law. The capital of a merchant, tradesman, or other person, including his merchandise, money and credits. In a narrower sense it signifies only the goods and wares he has for sale and traffic. The capital of corporations is also called stock; this is usually divided into shares of a definite value, as one hundred dollars, fifty dollars per share.

2. The stock held by individuals in corporations is generally considered as personal property. 4 Dane's Ab. 670; Sull. on Land. Titl. 71; Walk. Intro. 211; 1 Hill, Ab. 18.

STOCK, descents. This is a metaphorical expression which designates, in the genealogy of a family, the person from whom others are descended: those persons who have so descended are called branches. Vide 1 Roper on Leg. 103; 2 Suppl. to Ves. 307; and *Branch; Descent; Line; Stirpes*.

STOCKS, crim. law. A machine commonly made of wood, with holes in it, in which to confine persons accused of or guilty of a crime.

2. It was used either to confine unruly offenders by way of security, or convicted criminals for punishment.

3. This barbarous punishment has been generally abandoned in the United States.

STOPPAGE IN TRANSITU, contracts. This is the name of that act of a vendor of goods, upon a credit, who, on learning that the buyer has failed, resumes the possession of the goods, while they are in the hands of a carrier or middle-man, in their transit to the buyer, and before they get into his actual possession.

2. The subject will be considered with reference to, 1. The person who has a right to stop goods in transitu. 2. The property which may be stopped. 3. The time when to be stopped. 4. The manner of stopping. 5. The failure of the buyer. 6. The effect of stopping.

3.—1. The right of stopping property in transitu is confined to cases in which the consignor is substantially the seller; and does not extend to a mere surety for the price, nor to any person who does not rest his claim on a proprietor's right. 6 East, R. 371; 4 Burr. 2047; 3 T. R. 119, 783; 1 Bell's Com. 224.

4.—2. The property stopped must be personal property actually sold or bartered, on a credit. 2 Dall. 180; 1 Yeates, 177.

5.—3. It must be stopped *during the*

transit, and while something remains to be done to complete the delivery; for the actual or symbolical delivery of the goods to the buyer puts an end to the right of the seller to stop the goods in transitu; 3 T. R. 464; 8 T. R. 199; but it has been decided that if, before delivery, the seller annex a condition that security shall be given before taking possession; or that the price shall be paid in ready money; or that a bill shall be delivered; the property will not pass by the mere act of the buyer's attaining the possession. 3 Esp. Rep. 58. When the seller has given the buyer documents sufficient to transfer the property, and the buyer, upon the strength of such documents, has sold the goods to a *bona fide* purchaser without notice, the seller is divested of his rights; 2 W. C. C. R. 283; but a resale by the buyer does not, of itself, and without other circumstances, destroy the vendor's right of stoppage in transitu. 6 Taunt. R. 433. Vide *Delivery*; and 1 Rawle's R. 9; 1 Ashm. R. 103; Harr. Dig. Sale, III. 4; 7 Taunt. R. 59; 2 Marsh. R. 366; Holt's R. 248; 1 Moore's R. 526; 3 B. & P. 320; Id. 119; 5 East, R. 175.

6.—4. The manner of stopping the goods, is usually by taking corporal possession of them; but this is not the only way it may be done; the seller may put in his claim or demand of his right to the goods either verbally or in writing. 2 B. & P. 257, 462; 2 Esp. R. 613; Co. Bankr. Law, 494; Holt's Cases, N. B. 338. Vide *Corporal Touch*.

7.—5. The buyer must have actually failed, or be in actual and immediate danger of insolvency.

8.—6. The stopping of goods *in transitu* does not of itself rescind the contract. 1 Atk. 245; Co. B. L. 394; 6 East, R. 27, n. The seller may, therefore, upon offering to deliver them, recover the price. 1 Campb. 109; 6 Taunt. 162. But inasmuch as the seller is permitted in equity to annul the transfer he has made, by stopping the goods on their transit, and by that means to deprive the general creditors of the buyer of property, which, in strict law, has passed to their debtor, it has been considered as equitable, on the other hand, that this act should be accompanied by a rescinding of the whole contract, and a renunciation of any further claim; since it would be a great hardship to give a preference to the seller over the other creditors, and subject the divisible funds, which have derived no bene-

fit from the contract, to a further claim of indemnification. 1 Bell's Com. B. 2, pt. 3, c. 2, s. 2, § 5.

Vide, generally, 2 Kent, Com. 427; Bac. Abr. Merchant, L; Ross on Vend. Index, h. t.; 2 Selw. N. P. 1206; Whitaker on Stoppage in Transitu; Abbott on Ship. 351; 3 Chit. Com. Law, 340; Chit. on Contr. 124-126; 2 Com. Dig. 268; 8 Com. Dig. 952; 2 Supp. to Ves. jr. 231, 481; 2 Leigh's N. P. 1472; 1 Bouv. Inst. n. 959-65.

STORES. The victuals and provisions collected together for the subsistence of a ship's company, of a camp, and the like.

STOUTHRIEFF, Scotch law. Formerly this word included in its signification every species of theft, accompanied with violence to the person; but of late years it has become the *vox signata* for forcible and masterful depredation within or near the dwelling house; while robbery has been more particularly applied to violent depredation on the highway, or accompanied by house-breaking. Alison, Princ. Cr. Law of Scotl. 227.

STOWAGE, mar. law. The proper arrangement in a ship, of the different articles of which a cargo consists, so that they may not injure each other by friction, or be damaged by the leakage of the ship.

2. The master of the ship is bound to attend to the stowage, unless, by custom or agreement, this business is to be performed by persons employed by the merchant. Abbott on Shipp. 228; Pardes. Dr. Com. n. 721.

STRANDING, maritime law. The running of a ship or other vessel on shore; it is either accidental or voluntary.

2. It is accidental where the ship is driven on shore by the winds and waves; it is voluntary where she is run on shore, either to preserve her from a worse fate, or for some fraudulent purpose. Marsh. Ins. B. 1, c. 12, s. 1.

3. It is of great consequence to define accurately what shall be deemed a stranding, but this is no easy matter. In one case a ship having run on some wooden piles, four feet under water, erected in Wisbeach river, about nine yards from shore, which were placed there to keep up the banks of the river, and having remained on these piles until they were cut away, was considered by Lord Kenyon to have been stranded. Marsh. Ins. B. 7, s. 3. In another case, a ship arrived in the river Thames, and, upon coming up to the Pool, which was

full of vessels, one brig ran foul of her bow, and another of her stern, in consequence of which she was driven aground, and continued in that situation an hour, during which period several other vessels ran foul of her; this, Lord Kenyon told the jury, that unskilled as he was in nautical affairs, he thought he could safely pronounce to be no stranding. Ib.; 1 Camp. 131; 3 Camp. 431; 4 M. & S. 503; 7 B. & C. 224; 5 B. & A. 225; 4 B. & C. 736. See *Perils of the Sea*.

STRANGER, persons, contracts. This word has several significations. 1. A person born out of the United States; but in this sense the term alien is more properly applied, until he becomes naturalized. 2. A person who is not privy to an act or contract; example, he who is a *stranger* to the issue, shall not take advantage of the verdict. Bro. Ab. Record, pl. 3; Vin. Ab. h. t. pl. 1; and vide Com. Dig. Abatement, H 54.

2. When a man undertakes to do a thing, and a stranger interrupts him, this is no excuse. Com. Dig. Condition, L 14. When a party undertakes that a stranger shall do a certain thing, he becomes liable as soon as the stranger refuses to perform it. Bac. Ab. Conditions, Q 4.

STRATAGEM. A deception either by words or actions, in times of war, in order to obtain an advantage over an enemy.

2. Such stratagems, though contrary to morality, have been justified, unless they have been accompanied by perfidy, injurious to the rights of humanity, as in the example given by Vattel of an English frigate, which during a war between France and England, appeared off Calais and made signals of distress in order to allure some vessel to come to its relief, and seized a shallop and its crew, who had generously gone out to render it assistance. Vattel, Droit des Gens, liv. 3, c. 9, § 178.

3. Sometimes stratagems are employed in making contracts, this is unlawful and fraudulent, and avoids the contract. See *Fraud*.

STRATOCRACY. A military government; government by military chiefs of an army.

STREAM. A current of water. The right to a water course is not a right in the fluid itself so much as a right in the current of the stream. 2 Bouv. Inst. n. 1612. See *River; Water Course*.

STREET. A road in a village or city

In common parlance the word street is equivalent to highway. 4 Serg. & Rawle, 108.

2. A permission to the public for the space of eight, or even of six years, to use a street without bar or impediment, is evidence from which a dedication to the public may be inferred. 11 East, R. 376; See 2 N. Hamp. 513; 4 B. & A. 447; 3 East, R. 204; 1 Law Intell. 134; 2 Smith's Lead. Cas. 94, n.; 2 Pick. R. 162; 2 Verm. R. 480; 5 Taunt. R. 125; S. C. 1 E. C. L. R. 34; 4 Camp. R. 169; 1 Camp. R. 260; 7 B. & C. 257; S. C. 14 E. C. L. R. 39; 5 B & Ald. 454; S. C. 7 E. C. L. R. 159; 1 Blackf. 44; 2 Wend. 472; 8 Wend. 85; 11 Wend. 486; 6 Pet. 431; 1 Paige, 510; and the article *Dedication*.

STRICT SETTLEMENT. When lands are settled to the parent for life, and after his death to his first and other sons in tail, and trustees are interposed to preserve the contingent remainders, this is called a strict settlement.

STRICTISSIMI JURIS. The most strict right or law. In general, when a person receives an advantage, as the grant of a license, he is bound to conform strictly to the exercise of the rights given him by it, and in case of a dispute, it will be strictly construed. See 8 Story, Rep. 159.

STRICTUM JUS. This phrase is used to denote mere law, in contradistinction to equity.

STRUCK, pleadings. In an indictment for murder, when the death arises from any wounding, beating or bruising, it is said, that the word "struck" is essential. 1 Bulstr. 184; 5 Co. 122; 3 Mod. 202; Cro. Jac. 655; Palm. 282; 2 Hale, 184, 6, 7; Hawk. B. 2, c. 23, s. 82; 1 Chit. Cr. Law, *243; 6 Binn. R. 179.

STRUCK JURY. A special jury selected by striking from the pannel of jurors, a certain number by each party, so as to leave a number required by law to try the cause. In general, a list of forty-eight jurors is made out for each case; the plaintiff strikes off twelve, and the defendant the same number; from those who remain twelve are to be selected to try the cause, unless they are challenged for cause. See *Challenge*.

STRUCK OFF. A case is said to be struck off, where the court has no jurisdiction, and can give no judgment, and order that the case be taken off the record, which is done by an entry to that effect.

STRUMPET. A harlot, or courtesan:

this word was formerly used as an addition. Jacob's Law Dict. h. t.

TO STULTIFY. To make or declare insane. It is a general rule in the English law, that a man shall not be permitted to stultify himself; that is, he shall not be allowed to plead his insanity to avoid a contract. 2 Bl. Com. 291; Fonbl. Eq. b. 1, c. 2, § 1; Pow. on Contr. 19.

2. In the United States, this rule seems to have been exploded, and the party may himself avoid his acts except those of record, and contracts for necessities and services rendered, by allegation and proof of insanity. 5 Whart. R. 371, 379; 2 Kent, Com. 451; 3 Day, R. 90; 3 Conn. R. 203; 5 Pick. R. 431; 5 John R. 503; 1 Bland. R. 376. Vide Fonbl. Eq. b. 1, c. 2, § 1, note 1; 2 Str. R. 1104; 3 Camp. R. 125; 7 Dowl. & Ryl. 614; 3 C. & P. 80; 1 Hagg. C. R. 414.

STUPIDITY, med. jur. That state of the mind which cannot perceive and embrace the data presented to it by the senses; and therefore the stupid person can, in general, form no correct judgment. It is a want of the perceptive powers. Ray, Med. Jur. c. 3, § 40. Vide *Imbecility*.

STUPRUM, civ. law. The criminal sexual intercourse which took place between a man and a single woman, maid or widow, who before lived honestly. Inst. 4, 18, 4; Dig. 48, 5, 6; Id. 50, 16, 101; 1 Bouv. Inst. Theolo. ps. 3, quæst. 2, art. 2, p. 252.

SUB-AGENT. A person appointed by an agent to perform some duty, or the whole of the business relating to his agency.

2. Sub-agents may be considered in two points of view. 1. With regard to their rights and duties or obligations, towards their immediate employers. 2. As to their rights and obligations towards their superior or real principals.

3.—1. A sub-agent is generally invested with the same rights, and incurs the same liabilities in regard to his immediate employers, as if he were the sole and real principal. To this general rule there are some exceptions; for example, where by the general usage of trade or the agreement of the parties, sub-agents are ordinarily or necessarily employed, to accomplish the ends of the agency, there, if the agency is avowed, and the credit is exclusively given to the principal, the intermediate agent may be entirely exempted from all liability to the sub-agent. The agent, however, will be liable to the sub-agent, unless such exclusive credit has

been given, although the real principal or superior may also be liable. Story on Ag. § 386; Paley on Ag. by Lloyd, 49. When the agent employs a sub-agent to do the whole, or any part of the business of the agency, without the knowledge or consent of his principal, either express or implied, the latter will only be entitled to recover from his immediate employer, and his sole responsibility is also to him. In this case the superior or real principal is not responsible to the sub-agent, because there is no privity between them. Story on Ag. § 18, 14, 15, 217, 387.

4.—2. Where by an express or implied agreement of the parties, or by the usages of trade, a sub-agent is to be employed, a privity exists between the principal and the sub-agent, and the latter may justly maintain his claim for compensation, both against the principal and his immediate employer, unless exclusive credit is given to one of them; and, in that case, his remedy is limited to that party. 1 Liv. on Ag. 64; 6 Taunt. R. 147.

SUBALTERN. A kind of officer who exercises his authority under the superintendence and control of a superior.

TO SUBDIVIDE. To divide a part of a thing which has already been divided. For example, when a person dies leaving children, and grandchildren, the children of one of his own who is dead, his property is divided into as many shares as he had children, including the deceased, and the share of the deceased is subdivided into as many shares as he had children.

SUBINFEUDATION, *estates, English law.* The act of an inferior lord by which he carved out a part of an estate which he held of a superior, and granted it to an inferior tenant to be held of himself.

2. It was an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation: this was forbidden by the statute of Quia Emptores, 18 Ed. I., 2 Bl. Com. 91; 3 Kent, Com. 406.

SUBJECT, contracts. The thing which is the object of an agreement. This term is used in the laws of Scotland.

SUBJECT, persons, government. An individual member of a nation, who is subject to the laws; this term is used in contradistinction to *citizen*, which is applied to the same individual when considering his political rights.

2. In monarchical governments, by sub-

ject is meant one who owes permanent allegiance to the monarch. Vide *Body politic*; Greenl. Ev. § 286; Phil. & Am. on Ev. 732, n. 1.

SUBJECT-MATTER. The cause, the object, the thing in dispute.

2. It is a fatal objection to the jurisdiction of the court when it has not cognizance of the subject-matter of the action; as, if a cause exclusively of admiralty jurisdiction were brought in a court of common law, or a criminal proceeding in a court having jurisdiction of civil cases only. 10 Co. 68, 76; 1 Ventr. 133; 8 Mass. 87; 12 Mass. 367. In such case, neither a plea to the jurisdiction, nor any other plea would be required to oust the court of jurisdiction. The cause might be dismissed upon motion, by the court, *ex officio*.

SUBJECTION. The obligation of one or more persons to act at the discretion, or according to the judgment and will of others.

2. Subjection is either private or public. By the former is meant the subjection to the authority of private persons; as, of children to their parents, of apprentices to their masters, and the like. By the latter is understood the subjection to the authority of public persons. Rutherf. Inst. B. 2, c. 8.

SUBLEASE. A lease by a tenant to another tenant of a part of the premises held by him; an underlease.

SUBMISSION. A yielding to authority. A citizen is bound to submit to the laws; a child to his parents; a servant to his master. A victor may enforce the submission of his enemy.

2. When a captor has taken a prize, and the vanquished have submitted to his authority, the property, as between the belligerents, has been transferred. When there is complete possession on one side, and submission upon the other, the capture is complete. 1 Gallis. R. 532.

SUBMISSION, contracts. An agreement by which persons who have a law-suit or difference with one another, name arbitrators to decide the matter, and bind themselves reciprocally to perform what shall be arbitrated.

2. The submission may be by the act of the parties simply, or through the medium of a court of law or equity. When it is made by the parties alone it may be in writing or not in writing. Kyd on Aw. 11; Cald. on Arb. 16; 6 Watts' R. 357.

When it is made through the medium of a court, it is made a matter of record by rule of court. The extent of the submission may be various, according to the pleasure of the parties; it may be of only one, or of all civil matters in dispute, but no criminal matter can be referred. It is usual to put in a time within which the arbitrators shall pronounce their award. *Caldw. on Arb.* ch. 3; *Kyd on Awards*, ch. 1; *Civ. Code of Lo.* tit. 19; 3 *Vin. Ab.* 131; 1 *Supp. to Ves. jr.* 174; 6 *Toull. n.* 827; 8 *Toull. n.* 332; *Merl. Répert. mot Compromis*; 1 *S. & R.* 24; 5 *S. & R.* 51; 8 *S. & R.* 9; 1 *Dall.* 164; 6 *Watts, R.* 134; 7 *Watts, R.* 362; 6 *Binn.* 333, 422; 2 *Miles, R.* 169; 3 *Bouv. Inst. n.* 2483, et seq.

SUB MODO. Under a qualification; a legacy may be given *sub modo*, that is, subject to a condition or qualification.

SUBNOTATIONS, *civ. law.* The answers of the prince to questions which had been put to him respecting some obscure or doubtful point of law. *Vide Rescripts.*

SUBORNATION OF PERJURY, *crim. law.* The procuring another to commit legal perjury, who in consequence of the persuasion takes the oath to which he has been incited. *Hawk. B. 1, c. 69, s. 10.*

2. To complete the offence, the false oath must be actually taken, and no abortive attempt (*q. v.*) to solicit will complete the crime. *Vide To Dissuade; To persuade.*

3. But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law. 2 *East, Rep.* 17; 6 *East, R.* 464; 2 *Chit. Crim. Law*, 317; 20 *Vin. Ab.* 20. For a form of an indictment for an attempt to suborn a person to commit perjury, *vide* 2 *Chit. Cr. Law*, 480; *Vin. Ab. h. t.*

4. The act of congress of March 3, 1825, § 18, provides, that if any person shall knowingly or wilfully procure any such perjury, mentioned in the act, to be committed, every such person so offending, shall be guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence.

SUBPŒNA, *practice, evidence.* A process to cause a witness to appear and give testimony, commanding him to lay aside all pretences and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party

named, under a penalty therein mentioned. This is usually called a *subpœna ad testificandum*.

2. On proof of service of a subpœna upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend as commanded.

SUBPŒNA, *chancery practice.* A mandatory writ or process, directed to and requiring one or more persons to appear at a time to come, and answer the matters charged against him or them; the writ of subpœna was originally a process in the courts of common law, to enforce the attendance of a witness to give evidence; but this writ was used in the court of chancery for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff.

2. This writ was invented by John Waltham, bishop of Salisbury, and chancellor to Rich. II. under the authority of the statutes of Westminster 2, and 13 *Edw. I. c. 34*, which enabled him to devise new writs. 1 *Harr. Prac.* 154; *Cruise, Dig. t. 11, c. 1, sect. 12-17.* *Vide Vin. Ab. h. t.*; 1 *Swanst. Rep.* 209.

SUBPŒNA DUCES TECUM, *practice.* A writ or process of the same kind as the *subpœna ad testificandum*, including a clause requiring the witness to bring with him and produce to the court, books, papers, &c., in his hands, tending to elucidate the matter in issue. 3 *Bl. Com.* 382.

SUB PEDE SIGILLI. Under the foot of the seal; under seal. This expression is used when it is required that a record should be certified under the seal of the court.

SUB POTESTATE. Under or subject to the power of another; as, a wife is under the power of her husband; a child subject to that of his father; a slave to that of his master.

SUBREPTION, *French law.* By this word is understood the fraud committed to obtain a pardon, title, or grant, by alleging facts contrary to truth.

SUBROGATION, *civil law, contracts.* The act of putting, by a transfer, a person in the place of another, or a thing in the place of another thing. It is the substitution (*q. v.*) of a new for an old creditor, and the succession to his rights, which is called subrogation; *transfusio unius creditoris in*

alium. It is precisely the reverse of delegation. (q. v.)

2. There are three kinds of subrogation :

1. That made by the owner of a thing of his own free will ; example, when he voluntarily assigns it. 2. That which arises in consequence of the law, even without the consent of the owner ; example, when a man pays a debt which could not be properly called his own, but which nevertheless it was his interest to pay, or which he might have been compelled to pay for another, the law subrogates him to all the rights of the creditor. Vide 2 Binn. Rep. 382 ; White's L. C. in Eq.* 60-72. 3. That which arises by the act of law joined to the act of the debtor ; as, when the debtor borrows money expressly to pay off his debt, and with the intention of substituting the lender in the place of the old creditor. 7 Toull. liv. 3, t. 3, c. 5, sect. 1, § 2. Vide Civ. Code of Louisiana, art. 2155 to 2158 ; Merl. Répert. h. t. ; Dig. lib. 20 ; Code, lib. 8, t. 18 et 19 ; 9 Watts. R. 451 ; 6 Watts & Serg. 190 ; 2 Bouv. Inst. n. 1413.

SUBSCRIBING WITNESS. One who subscribes his name to a writing in order to be able at a future time to prove its due execution ; an attesting witness.

2. In order to make a good subscribing witness, it is requisite he should sign his name to the instrument himself, at the time of its execution, and at the request or with the assent of the party. 6 Hill, N. Y. R. 303 ; 11 M. & W. 168 ; 1 Greenl. Ev. § 569 a, 4th ed. See *Witness instrumentary* ; 5 Watts, 399.

SUBSCRIPTION, contracts. The placing a signature at the bottom of a written or printed engagement ; or it is the attestation of a witness by so writing his name ; but it has been holden that the attestation of an illiterate witness, by making his mark, is a sufficient subscription. 7 Bing. 457 ; 2 Ves. 454 ; Atk. 177 ; 1 Ves. jr. 11 ; 3 P. Wms. 253 ; 1 V. & B. 362. Vide *To sign*.

2. By subscription is also understood the act by which a person contracts, in writing, to furnish a sum of money for a particular purpose ; as, a subscription to a charitable institution, a subscription for a book, for a newspaper, and the like.

SUBSCRIPTION LIST. The names of persons who have agreed to take a newspaper, magazine or other publication, placed upon paper, is a subscription list.

2. This is an incident to a newspaper,

and passes with the sale of the printing materials. 2 Watts, 111.

SUBSIDY, Engl. law. An aid, tax or tribute granted by parliament to the king for the urgent occasions of the kingdom, to be levied on every subject of ability, according to the value of his lands or goods. Jacob's Law. Dict. h. t.

2. The assistance given in money by one nation to another to enable it the better to carry on a war, when such nation does not join directly in the war, is called a subsidy. Vattel, liv. 3, § 82. See *Neutrality*.

SUB SILENTIO. Under silence, without any notice being taken. Sometimes passing a thing sub silentio is evidence of consent. See *Silence*.

SUBSTANCE, evidence. That which is essential ; it is used in opposition to form.

2. It is a general rule, that on any issue it is sufficient to prove the substance of the issue. For example, in a case where the defendant pleaded payment of the principal sum and all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the proof was held to be sufficient. 2 Str. 690 ; 1 Phil. Ev. 161.

SUBSTITUTE, contracts. One placed under another to transact business for him ; in letters of attorney, power is generally given to the attorney to nominate and appoint a substitute.

2. Without such power, the authority given to one person cannot in general be delegated to another, because it is a personal trust and confidence, and is not therefore transmissible. The authority is given to him to exercise his judgment and discretion, and it cannot be said that the trust and confidence reposed in him shall be exercised at the discretion of another. 2 Atk. 88 ; 2 Ves. 645. But an authority may be delegated to another, when the attorney has express power to do so. Bunb. 166 ; T. Jones, 110. See *Story, Ag. §§ 13, 14*. When a man is drawn in the militia, he may in some cases hire a substitute.

SUBSTITUTES, Scotch law. Where an estate is settled on a long series of heirs, substituted one after another, in tailzie, the person first called in the tailzies, is the institute ; the rest, the heirs of tailzie ; or the substitutes. Ersk. Princ. L. Scotl. 3, 8, 8. See *Tailzie; Institute*.

SUBSTITUTION, civil law. In the law of devises, it is the putting of one per

son in the place of another, so that he may, in default of ability in the former, or after him, have the benefit of a devise or legacy.

2. It is a species of subrogation made in two different ways; the first is *direct* substitution, and the latter a trust or *fidei commissary* substitution. The first or direct substitution, is merely the institution of a second legatee, in case the first should be either incapable or unwilling to accept the legacy; for example, if a testator should give to Peter his estate, but in case he cannot legally receive it, or he wilfully refuses it, then I give it to Paul; this is a direct substitution. Fidei commissary substitution is that which takes place when the person substituted is not to receive the legacy until after the first legatee, and consequently must receive the thing bequeathed from the hands of the latter; for example, I institute Peter my heir, and I request that at his death he shall deliver my succession to Paul. Merl. Répert. h. t.; 5 Toull. 14.

SUBSTITUTION, chancery practice. This takes place in a case where a creditor has a lien on two different parcels of land, and another creditor has a subsequent lien on one only of the parcels, and the prior creditor elects to have his whole demand out of the parcel of land on which the subsequent creditor takes his lien; the latter is entitled, by way of substitution, to have the prior lien assigned to him for his benefit. 1 Johns. Ch. R. 409; 2 Hawk's Rep. 623; 2 Mason, R. 342. And in a case where a bond creditor exacts the whole of the debt from one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he were a purchaser, either against the principal or his co-sureties. Id. 413; 1 Paige's R. 185; 7 John. Ch. Rep. 211; 10 Watts, R. 148.

2. A surety on paying the debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal. 2 Johns. Ch. R. 454; 4 Johns. Ch. R. 123; 1 Edw. R. 164; 17 John. R. 584; 3 Paige's R. 117; 2 Call, R. 125; 2 Yerg. R. 346; 1 Gill & John. 346; 6 Rand. R. 98; 8 Watts, R. 384. In Pennsylvania it is provided by act of assembly, that in all cases where a constable shall be entrusted with the execution of any process for the collection of money, and by neglect of duty shall fail to collect the same, by means whereof the bail or security of such constable shall be compelled to pay the amount of any judgment, such payment

shall vest in the person paying, as aforesaid, the equitable interest in such judgment, and the amount due upon any such judgment may be collected in the name of the plaintiff for the use of such person. Pamphlet Laws, 1828-29, p. 370. Vide 2 Binn. R. 382, and *Subrogation*.

SUBTRACTION, French law. The act of taking something fraudulently; it is generally applied to the taking of the goods of the estate of a deceased person fraudulently. Vide *Expiation*.

SUB-TENANT. The same as under-tenant. See *Under-leaser*; *Under-tenant*, and 1 Bell's Com. 76.

SUBTRACTION. The act of withholding or detaining anything unlawfully.

SUBTRACTION OF CONJUGAL RIGHTS. The act of a husband or wife by living separately from the other without a lawful cause. 3 Bl. Com. 94.

SUCCESSION, in Louisiana. The right and transmission of the rights and obligations of the deceased to his heirs. Succession signifies also the estate, rights and charges which a person leaves after his death, whether the property exceed the charges, or the charges exceed the property, or whether he has left only charges without property. The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be.

2. There are three sorts of successions, to wit: testamentary succession; legal succession; and, irregular succession. 1. Testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. 2. Legal succession is that which is established in favor of the nearest relations of the deceased. 3. Irregular succession is that which is established by law in favor of certain persons or of the state in default of heirs either legal or instituted by testament. Civ. Code, art. 867-874.

3. The lines of a regular succession are divided into three, which rank among themselves in the following order: 1. Descendants. 2. Ascendants. 3. Collaterals. See *Descent*. Vide Poth. *Traité des Successions*; Ibid. *Contumes d'Orleans*, tit. 17,

Ayl. Pand. 348; Toull. liv. 3, tit. 1; Domat, h. t.; Merl. Répert. h. t.

SUCCESSION, com. law. The mode by which one set of persons, members of a corporation aggregate, acquire the rights of another set which preceded them. This term in strictness is to be applied only to such corporations. 2 Bl. Com. 430.

SUCCESSOR. One who follows or comes into the place of another.

2. This term is applied more particularly to a sole corporation, or to any corporation. The word heir is more correctly applicable to a common person who takes an estate by descent. 12 Pick. R. 322; Co. Litt. 8 b.

3. It is also used to designate a person who has been appointed or elected to some office, after another person.

TO SUE. To prosecute or commence legal proceedings for the purpose of recovering a right.

SUFFRAGE, government. Vote; the act of voting.

2. The right of suffrage is given by the constitution of the United States, art. 1, s. 2, to the electors in each state, as shall have the qualifications requisite for electors of the most numerous branch of the state legislature. Vide 2 Story on the Const. § 578, et seq.; Amer. Citiz. 201; 1 Bl. Com. 171; 2 Wils. Lect. 130; Montesq. Esp. des Lois, liv. 11, c. 6; 1 Tucker's Bl. Com. App. 52, 3. See *Division of opinion*.

SUFFRANCE. The permitting a tenant who came in by a lawful title, to remain after his right has expired. Vide *Estates at suffrance*.

SUGGESTIO FALSI. A statement of a falsehood. This amounts to a fraud whenever the party making it was bound to disclose the truth.

2. The following is an example of a case where chancery will interfere and set aside a contract as fraudulent, on account of the *suggestio falsi*: a purchaser applied to the seller to purchase a lot of wild land, and represented to him it was worth nothing, except for a sheep pasture, when he knew there was a valuable mine on the lot, of which the seller was ignorant. The sale was set aside. 2 Paige, 390; 4 Bouv. Inst. n. 8837, et seq. Vide *Concealment*; *Misrepresentation*; *Representation*; *Suppressio veri*.

SUGGESTION. In its literal sense this word signifies to inform, to insinuate, to instruct, to cause to be remembered, to coun-

sel. In practice it is used to convey the idea of information; as, the defendant suggests the death of one of the plaintiffs. 2 Sell. Pr. 191.

2. In wills, when suggestions are made to a testator for the purpose of procuring a devise of his property in a particular way, and when such suggestions are false, they generally amount to a fraud. Bac. Ab. Wills, G 3; 5 Toull. n. 706.

SUGGESTIVE INTERROGATION. This phrase has been used by some writers to signify the same thing as *leading question*. (q. v.) 2 Benth. on Ev. b. 3, c. 3. It is used in the French law. Vide *Question*.

SUI JURIS. One who has all the rights to which a freemen is entitled; one who is not under the power of another, as a slave, a minor, and the like.

2. To make a valid contract, a person must, in general, be *sui juris*. Every one of full age is presumed to be *sui juris*. Story on Ag. p. 10.

SUICIDE, crimes, med. jur. The act of malicious self-murder; *felo de se*. (q. v.) 3 Man. Gran. & Scott, 437, 457, 458; 1 Hale, P. C. 441. But it has been decided in England that where a man's life was insured, and the policy contained a proviso that "every policy effected by a person on his or her own life should be void, if such person should commit suicide, or die by duelling or the hands of justice," the terms of the condition included all acts of voluntary self-destruction, whether the insured at the time such act was committed, was or was not a moral responsible agent. 3 Man. Gr. & Scott, 437. In New York it has been held that an insane person cannot commit suicide, because such person has no will. 4 Hill's R. 75.

2. It is not punishable it is believed in any of the United States, as the unfortunate object of this offence is beyond the reach of human tribunals, and to deprive his family of the property he leaves would be unjust.

3. In cases of sudden death, it is of great consequence to ascertain, on finding the body, whether the deceased has been murdered, died suddenly of a natural death, or whether he has committed suicide. By a careful examination of the position of the body, and of the circumstances attending it, it can be generally ascertained whether the deceased committed suicide, was murdered, or died a natural death. But there

are sometimes cases of suicide which can scarcely be distinguished from those of murder. A case of suicide is mentioned by Doctor Devergie, (*Annales d'Hygiène*, transcribed by Trebuchet, *Jurisprudence de la Médecine*, p. 40,) which bears a striking analogy to a murder. The individual went to the cemetery of Père la Chaise, near Paris, and with a razor inflicted a wound on himself immediately below the *os hyoïde*; the first blow penetrated eleven lines in depth; a second, in the wound made by the first, pushed the instrument to the depth of twenty-one lines; a third extended as far as the posterior of the pharynx, cutting the muscles which attached the tongue to the *os hyoïde*, and made a wound of two inches in depth. Imagine an enormous wound, immediately under the chin, two inches in depth, and three inches and three lines in width, and a foot in circumference; and then judge whether such wound could not be easily mistaken as having been made by a stranger, and not by the deceased. Vide *Death*, and 1 Briand, *Méd. Leg.* 2^e partie, c. 1, art. 6.

SUIT. An action. The word *suit* in the 25th section of the judiciary act of 1789, applies to any proceeding in a court of justice, in which the plaintiff pursues, in such court, the remedy which the law affords him. An application for a prohibition is therefore a suit. 2 Pet. 449. According to the code of practice of Louisiana, art. 96, a suit is a real, personal or mixed demand, made before a competent judge, by which the parties pray to obtain their rights, and a decision of their disputes. In that acceptation, the words suit, process and cause, are in that state almost synonymous. Vide *Secta*, and Steph. Pl. 427; 3 Bl. Com. 395; Gilb. C. P. 48; 1 Chit. Pl. 399; Wood's Civ. Law, b. 4, c. p. 315; 4 Mass. 263; 18 John. 14; 4 Watts, R. 154; 3 Story, Const. § 1719. In its most extended sense, the word suit, includes not only a civil action, but also a criminal prosecution, as indictment, information, and a conviction by a magistrate. Ham. N. P. 270.

SUITE. Those persons, who by his authority, follow or attend an ambassador or other public minister.

2. In general the suite of a minister are protected from arrest, and the inviolability of his person is communicated to those who form his suite. Vattel, lib. 4, c.

9, § 120. See 1 Dall. 177; Baldw. 240; and *Ambassador*.

SUITOR. One who is a party to a suit or action in court. One who is a party to an action. In its ancient sense, suitor meant one who was bound to attend the county court; also, one who formed part of the *secta*. (q. v.)

SULTAN. The title of the Turkish sovereign and other Mahometan princes.

SUMMARY PROCEEDINGS. When cases are to be adjudged promptly, without any unnecessary form, the proceedings are said to be summary.

2. In no case can the party be tried summarily unless when such proceedings are authorized by legislative authority, except perhaps in the cases of contempts, for the common law is a stranger to such a mode of trial. 4 Bl. Com. 280; 20 Vin. Ab. 42; Boscawen on Conv.; Paley on Convict.; vide *Convictions*.

SUMMING UP, practice. The act of making a speech before a court and jury, after all the evidence has been heard, in favor of one of the parties in the cause, is called summing up. When the judge delivers his charge to the jury, he is also said to sum up the evidence in the case. 6 Harg. St. Tr. 832; 1 Chit. Cr. Law, 632.

2. In summing up, the judge should, with much precision and clearness, state the issues joined between the parties, and what the jury are required to find, either in the affirmative or negative. He should then state the substance of the plaintiff's claim, and of the defendant's ground of defence, and so much of the evidence as is adduced for each party, pointing out as he proceeds, to which particular question or issue it respectively applies, taking care to abstain as much as possible from giving an opinion as to the facts. It is his duty clearly to state the law arising in the case in such terms as to leave no doubt as to his meaning, both for the purpose of directing the jury, and with a view of correcting, on a review of the case on a motion for a new trial, or on a writ of error, any error he may, in the hurry of the trial, have committed. Vide 8 S. & R. 150; 1 S. & R. 515; 4 Rawle, R. 100, 195, 356; 2 Penna. R. 27; 2 S. & R. 464. Vide *Charge*; *Opinion*, (*Judgment*.)

TO SUMMON, practice. The act by which a defendant is notified by a competent officer, that an action has been

instituted against him, and that he is required to answer to it at a time and place named. This is done either by giving the defendant a copy of the summons, or leaving it at his house; or by reading the summons to him.

SUMMONERS. Petty officers who cite men to appear in any court.

SUMMONS, practice. The name of a writ commanding the sheriff, or other authorized officer, to notify a party to appear in court to answer a complaint made against him and in the said writ specified, on a day therein mentioned. 21 Vin. Ab. 42; 2 Sell. Pr. 356; 3 Bl. Com. 279.

SUMMONS AND SEVERANCE. Vide *Severance*; and 20 Vin. Ab. 51; Bac. Ab. h. t.; Archb. Civil Plead. 59.

SUMMUM JUS. Extreme right, strict right. It is seldom that extreme right can be administered without the danger of doing injustice, for extreme right may produce extreme wrong. *Summum jus, summa injuria.*

SUMPTUARY LAWS. Those relating to expenses, and made to restrain excess in apparel.

2. In the United States the expenses of every man are left to his own good judgment, and not regulated by arbitrary laws.

SUNDAY. The first day of the week.

2. In some of the New England states it begins at sun setting on Saturday, and ends at the same time the next day. But in other parts of the United States, it generally commences at twelve o'clock on the night between Saturday and Sunday, and ends in twenty-four hours thereafter. 6 Gill & John. 268; and vide Bac. Ab. Heresy, &c. D; Id. Sheriff, N 4; 1 Salk. 78; 1 Sell. Pr. 12; Hamm. N. P. 140. The *Sabbath*, the *Lord's Day*, and *Sunday*, all mean the same thing. 6 Gill. & John. 268; see 6 Watts, 231; 3 Watts, 56, 59.

3. In some states, owing to statutory provisions, contracts made on Sunday are void; 6 Watts, R. 231; Leigh, N. P. 14; 1 P. A. Browne, 171; 5 B. & C. 406; 4 Bing. 84; but in general they are binding, although made on that day, if good in other respects. 1 Crompt. & Jervis, 130; 3 Law Intell. 210; Chit. on Bills, 59; Wright's R. 764; 10 Mass. 312; 1 Cowen, R. 76, n.; Cowp. 640; 1 Bl. Rep. 499; 1 Str. 702; see 8 Cowen, R. 27; 6 Penn. St. R. 417, 420.

4. Sundays are computed in the time allowed for the performance of an act, but if the last day happen to be a Sunday, it is to be excluded, and the act must in general be performed on Saturday; 3 Penna. R. 201; 3 Chit. Pr. 110; promissory notes and bills of exchange, when they fall due on Sunday, are generally paid on Saturday. See, as to the origin of keeping Sunday as a holiday, Neale's F. & F. Index, Lord's day; Story on Pr. Notes, § 220; Story on Bills, § 233; 2 Hill's N. Y. Rep. 587; 2 Applet. R. 264.

SUPER ALTUM MARE. Upon the high sea. Vide *High Seas*.

SUPER VISUM CORPORE. Upon view of the body. When an inquest is held over a body found dead, it must be *super visum corpore*. Vide *Coroner*; *Inquest*.

SUPERCARGO, mar. law. A person specially employed by the owner of a cargo to take charge of the merchandise which has been shipped, to sell it to the best advantage, and to purchase returning cargoes and to receive freight, as he may be authorized.

2. Supercargoes have complete control over the cargo, and everything which immediately concerns it, unless their authority is either expressly or impliedly restrained. 12 East, R. 381. Under certain circumstances, they are responsible for the cargo; 4 Mass. 115; see 1 Gill & John. 1; but the supercargo has no power to interfere with the government of the ship. 3 Pardes. n. 646; 1 Boulay-Paty, Dr. Com. 421.

SUPERFETATION, med. jur. The conception of a second embryo, during the gestation of the first, or the conception of a child by a woman already pregnant with another, during the time of such pregnancy.

2. This doctrine, though doubted, seems to be established by numerous cases. 1 Beck's Med. Jur. 193; Cassan on Superfœtation; New York Medical Repository; 1 Briand, Méd. Lég. prem. partie, c. 3, art. 4; 1 Foderé, Méd. Lég. § 299; Buffon, Hist. Nat. de l'Homme, *Puberté*.

SUPERFICIARIUS, civ. law. He who has built upon the soil of another, which he has hired for a number of years or forever, yielding a yearly rent. This is not very different from the owner of a lot on ground rent in Pennsylvania. Dig. 43, 18, 1 and 2.

SUPERFICIES. A Latin word used among civilians. It signifies in the edict of the prætor whatever has been erected on

the soil, *quidquid solo inaedificatum est*. Vide Dig. 43, tit. 18, l. 1 and 2.

SUPERIOR. One who has a right to command; one who holds a superior rank; as, a soldier is bound to obey his superior.

2. In estates, some are superior to others; an estate entitled to a servitude or easement over another estate, is called the superior or dominant, and the other the inferior or servient estate. 1 Bouv. Inst. n. 1612.

3. Of courts, some are supreme or superior, possessing in general appellate jurisdiction, either by writ of error or by appeal; 3 Bouv. Inst. n. 2527; the others are called inferior courts.

SUPERNUMERARIJ, Rom. civil law. From the reign of Constantine to Justinian, advocates were divided into two classes: viz. advocates in title, who were called *statuti*, and supernumeraries. The *statuti* were inscribed in the matriculation books, and formed a part of the college of advocates in each jurisdiction. The supernumeraries were not attached to any bar in particular, and could reside where they pleased; they took the place of advocates by title, as vacancies occurred in that body. Code Justin., *de adv. div. jud.* c. 3, 11, 13; Calvini *Lex*, ad voc.; also *Statuti*.

SUPERSEDEAS, practice, actions. The name of a writ containing a command to stay the proceedings at law.

2. It is granted on good cause shown that the party ought not to proceed. F. N. B. 236. There are some writs which though they do not bear this name have the effect to supersede the proceedings, namely, a writ of error, when bail is entered, operates as a supersedeas, and a writ of certiorari to remove the proceedings of an inferior into a superior court has, in general, the same effect. 8 Mod. 373; 1 Barnes, 260; 6 Binn. R. 461. But, under special circumstances, the *certiorari* has not the effect to stay the proceedings, particularly where summary proceedings, as to obtain possession under the landlord and tenant law, are given by statute. 6 Binn. R. 460; 1 Yeates, R. 49; 4 Dall. R. 214; 1 Ashm. R. 230; Vide Vin. Ab. h. t.; Bac. Ab. h. t.; Com. Dig. h. t.; Yelv. R. 6, note.

SUPERSTITIOUS USE, English law. When lands, tenements, rents, goods or chattels are given, secured or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest, or other man, to pray for the soul of any dead man, in such a church or

elsewhere; to have and maintain perpetual obits, lamps, torches, &c., to be used at certain times to help to save the souls of men out of purgatory; in such cases the king by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable. Bac. Ab. Charitable Uses and Mortmain, D; Duke on Char. Uses, 105; 6 Vcs. 567; 4 Co. 104.

2. In the United States, where all religious opinions are free, and the right to exercise them is secured to the people, a bequest to support a catholic priest, and perhaps certain other uses in England, would not in this country be considered as superstitious uses. 1 Pa. R. 49; 8 Penn. St. R. 327; 17 S. & R. 388; 1 Wash. 224. It is not easy to see how there can be a *superstitious use* in this country, at least in the acceptation of the British courts. 1 Watts, 224; 4 Bouv. Inst. n. 3985.

SUPERVISOR. An overseer; a surveyor.

2. There are officers who bear this name whose duty it is to take care of the highways.

SUPPLEMENTAL. That which is added to a thing to complete it; as a supplemental affidavit, which is an additional affidavit to make out a case; a supplemental bill. (q. v.)

SUPPLEMENTAL BILL, equity plead. A bill already filed to supply some defect in the original bill. See *Bill supplemental*.

SUPPLICAVIT, Eng. law. The name of a writ issuing out of the king's bench or chancery, for taking sureties of the peace; it is commonly directed to the justices of the peace, when they are averse to acting in the affair in their judicial capacity. 4 Bl. Com. 283; vide Vin. Ab. h. t.; Com. Dig. Chancery, 4 R.; Id. Forcible Entry, D 16, 17.

SUPPLICIUM, civil law. A corporal punishment ordained by law; the punishment of death, so called because it was customary to accompany the guilty man to the place of execution and there offer *supplications* for him.

SUPPLIES, Eng. Law. Extraordinary grants to the king by parliament, to supply the exigencies of the state. Jacob's Law. Dict. h. t.

SUPPORT. The right of support is an easement which one man, either by contract or prescription, enjoys, to rest the joists or timbers of his house upon the wall of an

adjoining building, owned by another person. 3 Kent, Com. 435. Vide *Lois des Bât.* part. 1, c. 3, s. 2, a. 1, § 7; *Party wall*.

SUPPRESSIO VERI. Concealment of truth.

2. In general a suppression of the truth, when a party is bound to disclose it, vitiates a contract. In the contract of insurance a knowledge of the facts is required to enable the underwriter to calculate the chances and form a due estimate of the risk; and, in this contract perhaps more than any other, the parties are required to represent every thing with fairness. 1 Bla. Rep. 594; 3 Burr. 1809.

3. *Suppressio veri* as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution. 3 Atk. 383; Prec. Ch. 138; 1 Fonb. Eq. c. 2, s. 8; 1 Ball & Beatty, 241; 3 Munf. 232; 1 Pet. 383; 2 Paige, 390; 4 Bouv. Inst. n. 3841. Vide *Concealment*; *Misrepresentation*; *Representation*; *Suggestio falsi*.

SUPRA PROTEST. Under protest. Vide *Acceptance supra protest*; *Acceptor supra protest*; *Bills of Exchange*.

SUPREMACY. Sovereign dominion, authority, and preëminence; the highest state. In the United States, the supremacy resides in the people, and is exercised by their constitutional representatives, the president and congress. Vide *Sovereignty*.

SUPREME. That which is superior to all other things; as the supreme power of the state, which is an authority over all others. The supreme court, which is superior to all other courts.

SUPREME COURT. The court of the highest jurisdiction in the United States, having appellate jurisdiction over all the other courts of the United States, is so called. Its powers are examined under the article *Courts of the United States*.

2. The following list of the judges who have had seats on the bench of this court is given for the purpose of reference.

Chief Justices.

John Jay, appointed September 26, 1789, resigned in 1795.

John Rutledge, appointed July 1, 1795, resigned in 1796.

Oliver Ellsworth, appointed March 4, 1796, resigned in 1801.

John Marshall, appointed January 31, 1801, died July 6, 1835.

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Roger B. Taney, appointed March 15, 1836.

Associate Justices.

William Cushing, appointed September 27, 1789, died in 1811.

James Wilson, appointed September 29, 1789, died in 1798.

John Blair, appointed September 30, 1789, died in 1796.

James Iredell, appointed February 10, 1790, died in 1799.

Thomas Johnson, appointed November 7, 1791, resigned in 1793.

William Patterson, appointed March 4, 1793, in the place of Judge Johnson, died in 1806.

Samuel Chase, appointed January 7, 1796, in the place of Judge Blair, died in 1811.

Bushrod Washington, appointed December 20, 1798, in the place of Judge Wilson, died November 26, 1829.

Alfred Moore, appointed December 10, 1799, in the place of Judge Iredell, resigned in 1804.

William Johnson, appointed March 6, 1804, in the place of Judge Moore, died in 1835.

Brookholst Livingston, appointed November 10, 1806, in the place of Judge Patterson, died in 1823.

Thomas Todd, appointed March 3, 1807, under the act of congress of February, 1807, providing for an additional justice, died in 1826.

Gabriel Duval, appointed November 18, 1811, in the place of Judge Chase, resigned in January, 1835.

Joseph Story, appointed November 18, 1811, in the place of Judge Cushing.

Smith Thompson, appointed December 9, 1823, in the place of Judge Livingston, deceased.

Robert Trimble, appointed May 9, 1826, in the place of Judge Todd, died in 1829.

John McLean, appointed March 1829, in the place of Judge Trimble, deceased.

Henry Baldwin, appointed January 1830, in the place of Judge Washington, deceased.

James M. Wayne, appointed January 9, 1835, in the place of Judge Johnson, deceased.

Philip P. Barbour, appointed March 15, 1836, died February 25, 1841.

John Catron, appointed March 8, 1837, under the act of congress providing for two additional judges.

John McKinley, appointed September 25, 1837, under the last mentioned act.

Peter V. Daniel, appointed March 3, 1841, in the place of Judge Barbour, deceased.

Samuel Nelson, appointed February 14, 1845, in the place of Judge Thompson, deceased.

Levi Woodbury, appointed September 20, 1845, in the recess of senate, in the place of Judge Story, deceased: his nomination confirmed January 3, 1846.

Robert C. Grier, appointed August 4, 1846, in the place of Judge Baldwin, deceased.

Benj. Robbins Curtis, appointed 1851, in the recess of the senate, in the place of Judge Woodbury, deceased: his nomination confirmed

The present judges of the supreme court are,

Chief Justice.—Roger B. Taney.

Associate Justices.—John McLean, James M. Wayne, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Robert C. Grier, and B. Robbins Curtis.

3. In the several states there are also supreme courts; their powers and jurisdiction will be found under the names of the several states.

SUR. A French word which signifies *upon, on*. It is very frequently used in connexion with other words; as, *sur rule* to take deposition, *sur trover* and conversion, and the like.

SUR CUI ANTE DIVORTIUM. The name of a writ issued in favor of the heir of the wife, where the husband alienated the wife's lands during the coverture, and afterwards they were divorced and she died, to recover the lands from the alienee. *Vide Cui ante divortium.*

SURCHARGE, *chancery practice*. When a bill is filed to open an account stated, liberty is sometimes given to the plaintiff to *surcharge* and *falsify* such account. That is, to examine not only errors of fact, but errors of law. 2 Atk. 112; 11 Wheat. 237; 2 Ves. 565.

2. "These terms, '*surcharge*,' and '*falsify*,'" says Mr. Justice Story, 1 Eq. Jur. § 525, "have a distinct sense in the vocabulary of courts of equity, a little removed from that, which they bear in the ordinary language of common life. In the language of common life, we understand '*surcharge*' to import an overcharge in quantity, or price, or degree, beyond what is just and

reasonable. In this sense, it is nearly equivalent to '*falsify*;' for every item, which is not truly charged, as it should be, is false; and by establishing such overcharge it is falsified. But, in the sense of courts of equity, these words are used in contradistinction to each other. A surcharge is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be allowed. A falsification applies to some item in the debets; and supposes, that the item is wholly false, or in some part erroneous. This distinction is taken notice of by Lord Hardwicke; and the words used by him are so clear, that they supersede all necessity for farther commentary. 'Upon a liberty to the plaintiff to surcharge and falsify,' says he, 'the *onus probandi* is always on the party having that liberty; for the court takes it as a stated account, and establishes it. But, if any of the parties can show an omission, for which credit ought to be, that is, a *surcharge*; or if anything is inserted, that is a wrong charge, he is at liberty to show it, and that is a *falsification*. But that must be by proof on his side. And that makes a great difference between the general cases of an open account, and were only [leave] to surcharge and falsify; for such must be made out.'"

SURETY, contracts. A person who binds himself for the payment of a sum of money or for the performance of something else, for another, who is already bound for the same. A surety differs from a guarantor, and the latter cannot be sued until after a suit against the principal. 10 Watts, 258.

2. The surety differs from bail in this, that the latter actually has, or is by law presumed to have, the custody of his principal, while the former has no control over him. The bail may surrender his principal in discharge of his obligation; the surety cannot be discharged by such surrender.

3. In Pennsylvania it has been decided that the creditor is bound to sue the principal when requested by the surety, and the debt is due; and that when proper notice is given by the surety that unless the principal be sued, he will consider himself discharged, he will be so considered, unless the principal be sued. 8 Serg. & Rawle, 116; 15 Serg. & Rawle, 29, 30; 8 P. in Alabama, 9 Porter, R. 409. But in general a creditor may resort to the surety for the payment of his debt in the first place, without applying to the principal.

1 Watts, 280 ; 7 Ham. part 1, 223. Vide Bouv. Inst. Index, h. t.; *Contribution; Contracts; Suretyship*.

SURETY OF THE PEACE, crim. law. A security entered into before some competent court or officer, by a party accused, together with some other person, in the form of recognizance to the commonwealth in a certain sum of money, with a condition that the accused shall keep the peace towards all the citizens of the commonwealth. A security for good behaviour is a similar recognizance with a condition that the accused shall be of good behaviour.

2. This security may be demanded by a court or officer having jurisdiction from all persons who threatened to kill or to injure others, or who by their acts give reason to believe they will commit a breach of the peace. And even after an acquittal a prisoner may be required to give security of the peace or good behaviour, when the circumstances of the case justify a court in believing the public good requires it. 2 Yeates, R. 487 ; Bac. Ab. h. t.; 1 Binn. R. 98, note ; Com. Dig. h. t.; Vin. Ab. h. t.; Bl. Com. B. 4, c. 18, p. 251.

3. To obtain surety to keep the peace, the party requiring it must swear or affirm he fears a present or future danger, and not merely swear or affirm to a breach of the peace which is past ; it is usual, however, to state such injuries, and when the circumstances warrant it, a threat of their repetition, as a legitimate ground for fearing future injury, which fear must always be stated. 1 Chit. Pr. 677.

4. A recognizance to keep the peace is forfeited only by an actual attack or threat of bodily harm, or burning a house, and the like, but not by bare words of heat and choler. Hawk. b. 1, c. 60, s. 22. Vide *Good Behaviour*.

SURETYSHIP, contracts. An accessory agreement by which a person binds himself for another already bound, either in whole or in part, as for his debt, default or miscarriage.

2. The person undertaken for must be liable as well as the person giving the promise, for otherwise the promise would be a principal and not a collateral agreement, and the promisor would be liable in the first instance ; for example, a married woman would not be liable upon her contract, and the person who should become surety for her that she would perform it would be responsible as a principal and not

as a surety. Pitm. on P. & S. 13 ; Burge on Sur. 6 ; Poth. Ob. n. 306. If a person undertakes as a surety when he knows the obligation of the principal is void, he becomes a principal. 2 Ld. Raym. 1066 ; 1 Burr. 373.

3. As the contract of suretyship must relate to the same subject as the principal obligation, it follows that it must not be of greater extent or more onerous, either in its amount, or in the time or manner, or place of performance, than such principal obligation ; and if it so exceed, it will be void, as to such excess. But the obligation of the surety may be less onerous, both in its amount, and in the time, place and manner of its performance, than that of the principal debtor ; it may be for a less amount, or the time may be more protracted. Burge on Sur. 4, 5.

4. The contract of suretyship may be entered into by all persons who are *sui juris*, and capable of entering into other contracts. See *Parties to contracts*.

5. It must be made upon a sufficient consideration. See *Consideration*.

6. The contract of suretyship or guaranty, requires a present agreement between the contracting parties ; and care must be taken to observe the distinction between an actual guaranty, and an offer to guaranty at a future time ; when an offer is made, it must be accepted before it becomes binding. 1 M. & S. 557 ; 2 Stark. 371 ; Cr. M. & Ros. 692.

7. Where the statute of frauds, 29 Car. II., c. 3, is in force, or its principles have been adopted, the contract of suretyship "to answer for the debt, default or miscarriage of another person," must be in writing, &c.

8. The contract of suretyship is discharged and becomes extinct, 1st. Either by the terms of the contract itself. 2d. By the acts to which both the creditor and principal alone are parties. 3d. By the acts of the creditor and sureties. 4th. By fraud. 5th. By operation of law.

9.—§ 1. When by his contract the surety limits the period of time for which he is willing to be responsible, it is clear he cannot be held liable for a longer period ; as when he engages that an officer who is elected annually shall faithfully perform his duty during his continuance in office ; his obligation does not extend for the performance of his duty by the same officer who may be elected for a second year. Burge on Sur. 63, 113 ; 1 McCord, 41 ; 2 Campb. 39 ;

8 Ad. & Ell. N. S. 276; 2 Saund. 411 a; 6 East, 512; 2 M. & S. 370; 2 New R. (5 B. & P.) 180; 2 M. & S. 363; 9 Moore, 102.

10.—§ 2. The contract of suretyship becomes extinct or discharged by the acts of the principal and of the creditor without any act of the surety. This may be done, 1. By payment, by the principal. 2. By release of the principal. 3. By tender made by principal to the creditor. 4. By compromise. 5. By accord and satisfaction. 6. By novation. 7. By delegation. 8. By set-off. 9. By alteration of the contract.

11.—1. When the principal makes *payment*, the sureties are immediately discharged, because the obligation no longer exists. But as payment is the act of two parties, the party tendering the debt and the party receiving it, the money or thing due must be accepted. 7 Pick 88; 4 Pick. 83; 8 Pick. 122. See *Payment*.

12.—2. As the *release* of the principal discharges the obligation, the surety is also discharged by it.

13.—3. A lawful *tender* made by the principal or his authorized agent, to the creditor or his authorized agent, will discharge the surety. See 2 Blackf. 87; 1 Rawle, 408; 2 Fairf. 475; 13 Pet. 136.

14.—4. When the creditor and principal make a *compromise* by which the principal is discharged, the surety is also discharged. 11 Ves. 420; 3 Bro. C. C. 1; Addis. on Contr. 443.

15.—5. *Accord and satisfaction* between the principal and the creditor will discharge the surety, as by that the whole obligation becomes extinct. See *Accord and satisfaction*.

16.—6. It is evident that a simple *novation*, or the making a new contract and annulling the old, must, by the destruction of the obligation, discharge the surety.

17.—7. An absolute *delegation*, where the principal procures another person to assume the payment upon condition that he shall be discharged, will have the effect to discharge the surety. See *Delegation*.

18.—8. When the principal has a just *set off* to the whole claim of the creditor, the surety is discharged.

19.—9. If the principal and creditor *change the nature of the contract*, so that it is no longer the same, the surety will be discharged; and even extending the time of payment, without the consent of the

surety, when the agreement to *give time* is founded upon a valuable consideration, is such an alteration of the contract as discharges the surety. See *Giving Time*.

20.—§ 3. The contract is discharged by the acts of the creditor and surety, 1. By payment made by the surety. 2. By release of the surety by the creditor. 3. By compromise between them. 4. By accord and satisfaction. 5. By set off.

21.—§ 4. Fraud by the creditor in relation to the obligation of the surety, or by the debtor with the knowledge or assent of the creditor, will discharge the liability of the surety. 3 B. & C. 605; S. C. 6 Dowl. & Ry. 505; 5 Bing. N. C. 142.

22.—§ 5. The contract of suretyship is discharged by *operation of law*, 1. By confusion. 2. By prescription, or the act of limitations. 3. By bankruptcy.

23.—1. The contract of suretyship is discharged by *confusion* or *merger* of rights; as, where the obligee marries the obligor. Burge on Sur. 256; 2 Ves. p. 264; 1 Salk. 306; Cro. Car. 551.

24.—2. The *act of limitations* or *prescription* is a perfect bar to a recovery against a surety, after a sufficient lapse of time, when the creditor was *sui juris* and of a capacity to sue.

25.—3. The discharge of the surety under the bankrupt laws, will put an end to his liability, unless otherwise provided for in the law.

26. The surety has the right to pay and discharge the obligation the moment the principal is in default, and have immediate recourse to his principal. He need not wait for the commencement of an action, or the issue of legal process, but he cannot accelerate the liability of the principal, and if he pays money voluntarily before the time of payment arrives, he will have no cause of action until such time, or if he pays after the principal obligation has been discharged, when he was under no obligation to pay, he has no ground of action.

27. Co-sureties are in general bound in *solido* to pay the debt, when the principal fails, and if one be compelled to pay the whole, he may demand contribution from the rest, and recover from them their several proportions of their common liability in an action for money paid by him to their use. 6 Ves. 807; 12 M. & W. 421; 8 M. & W. 539; 4 Scott, N. S. 429.

See, generally, 15 East, R. 617; Yelv. 47 n.; 20 Vin. Ab. 101; 1 Supp. to Ves. jr.

220, 498, 9; Ayliffe's Pand. 559; Poth. Obl. part 2, c. 6; 1 Bell's Com. 350, 5th ed.; *Giving time; Principal; Surety.*

SURGERY, med. jur. That part of the healing art which relates to external diseases; their treatment; and, specially, to the manual operations adopted for their cure.

2. Every lawyer should have some acquaintance with surgery; his knowledge on this subject will be found useful in cases of homicide and wounds.

SURNAME. A name which is added to the christian name, and which, in modern times, have become family names.

2. They are called surnames, because originally they were written *over the name* in judicial writings and contracts. They were and are still used for the purpose of distinguishing persons of the same name. They were taken from something attached to the persons assuming them, as John Carpenter, Joseph Black, Samuel Little, &c. See *Name*.

SURPLUS. That which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the residue. (q. v.) See 18 Ves. 466.

2. The following is an example of a surplus; if a thing be put in pledge as a security to pay one hundred dollars, and it be afterwards sold for one hundred and fifty dollars, the fifty dollars will be the surplus. Wolff, Inst. § 697. See *Overplus; Residue*.

SURPLUSAGE, pleading. A superfluous and useless statement of matter wholly foreign and impertinent to the cause.

2. In general *surplusagium non nocet*, according to the maxim *utile per inutile non vitiatur*; therefore if a man in his declaration, plea, &c., make mention of a thing which need not be stated, but the matter set forth is grammatically right, and perfectly sensible, no advantage can be taken on demurrer. Com. Dig. Pleader, C 28, E 2; 1 Salk. 326; 4 East, 400; Gilb. C. P. 131; Bac. Ab. Pleas, 1, 4; Co. Litt. 303, b; 2 Saund. 306, n. 14; 5 East, 444; 1 Chit. Pl. 282; Lawes on Pl. 63; 7 John. 462; 3 Day, 472; 2 Mass. R. 283; 13 John. 80.

3. When, by an unnecessary allegation, the plaintiff shows he has no cause of action, the defendant may demur. Com. Dig. Pleader, c. 29; Bac. Ab. Pleas, 1, 4; see 2 East, 451; 4 East, 400; Dougl. 667; 2 Bl. Rep. 842; 3 Cranch, 198; 2 Dall. 300; 1 Wash. R. 257.

4. When the surplusage is not grammatically set right, or it is unintelligible and no sense at all can be given it, or it be contradictory or repugnant to what is before alleged, the adversary may take advantage of it on special demurrer. Gilb. C. P. 132; Lewes on Pl. 64.

5. When a party alleges a material matter with an unnecessary detail of circumstances, and the essential and non-essential parts of a statement are, in their nature, so connected as to be incapable of separation, the opposite party may include under his traverse the whole matter alleged. And as it is an established rule that the evidence must correspond with the allegations, it follows that the party who has thus pleaded such unnecessary matter will be required to prove it, and thus he is required to sustain an increased burden of proof, and incurs greater danger of failure at the trial. For example, if in justifying the taking of cattle damage feasant, in which case it is sufficient to allege that they were doing damage to his freehold, he should state a *seisin in fee*, which is traversed, he must prove a *seisin in fee*. Dyer, 365; 2 Saund. 206, a, note 22; Steph. on Pl. 261, 262; 1 Smith's Lead. Cas. 328, note; 1 Greenl. Ev. § 51; 1 Chit. Pl. 524, 525; U. S. Dig. Pleading, VII. c.

SURPLUSAGE, accounts. A greater disbursement than the charges of the accountant amount to.

SURPRISE. This term is frequently used in courts of equity and by writers on equity jurisprudence. It signifies the act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper that a court of equity should relieve the party so surprised. 2 Bro. Ch. R. 150; 1 Story, Eq. Jur. § 120, note. Mr. Jeremy, Eq. Jur. 366, seems to think that the word surprise is a technical expression, and nearly synonymous with fraud. Page 383, note. It is sometimes used in this sense when it is deemed presumptive of, or approaching to fraud. 1 Fonbl. Eq. 123; 3 Chan. Cas. 56, 74, 103, 114. Vide 6 Ves. R. 327, 338; 2 Bro. Ch. R. 326; 16 Ves. R. 81, 86, 87; 1 Cox, R. 340; 2 Harr. Dig. 92.

2. In practice, by surprise is understood that situation in which a party is placed, without any default of his own, which will be injurious to his interest. 8 N. S. 407. The courts always do everything in their

power to relieve a party from the effects of a surprise, when he has been diligent in endeavouring to avoid it. 1 Clarke's R. 162; 3 Bouv. Inst. n. 3285.

SURREBUTTER, *pleading*. The plaintiff's answer to the defendant's rebutter. It is governed by the same rules as the replication. (q. v.) Vide 6 Com. Dig. 185; 7 Com. Dig. 389.

SURREJOINER, *pleading*. The plaintiff's answer to the defendant's rejoinder. It is governed in every respect by the same rules as the replication. (q. v.) Steph. Pl. 77; Arch. Civ. Pl. 284; 7 Com. Dig. 389.

SURRENDER, *estates, conveyancing*. A yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement. Co. Litt. 337, b.

2. A surrender is of a nature directly opposite to a release; for, as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed. A surrender immediately divests the estate of the surrenderer, and vests it in the surrenderee, even without the assent (q. v.) of the latter. Touchs. 300, 301.

3. The technical and proper words of this conveyance are, surrender and yield up; but any form of words, by which the intention of the parties is sufficiently manifested, will operate as a surrender. Perk. § 607; 1 Term Rep. 441; Com. Dig. Surrender, A.

4. The surrender may be express or implied. The latter is when an estate, incompatible with the existing estate, is accepted; or the lessee takes a new lease of the same lands. 16 Johns. Rep. 28; 2 Wils. 26; 1 Barn. & A. 50; 2 Barn. & A. 119; 5 Taunt. 518; and see 6 East, R. 86; 9 Barn. & Cr. 288; 7 Watts, R. 123. Vide, generally, Cruise, Dig. tit. 32, c. 7; Com. Dig. h. t.; Vin. Ab. h. t.; 4 Kent, Com. 102; Nels. Ab. h. t.; Rolle's Ab. h. t.; 11 East, R. 317, n.

5. The deed or instrument by which a surrender is made, is also called a surrender. For the law of presumption of surrenders, see Math. on Pres. ch. 13, p. 236; Addis. on Contr. 658-661.

SURRENDER OF CRIMINALS. The act by which the public authorities deliver a person accused of a crime, and who is found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime

has been committed. Vide *Extradition; Fugitives from justice*.

SURRENDEREE. One to whom a surrender has been made.

SURRENDEROR. One who makes a surrender; as when the tenant gives up the estate and cancels his lease before the expiration of the term; one who yields up a freehold estate for the purpose of conveying it.

SURREPTITIOUS. That which is done in a fraudulent stealthy manner.

SURROGATE. In some of the states, as in New Jersey, this is the name of an officer who has jurisdiction in granting letters testamentary and letters of administration.

2. In some states, as in Pennsylvania, this officer is called register of wills and for granting letters of administration; in others, as in Massachusetts, he is called judge of probates.

SURVEY. The act by which the quantity of a piece of land is ascertained; the paper containing a statement of the courses, distances, and quantity of land, is also called a survey.

2. A survey made by authority of law, and duly returned into the land office, is a matter of record, and of equal dignity with the patent. 3 Marsh. 226; 2 J. J. Marsh, 160. See 3 Greenleaf, 126; 5 Greenleaf, 24; 14 Mass. 149; 1 Harr. & John. 201; 1 Overt. 199; 1 Dev. & Bat. 76.

3. By survey is also understood an examination; as, a survey has been made of your house, and now the insurance company will insure it.

SURVIVOR. The longest liver of two or more persons.

2. In cases of partnership, the surviving partner is entitled to have all the effects of the partnership, and is bound to pay all the debts owing by the firm. Gow on Partn. 157; Watson on Partn. 364. He is, however, bound to account for the surplus to the representatives of his deceased partners, agreeably to their respective rights.

3. A surviving trustee is generally vested with all the powers of all the trustees, and the surviving administrator is authorized to act for the estate as if he had been sole administrator. As to the presumption of survivorship, when two or more persons have perished by the same event, see Civ. Code of Lo. art. 930 to 933; and vide *Death*; Cro. Eliz. 503; 1 Bl. Rep. 610; 2 Phill. Rep. 261; S. C. 1 Ecoles. Reports,

250; *Fearne on Rem.* iv.; *Poth. on Obli.* by Evans, vol. 2, p. 346; 8 Ves. 10; 14 Ves. 578; 17 Ves. 482; 6 Taunt. 213; *Cowp.* 257; 5 Ves. 485. Vide, generally, 2 Fonbl. Eq. 102; 8 Vin. Ab. 323; 20 Vin. Ab. 146; 8 Com. Dig. 475, 594; 1 Suppl. to Ves. jun. 115, 186, 407, 8, 2 Suppl. to Ves. jun. 47, 296, 340, 391, 477; 1 Foderé, Méd. Lég. § 424-483.

4. The right of survivorship among joint-tenants has been abolished, except as to estates held in trust, in Pennsylvania, New York, Kentucky, Virginia, Indiana, Missouri, Tennessee, Alabama, Georgia, North and South Carolina. Vide *Estates in Joint-tenancy*. In Connecticut it never existed. 1 Swift's Dig. 102; see 1 Hill. Ab. 440. As to survivorship among legatees, see 1 Turn. & R. 413; 1 Br. C. C. 574; 3 Russ. 217. See *Death; Estates in Joint-tenancy; Joint-tenants; Partnership*.

SUS' PER COLL', *Engl. law*. In the English practice, a calendar is made out of attainted criminals, and the judge signs the calendar with their separate judgments in the margin. In the case of a capital felony, it is written opposite the prisoner's name, "let him be hanged by the neck," which, when the proceedings were in Latin, was, "suspendatur per collum," or, in the abbreviated form, "sus' per coll'." 4 Bl. Comm. 403.

SUSPENDER, *Scotch law*. He in whose favor a suspension is made.

2. In general a suspender is required to give caution to pay the debt in the event it shall be found due. Where the suspender cannot, from his low or suspected circumstances, procure unquestionable security, the lords admit juratory caution; but the reasons of suspension are in that case, to be considered with particular accuracy at passing the bill. Act. 8. 8 Nov. 1682; *Ersk. Prin. L. Scot.* 4, 3, 6.

SUSPENSE. When a rent, profit a prendre, and the like, are, in consequence of the unity of possession of the rent, &c., of the land out of which they issue, not in esse for a time, they are said to be in suspense, *tunc dormiunt*, but they may be revived or awakened. *Co. Litt.* 313 a.

SUSPENSION. A temporary stop of a right, of a law, and the like.

2. In times of war the habeas corpus act may be suspended by lawful authority.

3. There may be a suspension of an officer's duties or powers, when he is charged with crimes. *Wood's Inst.* 510.

4. Suspension of a right in an estate is a partial extinguishment, or an extinguishment for a time. It differs from an extinguishment in this. A suspended right may be revived; one extinguished is absolutely dead. *Bac. Ab. Extinguishment, A.*

5. The suspension of a statute for a limited time operates so as to prevent its operation for the time, but it has not the effect of a repeal. 3 Dall. 365.

SUSPENSION, *Scotch law*. That form of law by which the effect of a sentence-condemnatory, that has not yet received execution, is stayed or postponed, till the cause be again considered. *Ersk. Prin. L. Scotl.* 4, 3, 5. Suspension is competent also, even where there is no decree, for putting a stop to any illegal act whatsoever. *Id.* 4, 3, 7.

2. Letters of suspension bear the form of a summons, which contains a warrant to cite the charger. *Ib.*

SUSPENSION, *eccl. law*. An ecclesiastical censure, by which a spiritual person is either interdicted the exercise of his ecclesiastical function, or hindered from receiving the profits of his benefice. It may be partial or total; for a limited time, or forever, when it is called deprivation or amotion. *Ayl. Parerg.* 501.

SUSPENSION OF ARMS. An agreement between belligerents, made for a short time or for a particular place, to cease hostilities between them. See *Armistice; Truce*.

SUSPENSION OF A RIGHT. The act by which a party is deprived of the exercise of his right, for a time.

2. When a right is suspended by operation of law, the right is revived the moment the bar is removed; but when the right is suspended by the act of the party, it is gone forever. See 1 Roll. Ab. tit. *Extinguishment, L, M.*

SUSPENSIVE CONDITION. One which prevents a contract from going into operation until it has been fulfilled; as if I promise to pay you one thousand dollars on condition that the ship Thomas Jefferson shall arrive from Havre, the contract is suspended until the arrival of the ship. 1 Bouv. Inst. n. 731.

SUSPICION. A belief to the disadvantage of another, accompanied by a doubt.

2. Without proof, suspicion, of itself, is evidence of nothing. When a crime has been committed, an arrest may be made when, 1st. There are such circumstances as induce a strong presumption of guilt; as being found in possession of goods recently

stolen, without giving a probable account of having obtained the possession honestly. 2d. The absconding of the party accused. 3d. Being found in company of known offenders. 4th. Living an idle, disorderly life, without any apparent means of support. In such cases the arrest must be made as in other cases. Vide 20 Vin. Ab. 150; 4 Bl. Com. 290.

SUTLER. A man whose employment is to sell provisions and liquor to a camp.

2. By the articles of war, art. 29, no sutler is permitted to sell any kind of liquor or victuals, or to keep his house or shop open for the entertainment of soldiers, after nine at night, or before the beating of the reveillé, or upon Sundays during divine service or sermon, on penalty of being dismissed all future sutling. And by art. 60, all sutlers are to be subject to orders according to the rules and discipline of war.

SWAINMOTE COURT, Engl. law. The court within the forest to which all the freeholders owe suit and service. Bac. Ab. Courts of the Forest, 2.

TO SWEAR. To take an oath, judicially administered. Vide *Affirmation; Oath*.

2. To swear also signifies to use such profane language as is forbidden by law. This is generally punished by statutory provisions in the several states.

SWINDLER, criminal law. A cheat; one guilty of defrauding divers persons. 1 Term Rep. 748; 2 H. Blackst. 531; Stark. on Sland. 135.

2. Swindling is usually applied to a transaction, where the guilty party procures the delivery to him, under a pretended contract, of the personal property of another, with the felonious design of appropriating it to his own use. 2 Russel on Crimes, 130; Alison, Princ. Cr. Law of Scotland, 250; 2 Mass. 406.

SYMBOL. A sign; a token; a representation of one thing by another.

2. A symbolical delivery is equivalent,

in many cases, in its legal effects, to actual delivery; as, for example, the delivery of the keys of a warehouse in which goods are deposited, is a delivery sufficient to transfer the property. 1 Atk. 171; 5 John. 335; 2 T. R. 462; 7 T. R. 71; 2 Campb. 243; 1 East, R. 194; 3 Caines, 182; 1 Esp. 598; 3 B. & C. 423.

SYNALLAGMATIC CONTRACT, civil law. A synallagmatic or bilateral contract is one by which each of the contracting parties binds himself to the other; such are the contracts of sale, hiring, &c. Poth. Ob. n. 9. Vide *Contract*.

SYNDIC. A term used in the French law, which answers in one sense to our word *assignee*, when applied to the management of bankrupts' estates; it has also a more extensive meaning; in companies and communities, syndics are they who are chosen to conduct the affairs and attend to the concerns of the body corporate or community; and in that sense the word corresponds to director or manager. Rodman's Notes to Code de Com. p. 351; Civ. Code of Louis. art. 429; Dict. de Jurisp. art. Syndic.

SYNGRAPH. A deed, bond, or other instrument of writing, under the hand and seal of all the parties. It was so called because the parties *wrote together*.

2. Formerly such writings were attested by the subscription and crosses of the witnesses; afterwards, to prevent frauds and concealments, they made deeds of mutual covenant in a script and rescript, or in a *part* and *counterpart*, and in the middle between the two copies they wrote the word *syngraphus* in large letters, which being cut through the parchment, and one being delivered to each party, on being afterwards put together, proved their authenticity.

3. Deeds thus made were denominated *syngraphs* by the canonists, and by the common lawyers *chirographs*. (q. v.) 2 Blackstone's Commentaries, 296.

SYNOD. An ecclesiastical assembly.

T.

TABELLIO. An officer among the Romans, who reduced to writing and into proper form agreements, contracts, wills, and other instruments, and witnessed their execution. The term *tabellio* is derived from the Latin *tabula, seu tabella*, which, in this sense, signified those tables or plates covered with wax which were then used instead of paper. 8 Toull. n. 58; Delaunier, sur Ragneau, mot Notaire.

2. *Tabelliones* differed from notaries in many respects: they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the *tabelliones*, they received the agreements of the parties, which they reduced to short notes; and these contracts were not binding until they were written in *extenso*, which was done by the *tabelliones*. Encyclopédie de M. D'Alembert, mot *Tabellion*; Jac. Law. Dict. *Tabellion*; Merlin, Répertoire, mot *Notaire*, § 1; 3 Giannone's *Istoria di Napoli*, p. 86.

TABEAU OF DISTRIBUTION. In Louisiana this is a list of creditors of an insolvent estate, stating what each is entitled to. 4 N. S. 535.

TABLES. A synopsis in which many particulars are brought together in a general view; as genealogical tables, which are composed of the names of persons belonging to a family. 2 Bouv. Inst. n. 1963-4. Vide *Law of the Twelve Tables*.

TABULA IN NAUFRAGIO, Engl. law. Literally a plank in a wreck. This figure has been used to denote the condition of a third mortgagee, who obtained his mortgage without any knowledge of a second mortgage, and then, being *puisse*, takes the first encumbrance; in this case he shall squeeze out and have satisfaction before the second. 2 Ves. 573; 2 Fonbl. Eq. B. 3, c. 2, § 2; 2 Vent. 337; 1 Ch. Cas. 162; 1 Story, Eq. §§ 414, 415; and *Tacking*.

TACIT. That which, although not expressed, is understood from the nature of the thing, or from the provision of the law; implied.

TACIT LAW. A law which derives its authority from the common consent of the

people, without any legislative enactment. 1 Bouv. Inst. n. 120.

TACK, Scotch law. A contract of location by which the use of land, or any other immovable subject, is set to the lessee or tacksman for a certain yearly rent, either in money, the fruits of the ground, or services. Ersk. Prin. Laws of Scot. B. 2, t. 6, n. 8; 1 Tho. Co. Litt. 209. This word is nearly synonymous with lease.

TACKING, Engl. law. The union of securities given at different times, so as to prevent any intermediate purchasers claiming title to redeem, or otherwise discharge one lien, which is prior, without redeeming or discharging other liens also, which are subsequent to his own title. Jer. Eq. Jur. B. 1, c. 2, § 1, p. 188 to 191; 1 Story, Eq. Jur. § 412.

2. It is an established doctrine in the English chancery that a *bonâ fide* purchaser and without any notice of a defect in his title at the time of the purchase, may lawfully buy any statute, mortgage, or encumbrance, and if he can defend by those at law, his adversary shall have no help in equity to set those encumbrances aside, for equity will not disarm such a purchaser. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has extended to them, and a mortgagee who has advanced his money without notice of any prior encumbrance, may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any encumbrance subsequent to such statute, judgment or recognizance, though prior to his mortgage; that is, he will be allowed to *tack* or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover anything. 2 Fonbl. Eq. 306; 2 Cruise, t. 15, c. 5, s. 27; Powell on Morg. Index, h. t.; 1 Vern. 188; 8 Com. Dig. 953; Madd. Ch. Index, h. t.

3. This doctrine is inconsistent with the laws of the several states, which require the recording of mortgages. Caines' Cas. Er. 112; 1 Hop. C. R. 231; 3 Pick. 50; 2 Pick. 517.

4. The doctrine of *tacking* seems to have been acknowledged in the civil law, Code, 8, 27, 1; but see Dig. 13, 7, 8; and see 7 Toull. 110. But this tacking could not take place to the injury of intermediate encumbrancers. Story on Eq. § 1010, and the authorities cited in the note.

TAIL. An estate tail is an estate of inheritance, to a man or a woman and his or her heirs of his or her body, or heirs of his body of a particular description, or to several persons and the heirs of their bodies, or the heirs generally or specially of the body or bodies of one person, or several bodies. Prest. on Estates, 355; Cruise, tit. 2, c. 1, s. 12.

2. Estates tail, as qualified in their limitation and extent, are of several sorts. They have different denominations, according to the circumstances under which, or the persons to whom they are limited. They are usually divided into estates tail general or special.

3. But they may be more advantageously arranged under the following classes.

4.—1. As to the extent of the degree to which the estates may descend, they are, 1st, general; 2d, qualified.

5.—2. As to the sex of the person who may succeed, they are, 1st. General, as extending to males or females of the body, without exception. 2d. Special, as admitting only one sex to the succession, and excluding the other sex.

6.—3. As to the person by whom or by whose body those heirs are to be begotten, they are either, 1st. General, as to all the heirs of the body of a man or woman. 2d. Special, as to the heirs of the body of a man or woman begotten by a particular person, or to the heirs of the two bodies of a man and woman. On the several species of estates tail noticed under this division, it may be observed, that the same estate may at the same time, be general in one respect; as, for example, to all the heirs of the body in whatever degree they are related; and may be special in another respect, as that these heirs shall be males, &c. Prest. on Estates, 383, 4.

7. The law relating to entails is diversified in the several states. In Indiana and Louisiana they never existed; they are unknown in Illinois and Vermont. In Ohio, Virginia, Tennessee, Kentucky, and New York, estates tail are converted into estates in fee simple by statute; and they may be

barred by a simple conveyance in Pennsylvania. In Alabama, Missouri, Mississippi, New Jersey, Connecticut and North Carolina, they have been modified, and in Georgia, they have been abolished without reservation. Griff. Reg. h. t.

Vide, generally, 8 Vin. Ab. 227 to 272; 10 Id. 257 to 269; 20 Id. 163; Bac. Ab. Estate in tail; 4 Com. Dig. 17; 4 Kent, Com. 12; Bouv. Inst. Index, h. t.; and 1 Bro. Civ. Law, 188, where an attempt is made to prove that an estate resembling an estate tail was not unknown to the Romans.

TAKE. This is a technical expression which signifies to be entitled to; as, a devisee will take under the will. To take also signifies to seize, as to take and carry away.

TAKING, crim. torts. The act of laying hold upon an article, with or without removing the same; a felonious taking is not sufficient without a carrying away, to constitute the crime of larceny. (q. v.) And when the taking has been legal, no subsequent act will make it a crime. 1 Moody, Cr. Cas. 160.

2. The taking is either actual or constructive. The former is when the thief takes, without any pretence of a contract, the property in question.

3. A constructive felonious taking occurs, when, under pretence of a contract, the thief obtains the felonious possession of goods; as, when under the pretence of hiring, he had a felonious intention at the time of the pretended contract, to convert the property to his own use. The court of criminal sessions for the city and county of Philadelphia have decided that in the case of a man who found a quantity of lumber, commonly called a raft, floating on the river Delaware and fastened to the shore, and sold it to another person, at so low a price as to enable the purchaser to remove it, and did no other act himself, but afterwards the purchaser removed it, that this was a taking by the thief, and he was actually convicted and sentenced to two years' imprisonment in the penitentiary. Hill's case, Aug. Sessions, 1838. It cannot be doubted, says Pothier, Contr. de Vente, n. 271, that by selling and delivering a thing which he knows does not belong to him, the party is guilty of theft.

4. When property is left through inadvertence with a person and he conceals it *animo furandi*, he is guilty of a felonious

taking and may be convicted of larceny. 17 Wend. 460.

5. But when the owner parts with the property willingly, under an agreement that he is never to receive the same indentical property, the taking is not felonious; as, when a person delivered to the defendant a sovereign to get it changed, and the defendant never returned either with the sovereign or the change, this was not larceny. 9 C. & P. 741. See 1 Moody, C. C. 179; Id. 185; 1 Hill. R. 94; 2 Bos. & P. 508; 2 East, P. C. 554; 1 Hawk. c. 33, s. 8; 1 Hale, P. C. 507; 3 Inst. 408; and *Carrying away*; *Finder*; *Invito Domino*; *Larceny*; *Robbery*.

6. The wrongful taking of the personal property of another, when in his actual possession, or such taking of the goods of another who has the right of immediate possession, subject the tortfeasor to an action. For example, such wrongful taking will be evidence of a conversion, and an action of trover may be maintained. 2 Saund. 47, h. t.; 3 Wills, 55. Trespass is a concurrent remedy in such a case. 3 Wils. 336. Replevin may be supported by the unlawful taking of a personal chattel. 1 Chit. Pl. 158. Vide Bouv. Inst. Index, h. t.

TALÉ, *comm. law*. A denomination of money in China. In the computation of the ad valorem duty on goods, &c. it is computed at one dollar and forty-eight cents. Act of March 2, 1799, s. 61, 1 St. L. U. S. 626. Vide *Foreign Coins*.

TALE, *Eng. law*. The declaration or count was anciently so called in law pleadings. 3 Bl. Com. 293.

TALES, *Eng. law*. The name of a book kept in the king's bench office, of such jurymen as were of the tales. See *Tales de circumstantibus*.

TALES DE CIRCUMSTANTIBUS, *practice*. Such persons as are standing round. Whenever the panel of the jury is exhausted, the court order that the jurors wanted shall be selected from among the bystanders, which order bears the name of *tales de circumstantibus*. Bac. Ab. Juries, C.

2. The judiciary act of Sept. 24, 1789, 1 Story, L. U. S. 64, provides, § 29, that when from challenges, or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen de talibus circumstantibus sufficient to complete the panel; and when the marshal

or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested persons as the court shall appoint. See 2 Hill, So. Car. R. 381; 2 Penna. R. 412; 4 Yeates, 236; Coxe, 283; 1 Blackf. 63; 2 Harr. & J. 426; 1 Pick. 43, n.

TALLAGE. This word is derived from the French *tailler*, and signifies literally to cut. In England it is used to signify subsidies, taxes, customs, and indeed any imposition whatever by the government for the purpose of raising a revenue. Bac. Ab. Smuggling, &c. B; Fortesc. De Laud. 26; Madd. Exch. oh. 17; 2 Inst. 531, 532; Spelm. Gl. h. v.

TALLIES, *evidence*. The parts of a piece of wood cut in two, which persons use to denote the quantity of goods supplied by one to the other. Poth. Obl. pt. 4, c. 1, art. 2, § 7.

TALZIE, HEIR IN. *Scotch law*. Heirs of talzie or tailzie, are heirs of estates entailed. 1 Bell's Com. 47.

TANGIBLE PROPERTY. That which may be felt or touched; it must necessarily be corporeal, but it may be real or personal. A house and a horse are, each, tangible property. The term is used in contradistinction to property not tangible. By the latter expression, is meant that kind of property which, though in possession as respects the right, and, consequently, not strictly choses in action, yet differs from goods, because they are neither tangible nor visible, though the thing produced from the right be perfectly so. In this class may be mentioned copyrights and patent-rights. 1 Bouv. Inst. n. 467, 478.

TARDE VENIT, *practice*. The name of a return made by the sheriff to a writ, when it came into his hands too late to be executed before the return day.

2. The sheriff is required to show that he has yielded obedience to the writ, or give a good excuse for his omission; and he may say, quod breve adeo tarde venit quod exequi non possunt. It is usual to return the writ with an indorsement of *tarde venit*. Com. Dig. Return, D 1.

TARE, *weights*. An allowance in the purchase and sale of merchandise, for the weight of the box, bag, or cask, or other thing, in which the goods are packed. It is also an allowance made for any defect, waste, or diminution in the weight, quality or quantity of goods. It differs from *tret*. (q. v.)

TARIFF. Customs, duties, toll or tribute payable upon merchandise to the

general government is called tariff; the rate of customs, &c. also bears this name, and the list of articles liable to duties is also called the tariff.

2. For the tariff of duties imposed on the importation of foreign merchandise into the United States.

TAVERN. A place of entertainment; a house kept up for the accommodation of strangers.

2. These are regulated by various local laws. For the liabilities of tavern keepers, vide Story on Bailm. art. 7; 2 Kent, Com. 458; 12 Mod. 487; Jones' Bailm. 94; 1 Bl. Com. 430; 1 Roll. Ab. 3, F; Bac. Ab. Inn, &c.; 1 Bouv. Inst. 1015, et seq.; and the articles *Inn*; *Inn-keeper*.

TAXES. This term in its most extended sense includes all contributions imposed by the government upon individuals for the service of the state, by whatever name they are called or known, whether by the name of tribute, tithe, tallage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.

2. The 8th section of art. 1, Const. U. S. provides, that "congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay," &c. "But all duties, imposts and excises shall be uniform throughout the United States."

3. In the sense above mentioned, taxes are usually divided into two great classes, those which are direct, and those which are indirect. Under the former denomination are included taxes on land or real property, and under the latter taxes on articles of consumption. 5 Wheat. R. 317.

4. Congress have plenary power over every species of taxable property, except exports. But there are two rules prescribed for their government, the rule of uniformity and the rule of apportionment. Three kind of taxes, namely, duties, imposts and excises are to be laid by the first rule; and capitation and other direct taxes, by the second rule. Should there be any other species of taxes, not direct, and not included within the words duties, imposts or customs, they might be laid by the rule of uniformity or not, as congress should think proper and reasonable. *Ib.*

5. The word taxes is, in a more confined sense, sometimes applied in contradistinction to duties, imposts and excises. Vide, generally, Story on the Const. c. 14; 1 Kent, Com. 254; 3 Dall. 171; 1 Tuck. Black. App. 232; 1 Black. Com. 308; The Fede-

ralist, No. 21; 36; Woodf. Landl. and Ten. 197, 254.

TAXING COSTS, practice. The act by which it is ascertained to what costs a party is entitled.

2. It is a rule that the jury must assess the damages and costs separately, so that it may appear to the court that the costs were not considered in the damages; and when the jury give costs in an amount insufficient to answer the costs of the suit, the plaintiff may pray that the officer may tax the costs, and such taxation is inserted in the judgment: this is said to be done *ex assensu* of the plaintiff, because at his prayer. Bac. Ab. Costs, K. The costs are taxed in the first instance, by the prothonotary or clerk of the court. See 2 Wend. R. 244; 1 Cowen, R. 591; 7 Cowen, R. 412; 2 Yerg. R. 245, 310; 6 Yerg. R. 412; Harp. R. 326; 1 Pick. R. 211; 10 Mass. R. 26; 16 Mass. R. 370. A bill of costs having been once submitted to such an officer for taxation, cannot be withdrawn from him and referred to another. 2 Wend. R. 252.

TEAMSTER. One who drives horses in a wagon for the purpose of carrying goods for hire; he is liable as a common carrier. Story, Bailm. § 496.

TECHNICAL. That which properly belongs to an art.

2. In the construction of contracts, it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into, or to which it relates, unless they have manifestly been understood in another sense by the parties. 2 B. & P. 164; 6 T. R. 320; 3 Stark. Ev. 1036, and the article *Construction*.

3. Words which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious and natural meaning. 6 Watts & Serg. 114.

4. The law, like other professions, has a technical language. "When a mechanic speaks to me of the instruments and operations of his trade," says Mr. Wynne, Eunom. Dial. 2, s. 5, "I shall be as unlikely to comprehend him, as he would me in the language of my profession, though we both of us spoke English all the while. Is it wonderful then, if in systems of law, and especially among the hasty recruits of commentators, you meet (to use Lord Coke's expression) with a whole army of words that

cannot defend themselves in a grammatical war? Technical language, in all cases, is formed from the most intimate knowledge of any art. One word stands for a great many, as it is always to be resolved into many ideas by definitions. It is, therefore, unintelligible, because it is concise, and it is useful for the same reason." Vide *Language*.

TEINDS, Scotch Law. That liquid proportion of the rents or goods of the people, which is due to churchmen for performing divine service, or exercising the other spiritual functions proper to their several offices. Ersk. Pr. L. Scot. B. 2, t. 10, s. 2. See *Tithes*.

TELLER. An officer in a bank or other institution. He is said to take that name from *tallier*, or one who kept a tally, because it is his duty to keep the accounts between the bank or other institution and its customers, or to make their accounts tally. In another sense teller signifies a person appointed to receive votes. In England the name of teller is given to certain officers in the exchequer.

TEMPORARY. That which is to last for a limited time; as, a temporary statute, or one which is limited in its operation for a particular period of time after its enactment; the opposite of perpetual.

TENANCY or TENANTCY. The state or condition of a tenant; the estate held by a tenant, as a tenant at will, a tenancy for years.

TENANT, estates. One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. See 5 Mann. & Gr. 54; S. C. 44 Eng. C. L. Rep. 39; 5 Mann. & Gr. 112; Bouv. Inst. Index, h. t.

2. Tenants may be considered with regard to the estate to which they are entitled. There are tenants in fee; tenants by the curtesy; tenants in dower; tenants in tail after possibility of issue extinct; tenants for life; tenants for years; tenants from year to year; tenants at will; and tenants at sufferance. When considered with regard to their number, tenants are in severalty; tenants in common; and joint tenants. There is also a kind of tenant, called tenant to the præcipe. These will be separately examined.

3. Tenant *in fee*, is he who has an estate of inheritance in the land. See *Fee*.

4. Tenant *by the curtesy*, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail; and has by

her issue born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for life, as tenant by the curtesy. Co. Litt. 29, a; 2 Lilly's Reg. 556; 2 Bl. Com. 126. See *Curtsey*.

5. Tenant *in dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of the lands and tenements of which he was seised at any time during the coverture, to hold to herself during the term of her natural life. 2 Bl. Com. 129; Com. Dig. Dower, A 1. See *Dower*.

6. Tenant *in tail after possibility of issue extinct*, is where one is tenant in special tail, and a person from whose body the issue was to spring, dies without issue; or having issue, becomes extinct; in these cases the survivor becomes tenant in tail after possibility of issue extinct. 2 Bl. Com. 124; and vide *Estate tail after possibility of issue extinct*.

7. Tenant *for life*, is he to whom lands or tenements are granted, or to which he derives by operation of law a title for the term of his own life, or for that of any other person, or for more lives than one.

8. He is called tenant for life, except when he holds the estate by the life of another, when he is called tenant *per autre vie*. 2 Bl. Com. 84; Com. Dig. Estates, E 1; Bac. Ab. Estates, B. See *Estate for life*; 2 Lilly's Reg. 557.

9. Tenant *for years*, is he to whom another has let lands, tenements and hereditaments for a term of certain years, or for a lesser definite period of time, and the lessee enters thereon. 2 Bl. Com. 140; Com. Dig. Estates by grant, G.

10. A tenant for years has incident to, and inseparable from his estate, unless by special agreement, the same estovers to which a tenant for life is entitled. See *Estate for life*. With regard to the crops or emblements, the tenant for years is not, in general, entitled to them after the expiration of his term. 2 Bl. Com. 144. But in Pennsylvania, the tenant is entitled to the way-going crop. 2 Binn. 487; 5 Binn. 285, 289; 2 S. & R. 14. See 5 B. & A. 768; this Dict. *Distress*; *Estate for years*; *Lease*; *Lessee*; *Notice to quit*; *Underlease*.

11. Tenant *from year to year*, is he to whom another has let lands or tenements, without any certain or determinate estate; especially if an annual rent be reserved

Com. Dig. Estates, H 1. And when a person is let into possession as a tenant, without any agreement as to time, the inference now is, that he is a tenant from year to year, until the contrary be proved; but, of course, such presumption may be rebutted. 3 Burr. 1609; 1 T. R. 163; 3 T. R. 16; 5 T. R. 471; 8 T. R. 3; 3 East, 451. The difference between a tenant from year to year, and a tenant for years, is rather a distinction in words than in substance. Woodf. L. & J. 163.

12. Tenant *at will*, is when lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which the lessee is in possession. In this case the lessee is called tenant at will.

13. Every lease at will must be at the will of both parties. Co. Lit. 55; 2 Lilly's Reg. 555; 2 Bl. Com. 145. See Com. Dig. Estates, H 1; 12 Mass. 325; 1 Johns. Cas. 33; 2 Caines' C. Err. 314; 2 Caines' R. 169; 17 Mass. R. 282; 9 Johns. R. 331; 13 Johns. R. 235. Such a tenant may be ejected by the landlord at any time. 1 Watts & Serg. 90.

14. Tenant *at sufferance*, is he who comes into possession by a lawful demise, and after his term is ended, continues the possession wrongfully, and holds over. Co. Lit. 57, b; 2 Leo. 46; 3 Leo. 153. See 1 Johns. Cas. 123; 5 Johns. R. 128; 4 Johns. R. 150; Id. 312.

15. Tenant *in severalty*, is he who holds land and tenements in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. 2 Bl. Com. 179.

16. Tenants *in common*, are such as hold by several and distinct titles, but by unity of possession. 2 Bl. Com. 191. See *Estate in common*; 7 Cruise, Dig. Ind. tit. Tenancy in Common; Bac. Abr. Joint-Tenants and Tenants in Common; Com. Dig. Abatement, E 10, F 6; Chancery, 3 V 4; Devise, N 8; Estates, K 8, K 2; Supp. to Ves. jr. vol. 1, 272, 315; 1 Vern. R. 353; Arch. Civ. Pl. 53, 73.

17. Tenants in common may have title as such to real or personal property; they may be tenants of a house, land, a horse, a ship, and the like.

18. Tenants in common are bound to account to each other; but they are bound to account only for the value of the property as it was when they entered, and not for any improvement or labor they put upon

it, at their separate expense. 1 McMull. R. 298. Vide *Estates in common*; and 4 Kent, Com. 363.

19. *Joint tenants*, are such as hold lands or tenements by joint tenancy. See *Estate in joint tenancy*; 7 Cruise, Dig. Ind. tit. Joint Tenancy; Bac. Abr. Joint Tenants and Tenants in Common; Com. Dig. Estates, K 1; Chancery, 3 V 1; Devise, N 7, N 8; 2 Saund. Ind. Joint Tenants; Preston on Estates; 2 Bl. Com. 179.

20. Tenants *to the præcipe*, is he against whom the writ of præcipe is brought, in suing out a common recovery, and must be the tenant or seised of the freehold. 2 Bl. Com. 362.

TENANT OF THE DEMESNE, *Eng. law*. One who is tenant of a mesne lord; as where A is tenant of B, and C of A; B is the lord, A the mesne lord, and C tenant of the demesne. Ham. N. P. 392, 393.

TENANT BY THE MANNER. One who has a less estate than a fee in land, which remains in the reversioner. He is so called because in avowries and other pleadings, it is specially shown in what manner he is tenant of the land, in contradistinction to the *veray tenant*, who is called simply, tenant. Hamm. N. P. 393. See *Veray*.

TENANT PARAVAIL, *English law*. The tenant of a tenant; and is so called because he has the avails or profits of the land. Ham. N. P. 392, 393.

TENANT RIGHT, *Eng. law*. In leases from the crown, corporations or the church, it is usual to grant a further term to the old tenants in preference to strangers, and, as this expectation is seldom disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term; and this interest is called the *tenant right*. Bac. Ab. Leases and Terms for years, U.

TENDER, *contracts, pleadings*. A tender is an offer to do or perform an act which the party offering is bound to perform to the party to whom the offer is made.

2. A tender may be of money or of specific articles; these will be separately considered. § 1. Of the tender of *money*. To make a valid tender the following requisites are necessary:

1. It must be made by a person capable of paying: for if it be made by a stranger without the consent of the debtor, it will be insufficient. Cro. Eliz. 48, 132; 2 M. & S. 86; Co. Lit. 206.

3.—2. It must be made to the creditor

having capacity to receive it, or to his authorized agent. 1 Camp. 477; Dougl. 632; 5 Taunt. 307; S. C. 1 Marsh. 55; 6 Esp. 95; 3 T. R. 683; 14 Serg. & Rawle, 307; 1 Nev. & M. 398; S. C. 28 E. C. L. R. 324; 4 B. & C. 29; S. C. 10 E. C. L. R. 272; 3 C. & P. 453; S. C. 14 E. C. L. R. 386; 1 M. & W. 310; M. & M. 238; 1 Esp. R. 349; 1 C. & P. 365.

4.—3. The whole sum due must be offered, in the lawful coin of the United States, or foreign coin made current by law; 2 N. & M. 519; and the offer must be unqualified by any circumstance whatever. 2 T. R. 305; 1 Campb. 131; 3 Campb. 70; 6 Taunt. 336; 3 Esp. C. 91; Stark. Ev. pt. 4, page 1392, n. g; 4 Campb. 156; 2 Campb. 21; 1 M. & W. 310. But a tender in bank notes, if not objected to on that account, will be good. 3 T. R. 554; 2 B. & P. 526; 1 Leigh's N. P. c. 1, s. 20; 9 Pick. 539; see 2 Caines, 116; 13 Mass. 235; 4 N. H. Rep. 296; 10 Wheat. 333. But in such case, the amount tendered must be what is due exactly, for a tender of a five dollar note, demanding change, would not be a good tender of four dollars. 3 Campb. R. 70; 6 Taunt. R. 336; 2 Esp. R. 710; 2 D. & R. 305; S. C. 16 E. C. L. R. 87. And a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back demanding a larger sum, without objecting to the nature of the tender. 8 D. P. C. 442. When stock is to be tendered, everything must be done by the debtor to enable him to transfer it, but it is not absolutely requisite that it should be transferred. Str. 504, 533, 579.

5.—4. If a term had been stipulated in favor of a creditor, it must be expired; the offer should be made at the time agreed upon for the performance of the contract; if made afterwards, it only goes in mitigation of damages, provided it be made before suit brought. 7 Taunt. 487; 8 East, R. 168; 5 Taunt. 240; 1 Saund. 33 a, note 2. The tender ought to be made before day-light is entirely gone. 7 Greenl. 31.

6.—5. The condition on which the debt was contracted must be fulfilled.

7.—6. The tender must be made at the place agreed upon for the payment, or, if there be no place appointed for that purpose, then to the creditor or his authorized agent. 8 John. 474; Lit. Sel. Cas. 132; Bac. Ab. h. t. c.

8. When a tender has been properly

made, it is a complete defence to the action; but the benefit of a tender is lost, if the creditor afterwards demand the thing due from the debtor, and the latter refuse to pay it. Kirby, 293.

9.—§ 2. Of the tender of *specific articles*. It is a rule that specific articles may be tendered at some particular place, and not, like money, to the person of the creditor wherever found. When no place is expressly mentioned in the contract, the place of delivery is to be ascertained by the intent of the parties, to be collected from the nature of the case and its circumstances. If, for example, the contract is for delivery of goods from the seller to the buyer on demand, the former being the manufacturer of the goods or a dealer in them, no place being particularly named, the manufactory or store of the seller will be considered as the place intended, and a tender there will be sufficient. When the specific articles are at another place at the time of sale, that will be the place of delivery. 2 Greenl. Ev. § 609; 4 Wend. 377; 2 Applet. 325.

10. When the goods are cumbrous, and the place of delivery is not designated, nor to be inferred from the circumstances, it is presumed that it was intended that they should be delivered at any place which the creditor might reasonably appoint; if the creditor refuses, or names an unreasonable place, the debtor may select a proper place, and having given notice to the creditor, deliver the goods there. 2 Kent, Comm. 507; 1 Greenl. 120; Chip. on Contr. 51; 13 Wend. 95; 2 Greenl. Ev. § 610.

Vide, generally, 20 Vin. Ab. 177; Bac. Ab. h. t.; 1 Sell. 314; Com. Dig. Action upon the case upon Assumpsit, H 8—Condition, L 4—Pleader, 2 G 2—2 W, 28, 49—3 K 23—3 M 36; Chipm. on Contr. 31, 74; Ayl. Pand. B. 4, t. 29; 7 Greenl. 31; Bouv. Inst. Index, h. t.

TENEMENT, *estates*. In its most extensive signification tenement comprehends every thing which may be *holden*, provided it be of a *permanent* nature; and not only lands and inheritances which are holden, but also rents and profits *a prendre* of which a man has any frank tenement, and of which he may be seized *ut de libero tenemento*, are included under this term. Co. Litt. 6 a; 1 Tho. Co. Litt. 219; Perk. s. 114; 2 Bl. Com. 17. But the word *tenements* simply, without other circumstances, has never been construed to pass a fee. 10 Wheat. 204. In its more confined and vulgar acceptation,

it means a house or building. *Ibid.* and 1 Prest. on Est. 8. Vide 4 Bing. 298; S. C. 11 Eng. C. L. Rep. 207; 1 T. R. 358; 3 T. R. 772; 3 East, R. 113; 5 East, R. 239; Burn's Just. Poor, 525 to 541; 1 B. & Adolph. 161; S. C. 20 Engl. C. L. Rep. 368; Com. Dig. Grant, E 2; Trespass, A 2; Wood's Inst. 120; Babington on Auctions, 211, 212.

TENENDAS, *Scotch law*. The name of a clause in charters of heritable rights which derives its name from its first words *tenendas predictas terras*, and expresses the particular tenure by which the lands are to be holden. Erak. Prim. B. 2, t. 3, n. 10.

TENENDUM, *conveyancing*. This is a Latin word, which signifies *to hold*.

2. It was formerly that part of a deed which was used to express the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use even in England, and is therefore joined to the *habendum* in this manner, "to have and to hold." The words "to hold" have now no meaning in our deeds. 2 Bl. Com. 298. Vide *Habendum*.

TENERI, *contracts*. That part of a bond where the obligor declares himself to be held and firmly bound to the obligee, his heirs, executors, administrators and assigns, is called the *teneri*. 3 Call, 850.

TENNESSEE. The name of one of the new states of the United States of America. This state was admitted into the Union by virtue of the "act for the admission of the state of Tennessee into the Union," approved June 1, 1796, 1 Story's L. U. S. 450, which recites and enacts as follows:

2. Whereas, by the acceptance of the deed of cession of the state of North Carolina, congress are bound to lay out, into one or more states, the territory thereby ceded to the United States:

3.—§ 1. *Be it enacted, &c.*, That the whole of the territory ceded to the United States by the state of North Carolina, shall be one state, and the same is hereby declared to be one of the United States of America, on an equal footing with the original states in all respects whatever, by the name and title of the state of Tennessee. That, until the next general census, the said state of Tennessee shall be entitled to one representative in the house of representatives of the United States; and, in all other respects, as far as they may be applicable,

the laws of the United States shall extend to, and have force in, the state of Tennessee, in the same manner as if that state had originally been one of the United States.

4. The constitution was adopted on the sixth day of February, 1796; and amended by a convention which sat at Nashville, on the 30th day of August, 1834. The powers of the government are divided into three distinct departments; the legislative, executive, and judicial. Art. 2, 1.

5.—1st. The legislative authority of the state is vested in a general assembly, which consists of a senate and house of representatives, both dependent on the people.

6.—1. The senate will be considered with reference to the qualifications of the electors; the qualifications of the members, the number of members; the length of time for which they are elected; and, the time of their election. 1. Every free white man of the age of twenty-one years, being a citizen of the United States, and a citizen of the county wherein he may offer his vote, six months next preceding the day of his election, shall be entitled to vote for members of the general assembly, and other civil officers, for the county and district in which he resides; provided, that no person shall be disqualified from voting on account of color, who is now, by the laws of this state, a competent witness in a court of justice against a white man. Art. 4, sect.

1. 2. No person shall be a senator, unless he be a citizen of the United States, of the age of thirty years, and shall have resided three years in this state, and one year in the county or district, immediately preceding the election. Art. 2, s. 10. 3. The number of senators shall not exceed one-third of the number of representatives. Art. 2, s. 6. 4. Senators shall hold their office for the term of two years. Art. 2, s. 7. 5. Their election takes place on the first Thursday of August, 1835, and every second year thereafter. Art. 2, s. 7.

7.—2. The house of representatives will be considered in the same order which has been observed in considering the senate. 1. The qualifications of the electors of representatives are the same as those of senators. 2. To be elected a representative, the candidate must be a citizen of the United States, of the age of twenty-one years, and must have been a citizen of the state for three years, and a resident of the county he represents one year immediately

preceding the election. Art. 2, s. 9. 3. The number of representatives shall not exceed seventy-five, until the population of the state shall exceed one million and a half; and shall never thereafter exceed ninety-nine. Art. 2, s. 5. 4. They are elected for two years. Art. 2, s. 7. 5. The election is to be at the same time as that of senators. Art. 2, s. 7.

8.—2d. The *supreme executive power* of this state is vested in a governor. Art. 3, s. 2. 1. He is chosen by the electors of the members of the general assembly. Art. 3, s. 2. 2. He shall be at least thirty years of age, shall be a citizen of the United States, and shall have been a citizen of this state seven years next before his election. Id. sect. 3. He shall hold his office for two years, and until his successor shall be elected and qualified. He shall not be eligible more than six years in any term of eight. Id. sect. 4. 3. He shall be elected by the electors of the members of the general assembly, at the times and places where they respectively vote for the members thereof. Id. s. 2. 4. He shall be commander-in-chief of the army and navy of the state, and of the militia, except when they are called into the service of the United States; shall have the power to grant reprieves and pardons, except in cases of impeachment; may convene the legislature on extraordinary occasions, by proclamation; take care that the laws be faithfully executed; from time to time give to the general assembly information of the state of the government, and recommend to their consideration such measures as he shall deem expedient; may require information in writing from the officers in the executive department, upon any subject relating to the duties of their respective offices. Id. s. 5 to 11. 5. He shall, at stated times, receive a compensation for his services, which shall not be increased nor diminished during the period for which he shall have been elected. Id. s. 7. 6. In case of the removal of the governor from office, or of his death or resignation, the duties of the office shall devolve on the speaker of the senate; and in case of a vacancy in the office of the latter, on the speaker of the house of representatives. Id. s. 12.

9.—3d. The *judicial power* of the state is vested, by the sixth article of the constitution, in one supreme court; in such inferior courts as the legislature shall, from time to time, ordain and establish, and the

judges thereof; and in justices of the peace. The legislature may also vest such jurisdiction as may be deemed necessary in corporation courts.

10.—1. The supreme court shall be composed of three judges; one of whom shall reside in each of the grand divisions of the state. The judges shall be thirty-five years of age, and shall be elected for the term of twelve years. The jurisdiction of the supreme court shall be appellate only, under such restrictions and regulations as may, from time to time, be prescribed by law: but it may possess such other jurisdiction as is now conferred by law on the present supreme court. The concurrence of two of the judges shall be necessary to a decision. Said courts shall be held at one place, and at one place only, in each of the three grand divisions of the state.

11.—2. The judges of such inferior courts as the legislature may establish, shall be thirty-five years of age, and shall be elected for eight years. The jurisdiction of such inferior courts shall be regulated by law. The judges shall not charge juries with regard to matters of fact, but may state the testimony and declare the law. They shall have power in all civil cases to issue writs of *certiorari* to remove any cause or transcript thereof, from any inferior jurisdiction, into said court, on sufficient cause, supported by oath or affirmation.

12.—3. Judges of the courts of law and equity are appointed by a joint vote of both houses of the general assembly; but courts may be established to be holden by justices of the peace.

13.—4. The judges of the supreme court and inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased nor diminished, during the time for which they are elected. They shall not be allowed any fees or perquisites of office, nor hold any other office of trust or profit under this state or the United States.

TENET. Which he holds. There are two ways of stating the tenure in an action of waste. The averment is either in the *tenet* and the *tenuit*; it has a reference to the time of the waste done, and not to the time of bringing the action.

2. When the averment is in the *tenet* the plaintiff on obtaining a verdict will recover the place wasted, namely, that part of the premises in which the waste was

exclusively done, if it were done in a part only, together with treble damages. But when the averment is in the *tenuit*, the tenancy being at an end, he will have judgment for his damages only. 2 Greenl. Ev. § 652.

TENOR, pleading. This word, applied to an instrument in pleading, signifies an exact copy; it differs from purport. (q. v.) 2 Phil. Ev. 99; 2 Russ. on Cr. 365; 1 Chit. Cr. Law, 235; 1 Mass. 203; 1 East, R. 180, and the cases cited in the notes. In chancery practice, by tenor is understood a certified copy of records of other courts removed into chancery by certiorari. Gresl. Ev. 309.

TENUIT. Which he held. When the tenancy is ended and the tenant is sued in an action of waste, the averment of tenure is in the *tenuit*. For a distinction between the averment in the *tenet* and *tenuit*, see 2 Greenl. Ev. § 652, and *Tenet*.

TENURE, estates. The manner in which lands or tenements are holden.

2. According to the English law, all lands are held mediately or immediately from the king, as lord paramount and supreme proprietor of all the lands in the kingdom. Co. Litt. 1 b, 65 a; 2 Bl. Com. 105.

3. The idea of tenure pervades, to a considerable degree, the law of real property in the several states; the title to land is essentially allodial, and every tenant in fee simple has an absolute and perfect title, yet in technical language, his estate is called an estate in fee simple, and the tenure free and common socage. 3 Kent, Com. 289, 290. In the states formed out of the North Western Territory, it seems that the doctrine of tenures is not in force, and that real estate is owned by an absolute and allodial title. This is owing to the wise provisions on this subject contained in the celebrated ordinance of 1787. Am. Jur. No. 21, p. 94, 5. In New York, 1 Rev. St. 718; Pennsylvania, 5 Rawle, R. 112; Connecticut, 1 Rev. L. 348; and Michigan, Mich. L. 393, feudal tenures have been abolished, and lands are held by allodial titles. South Carolina has adopted the statute, 12 C. II., c. 24, which established in England the tenure of free and common socage. 1 Brev. Dig. 136. Vide Wright on Tenures; Bro. h. t.; Treatises of Feuds and Tenures by Knight's service; 20 Vin. Ab. 201; Com. Dig. h. t.; Bac. Ab. h. t.; Thom. Co. Litt. Index, h. t.; Sulliv. Lect. Index, h. t.

TENSE. A term used in grammar to denote the distinction of time.

2. The acts of a court of justice ought to be in the present tense; as, "*præceptum est*," not "*præceptum fuit*;" but the acts of the party may be in the preterperfect tense, as "*venit et protulit hic in curiâ quandum querelam suam*;" and the continuances are in the preterperfect tense; as, "*venerunt*," not "*veniunt*." 1 Mod. 81.

3. The contract of marriage should be made in language in the present tense. 6 Binn. Rep. 405. Vide 1 Saund. 393, n. 1.

TERCE, law of Scotland. A life-rent competent by law to widows who have not accepted of special provisions in the third part of the heritable subjects in which the husband died infest.

2. The *terce* takes place only where the marriage has subsisted for a year and day, or where a child has been born alive of it. No *terce* is due out of lands in which the husband was not infest, unless in case of a fraudulent omission. Cr. 423, § 28; St. 2, 6, 16. The *terce* is not limited to lands, but extends to teinds, and to servitudes and other burdens affecting lands. Ersk. Pr. L. Scot. B. 2, t. 9, s. 26, 27; Burge on the Confl. of Laws, 429 to 435.

TERM, construction. Word; expression; speech.

2. Terms or words are characters by which we announce our sentiments, and make known to others things with which we are acquainted. These must be properly construed or interpreted in order to understand the parties using them. Vide *Construction*; *Interpretation*; *Word*.

TERM, contracts. This word is used in the civil law to denote the space of time granted to the debtor for discharging his obligation; there are express terms resulting from the positive stipulations of the agreement; as, where one undertakes to pay a certain sum on a certain day; and also terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder engage to construct a house for me, I must allow a reasonable time for fulfilling his engagement.

2. A term is either of right or of grace; when it makes part of the agreement and is expressly or tacitly included in it, it is of right; when it is not part of the agreement, it is of grace; as if it is not afterwards granted by the judge at the requisition of the debtor.

Poth. on Oblig. P. 2, c. 3, art. 3; 1 Bouv. Inst. n. 719 et seq.

TERM, estates. The limitation of an estate, as a term for years, for life, and the like. The word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire during the continuance of the time, as by surrender, forfeiture and the like. 2 Bl. Com. 145; 8 Pick. R. 339.

TERM, practice. The space of time during which a court holds a session; sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

2. The whole term is considered as but one day, so that the judges may at any time during the term, revise their judgments. In the computation of the term all adjournments are to be included. 9 Watts, R. 200. Courts are presumed to know judicially when their terms are required to be held by public law. 4 Dev. R. 427. See, generally, Peck, R. 82; 6 Yerg. R. 395; 7 Yerg. R. 365; 6 Rand. R. 704; 2 Cowen, R. 445; 1 Cowen, R. 58; 5 Binn. R. 389; 4 S. & R. 507; 5 Mass. R. 195, 435.

TERM ATTENDANT ON THE INHERITANCE. This phrase is used in the English courts of equity, to signify that when a term has been created for a particular purpose, which is satisfied, and the instrument by which it is created does not provide for a cesser of the term, on the happening of the event, the benefit in it becomes subject to the rules of equity, and must be moulded and disposed of according to the equitable interests of all persons having claims upon the inheritance; and, when the purposes of the trust are satisfied, the ownership of the term belongs in equity, to the owner of the inheritance, whether declared by the original conveyance to attend it or not.

2. Terms attendant on the inheritance are but little known in the United States. 1 Hill. Ab. 243.

TERM PROBATORY. A probatory term is the time during which evidence may be taken in a cause. Vide *Probatory term*.

TERM FOR YEARS. An estate for years, (q. v.) and the time during which such estate is to be held, are each called a term; hence the term may expire before the time, as by a surrender. Co. Litt. 45. If, for example, a conveyance be made to Peter for three years, and after the expiration of the said *term* to Paul for six, and

Peter surrenders or forfeits his term after one year, Paul's estate takes effect immediately; if, on the contrary, the language had been after the expiration of the said time, or of the said three years, the result would have been different, and Paul's estate would not have taken effect till the end of such time, notwithstanding the forfeiture or surrender.

2. Whatever be its duration, a term for years is less than an estate for life. If, therefore, the same person have a term for years and an estate for life immediately succeeding it, the term is merged; but if the order of the estates be reversed, that is, if the greater precede the less, there is no merger. Co. Litt. 54 b; Vin. Ab. Merger, F 4 and G 13; Godb. 51; Biss. on Est. c. 8, s. 1, n. 3, p. 186. Vide *Estate for years; Leases*.

TERMINUM. In the civil law, says Spelman, this word signifies a day set to the defendant, and, in that sense, Bracton, Glanville and some others sometimes use it. Reliquiæ Spelmanianæ, p. 71; Beames' Gl. 27 n.

TERMINUS A QUO. The starting point of a private way is so called. Hamm. N. P. 196.

TERMINUS AD QUEM. The point of termination of a private way is so called.

TERMOR. One who holds lands and tenements for a term of years or life. Litt. sect. 100; 4 Tyr. 561.

TERRE-TENANT, or improperly *tertenant*. One who has the actual possession of land; but in a more technical sense, he who is seised of the land; and, in the latter sense the owner of the land, or the person seised, is the terre-tenant, and not the lessee. 4 W. & S. 256; Bac. Ab. Uses and Trusts, *in pr*. It has been holden that mere occupiers of the land are not terre-tenants. See 16 S. & R. 432; 3 Penna. 229; 2 Saund. 7, n. 4; 2 Bl. Com. 91, 328.

TERRIER, Engl. law. A roll, catalogue or survey of lands, belonging either to a single person or a town, in which are stated the quantity of acres, the names of the tenants, and the like.

2. By the ecclesiastical law an inquiry is directed to be made from time to time, of the temporal rights of the clergyman of every parish, and to be returned into the registry of the bishop: this return is denominated a terrier. 1 Phil. & Am. Ev. 602, 603.

TERRITORIAL COURTS. The courts established in the territories of the United States. Vide *Courts of the United States*.

TERRITORY. A part of a country, separated from the rest, and subject to a particular jurisdiction. The word is derived from *terreo*, and is so called because the magistrate within his jurisdiction has the power of inspiring a salutary fear. Dictum est ab eo quod magistratus intra fines ejus *terrendi* jus habet. Henrion de Pansy, Auth. Judiciare, 98. In speaking of the ecclesiastical jurisdictions, Francis Duaren observes, that the ecclesiastics are said not to have *territory*, nor the power of arrest or removal, and are not unlike the Roman magistrates of whom Gellius says *vocationem habebant non prehensionem*. De Sacris Eccles. Minist. lib. 1, cap. 4. In the sense it is used in the constitution of the United States, it signifies a portion of the country subject to and belonging to the United States, which is not within the boundary of any of them.

2. The constitution of the United States, art. 4, s. 3, provides, that "the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States; and nothing in this constitution shall be construed, so as to preclude the claims of the United States or of any state."

3. Congress possesses the power to erect territorial governments within the territory of the United States; the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions, or by the ordinance of 1787, 3 Story's L. U. S. 2073, under which any part of it has been settled. Story on the Const. § 1322; Rawle on the Const. 237; 1 Kent's Com. 243, 359; 1 Pet. S. C. Rep. 511, 542, 517.

4. The only organized territories of the United States are Oregon, Minnesota, New Mexico and Utah. Vide *Courts of the United States*.

TERROR. That state of the mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger.

2. One of the constituents of the offence of riot is that the acts of the persons engaged in it should be to the terror of the people, as a show of arms, threatening speeches, or turbulent gestures; but it is

not requisite, in order to constitute this crime, that personal violence should be committed. 3 Camp. R. 369; 1 Hawk. P. C. c. 65, s. 5; 4 C. & P. 373; S. C. 19 E. C. L. R. 425; 4 C. & P. 538; S. C. 19 E. C. L. R. 516. Vide Rolle's R. 109; Dalt. Just. c. 186; 19 Vin. Ab. Riots, A 8.

3. To constitute a forcible entry, 1 Russ. Cr. 287, the act must be accompanied with circumstances of violence or terror; and in order to make the crime of robbery, there must be violence or putting in fear, but both these circumstances need not concur. 4 Binn. R. 379. Vide *Riot; Robbery; Putting in fear*.

TERTIUS INTERVENIENS, *civil law*. One, who claiming an interest in the subject or thing in dispute in action between other parties, asserts his right to act with the plaintiff, to be joined with him, and to recover the matter in dispute because he has an interest in it; or to join the defendant, and with him, oppose the interest of the plaintiff, which it is his interest to defeat. He differs from the intervener or he who interpleads in equity. 4 Bouv. Inst. n. 3819, note.

TEST. Something by which to ascertain the truth respecting another thing. 7 Penn. St. Rep. 428; 6 Whart. 284. Vide *Religious Test*.

TESTACY. The state or condition of dying after making a will, which was valid at the time of testator's death.

TESTAMENT, *civil law*. The appointment of an executor or testamentary heir, according to the formalities prescribed by law. Domat, Liv. 1, tit. 1, s. 1.

2. At first there were only two sorts of testaments among the Romans; that called *calatis comitiis*, and another called *in procinctu*. (See below.) In the course of time these two sorts of testament having become obsolete, a third form was introduced, called *per æs et libram*, which was a fictitious sale of the inheritance to the heir apparent. The inconveniences which were experienced from these fictitious sales again changed the form of testaments; and the prætor introduced another which required the seal of seven witnesses. The emperors having increased the solemnity of these testaments, they were called written or solemn testaments, to distinguish them from nuncupative testaments which could be made without writing. Afterwards military testaments were introduced in favor of soldiers actually engaged in military service.

3. Among the civilians there are various kinds of testaments, the principal of which are mentioned below.

4. A civil testament is one made according to all the forms prescribed by law, in contradistinction to a military testament, in making which some of the forms may be dispensed with. Civil testaments are more ancient than military ones; the former were in use during the time of Romulus, the latter were introduced during the time of Coriolanus. See Hist. de la Jurisp. Rom. de M. Terrason, p. 119.

5. A common testament is one which is made jointly by several persons. Such testaments are forbidden in Louisiana, Civ. Code of Lo. art. 1565, and by the laws of France, Code Civ. 968, in the same words, namely, "A testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition."

6. A testament *calatis comitiis*, or made in the comitia, that is, the assembly of the Roman people, was an ancient manner of making wills used in times of peace among the Romans. The comitia met twice a year for this purpose. Those who wished to make such testaments caused to be convoked the assembly of the people by these words, *calatis comitiis*. None could make such wills that were not entitled to be at the assemblies of the people. This form of testament was repealed by the law of the Twelve Tables.

7. Testament *ab irato*, a term used in the civil law. A testament *ab irato*, is one made in a gust of passion or hatred against the presumptive heir, rather than from a desire to benefit the devisee. When the facts of unreasonable anger are proved, the will is annulled as unjust, and as not having been freely made. Vide *Ab irato*.

8. A *mystic* testament is also called a solemn testament, because it requires more formality than a nuncupative testament; it is a form of making a will, which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses.

9. This kind of testament is used in Louisiana. The following are the provisions of the civil code of that state on the subject, namely: the mystic or secret testament, otherwise called the close testament, is made in the following manner: the testator must sign his dispositions, whether he has written them himself, or has caused them to be written by another person. The paper con-

taining those dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it thus closed and sealed to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence; then he shall declare to the notary, in the presence of the witnesses, that that paper contains his testament written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper, or on the sheet that serves as its envelope, and that act shall be signed by the testator, and by the notary and the witnesses. Art. 1577, 5 M. R. 182. All that is above prescribed shall be done without interruption or turning aside to other acts; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary, in that case, to increase the number of witnesses. Art. 1578. Those who know not how, or are not able to write, and those who know not how, or are not able to sign their names, cannot make dispositions in the form of the mystic will. Art. 1579. If any one of the witnesses to the act of superscription knows not how to sign, express mention shall be made thereof. In all cases the act must be signed by at least two witnesses. Art. 1580.

10. *Nuncupative testament*, a term used in the civil law. A nuncupative testament was one made verbally, in the presence of seven witnesses; it was not necessary that it should have been in writing; the proof of it was by parol evidence.

11. In Louisiana, testaments, whether nuncupative or mystic, must be drawn up in writing, either by the testator himself, or by some other person under his dictation. Civil Code of Lo. art. 1568. The custom of making verbal statements, that is to say, resulting from the mere deposition of witnesses, who were present when the testator made known to them his will, without his having committed it, or caused it to be committed to writing, is abrogated. Id. art. 1569. Nuncupative testaments may be made by public act, or by act under private signature. Id. art. 1570. See *Will, nuncupative*.

12. *Olographic testament*, a term used in the civil law. The olographic testament is

that which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated, and signed by the hand of the testator. It is subject to no other form. See Civil Code of Lo. art. 1581.

TESTAMENTARY. Belonging to a testament; as a testamentary gift; a testamentary guardian, or one appointed by will or testament; letters testamentary, or a writing under seal given by an officer lawfully authorized, granting power to one named as executor to execute a last will or testament.

TESTATE. One who dies having made a testament; a testator. This word is used in this sense, in the act of the legislature of Pennsylvania, entitled "An act relative to dower and for other purposes." Sect. 2, 5 Sm. Laws, 257.

TESTATOR. One who has made a testament or will.

2. In general, all persons may be testators. But to this rule there are various exceptions. First, persons who are deprived of understanding cannot make wills; idiots, lunatics and infants, are among this class. Secondly, persons who have understanding, but being under the power of others, cannot freely exercise their will; and this the law presumes to be the case with a married woman, and, therefore, she cannot make a will without the express consent of her husband to the particular will. When a woman makes a will under some general agreement on the part of the husband that she shall make a will, the instrument is not properly a will, but a writing in the nature of a will or testament. Thirdly, persons who are deprived of their free will cannot make a testament; as, a person in duress. 2 Bl. Com. 497; 2 Bouv. Inst. n. 2102, et seq. See *Devisor*; *Duress*; *Feme covert*; *Idiot*; *Influence*; *Parties to Contracts*; *Testament*; *Wife*; *Will*.

TESTATRIX. A woman who makes a will or testament, is so called.

TESTATUM, practice. The name of a writ which is issued by the court of one county, to the sheriff of another county, in the same state, when the defendant cannot be found in the county where the court is located; for example, after a judgment has been obtained, and a *ca. sa.* has been issued, which has been returned *non est inventus*, a *testatum ca. sa.* may be issued to the sheriff of the county where the defendant is. Vide 20 Vin. Ab. 259; 7 Com. Dig. 424.

TESTATUM, conveyancing. That part of a deed which commences with the words "this indenture witnesseth."

TESTE, practice. The teste of a writ is the concluding clause, commencing with the word *witness*, &c.

2. The act of congress of May 8, 1792, 1 Story's Laws U. S. 257, directs that all writs and process issuing from the supreme or a circuit court, shall bear teste of the chief justice of the supreme court, or if that office be vacant, of the associate justice next in precedence; and that all writs or process issuing from a district court, shall bear teste of the judge of such court, or if the said office be vacant, of the clerk thereof. Vide Serg. Const. Law, Index, h. t.; 20 Vin. Ab. 262; Steph. Plead. 25.

TESTES. Witnesses.

TO TESTIFY. To give evidence according to law; the examination of a witness who declares his knowledge of facts.

TESTIMONIAL PROOF, civ. law. This word is used in the same sense as we use *parol evidence*, and in contradistinction to *literal proof*, which is written evidence.

TESTIMONY, evidence. The statement made by a witness under oath or affirmation. Vide *Bill to perpetuate testimony*.

TESTMOIGNE. This is an old and barbarous French word, signifying in the old books, evidence. Com. Dig. h. t.

TEXAS. The name of one of the new states of the United States of America. Texas was an independent republic. By the joint resolution of congress of March 1, 1845, congress gave consent that the republic of Texas might be erected into a new state, to be called the state of Texas, with a republican form of government to be adopted by the people. And by the joint resolution of congress of the 29th day of December, 1845, the state of Texas was admitted into the union on an equal footing with the original states in all respects whatever.

2. The constitution of the state was adopted in convention by the deputies of the people of Texas, at the city of Austin, the 27th day of August, 1845.

3. By the second article, it is provided that the powers of the government of the state of Texas shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another; and no

person, or collection of persons, being of one of those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

4.—§ 1. In considering the *legislative power*, it will be proper to consider, 1. The qualification of voters. 2. The rights of members of the legislature. 3. The senate. 4. The house of representatives.

5.—1. By sections 1st and 2d, it is declared that every free male person who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, or who is, at the time of the adoption of this constitution by the congress of the United States, a citizen of the republic of Texas, and shall have resided in this state one year next preceding an election, and the last six months within the district, county, city, or town in which he offers to vote, (Indians not taxed, Africans, and the descendants of Africans, excepted,) shall be deemed a qualified elector; and should such qualified elector happen to be in any other county situated in the district in which he resides at the time of an election, he shall be permitted to vote for any district officer: *Provided*, That the qualified electors shall be permitted to vote anywhere in the state for state officers: *And provided further*, That no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this constitution.

Sect. 2. All free male persons over the age of twenty-one years, (Indians not taxed, Africans, and descendants of Africans, excepted,) who shall have resided six months in Texas, immediately preceding the acceptance of this constitution by the congress of the United States, shall be deemed qualified electors.

6.—2. The powers of the two houses are defined by the following sections of the third article, namely:

Sec. 12. The house of representatives, when assembled, shall elect a speaker and its other officers; and the senate shall choose a president for the time being, and its other officers. Each house shall judge of the qualifications and elections of its own members; but contested elections shall be determined in such manner as shall be directed by law. Two-thirds of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent

members, in such manner and under such penalties as each house may provide.

Sec. 13. Each house may determine the rules of its own proceedings; punish members for disorderly conduct; and with the consent of two-thirds, expel a member, but not a second time for the same offence.

Sec. 14. Each house shall keep a journal of its own proceedings, and publish the same; and the yeas and nays of the members of either house on any question shall, at the desire of any three members present, be entered on the journals.

Sec. 16. Senators and representatives shall, in all cases, except in treason, felony, or breach of the peace, be privileged from arrest during the session of the legislature; and, in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the legislature is convened.

Sec. 17. Each house may punish, by imprisonment during the session, any person, not a member, for disrespectful or disorderly conduct in its presence, or for obstructing any of its proceedings, provided such imprisonment shall not, at any one time, exceed forty-eight hours.

Sec. 18. The doors of each house shall be kept open.

7.—3. The senate will be considered by taking a view, 1. Of the qualifications of senators. 2. Of the time of their election. 3. Of the length of their service. 4. By whom chosen.

8.—1st. The 11th section of the 3d article of the constitution directs that no person shall be a senator unless he be a citizen of the United States, or at the time of the acceptance of this constitution by the congress of the United States a citizen of the republic of Texas, and shall have been an inhabitant of this state three years next preceding the election; and the last year thereof a resident of the district for which he shall be chosen, and have attained the age of thirty years.

9.—2d. Elections are to be held at such times and places as are now or may hereafter be designated by law. Art. 3, s. 7.

10.—3d. Senators are duly elected for four years.

11.—4th. Senators are chosen by the qualified electors.

12.—1. The *house of representatives* will be considered in the same order which has been observed in speaking of the senate.

13.—1st. By the 6th section of the 3d

article of the constitution, it is declared that no person shall be a representative unless he be a citizen of the United States, or at the time of the adoption of this constitution a citizen of the republic of Texas, and shall have been an inhabitant of this state two years next preceding his election, and the last year thereof a citizen of the county, city, or town for which he shall be chosen, and shall have attained the age of twenty-one years at the time of his election.

14.—2d. Elections are to be held at such times and places as are now or may hereafter be designated by law. Art. 3, s. 7.

15.—3d. The members of the house of representatives hold their office for two years from the day of the general election; and the sessions of the legislature shall be biennial, at such times as shall be prescribed by law. Art. 3, s. 5.

16.—4th. The members of the house of representatives shall be chosen by the qualified electors. Art. 3, s. 5.

17.—§ 2. The *judicial power* is vested in one supreme court, in district courts, and in such inferior courts as the legislature may from time to time ordain and establish; and such jurisdiction may be vested in corporation courts as may be deemed necessary, and be directed by law. Art. 4, s. 1. Each of these will be separately considered.

18.—1. The *supreme court* will be considered by, 1. Taking a view of the appointment of the judges, and the time during which they hold their office. 2. The organization of the court. 3. Its jurisdiction.

19.—1st. The governor shall nominate, and, by and with the advice and consent of two-thirds of the senate, shall appoint the judges of the supreme and district courts, and they shall hold their offices for six years. Art. 4, s. 5.

20.—2d. The supreme court shall consist of a chief justice and two associates, any two of whom shall form a quorum. Art. 4, s. 2. It appoints its own clerk.

21.—3d. The 3d section of the 4th article of the constitution declares that the supreme court shall have appellate jurisdiction only, which shall be coextensive with the limits of the state; but in criminal cases, and in appeals from interlocutory judgments, with such exceptions and under such regulations as the legislature shall make; and the supreme court and judges thereof shall have power to issue the writ of *habeas corpus*, and, under such regulations as may be prescribed by law, may issue writs of *manda-*

mus, and such other writs as shall be necessary to enforce its own jurisdiction; and also compel a judge of the district court to proceed to trial and judgment in a cause; and the supreme court shall hold its sessions once every year, between the months of October and June inclusive, at not more than three places in the state.

22.—2. The *circuit courts* will be considered in the same order observed with regard to the supreme court.

23.—1st. Circuit court judges are appointed in the same way as judges of the supreme court, and hold their office for the same time.

24.—2d. By the 6th section of the 4th article of the constitution, it is directed that the state shall be divided into convenient judicial districts. For each district there shall be appointed a judge, who shall reside in the same, and hold the courts at one place in each county, and at least twice in each year, in such manner as may be prescribed by law. The clerk is elected by the qualified voters of members of the legislature. Art. 4, s. 11.

24.—3d. By the tenth section of the fourth article, jurisdiction is given to the district courts in these words: The district court shall have original jurisdiction of all criminal cases, of all suits in behalf of the state to recover penalties, forfeitures and escheats, and of all cases of divorce, and of all suits, complaints, and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to one hundred dollars, exclusive of interest; and the said courts, or the judges thereof, shall have power to issue all writs necessary to enforce their own jurisdiction, and give them a general superintendence and control over inferior jurisdictions; and in the trial of all criminal cases, the jury trying the same shall find and assess the amount of punishment to be inflicted, or fine imposed; except in capital cases, and where the punishment or fine imposed shall be specifically imposed by law.

25.—§ 3. The supreme executive power is vested in a *governor*. We will consider, 1. His qualifications. 2. By whom elected. 3. Duration of his office. 4. His power and duty.

26.—1st. He must be at least thirty years of age, be a citizen of the United States, or a citizen of Texas, at the time of the adoption of the constitution, and shall have

resided in the same three years next immediately preceding his election. Art. 5, s. 4.

27.—2d. The governor shall be elected by the qualified electors of the state, at the time and places of elections for members of the legislature. Art. 5, s. 2.

28.—3d. He holds his office for two years from the regular time of installation, and until his successor shall have been duly qualified, but shall not be eligible for more than four years in any term of six years. Art. 5, s. 4.

29.—4th. He is commander-in-chief of the army and navy of the state—may require information from officers of the executive department—may convene the legislature, or adjourn the same, when the houses cannot agree—may recommend measures to the legislature—shall cause the laws to be executed. Art. 5.

30. There shall be a *lieutenant governor*, who shall be chosen at every election for governor, by the same persons and in the same manner, continue in office for the same time, and possess the same qualifications. In voting for governor and lieutenant governor, the electors shall distinguish for whom they vote as governor, and for whom as lieutenant governor. The lieutenant governor shall, by virtue of his office, be president of the senate, and have, when in committee of the whole, a right to debate and vote on all questions, and when the senate is equally divided, to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the governor to serve, or of his impeachment or absence from the state, the lieutenant governor shall exercise the power and authority appertaining to the office of governor until another be chosen at the periodical election and be duly qualified, or until the governor impeached, absent, or disabled, shall be acquitted, return, or his disability be removed. Art. 5, s. 12.

THAINLAND, *old Eng. law*. The land which was granted by the Saxon kings to their thains or thanes was so called. Crabb's C. L. 10.

THALER. The name of a coin. The thaler of Prussia and of the northern states of Germany is deemed as money of account, at the custom-house, to be of the value of sixty-nine cents. Act of May 22, 1846.

2. The thaler of Bremen, of seventy-two grotes, is deemed of the value of seventy-one cents. Act of March 3, 1848.

THEFT, *crimes*. This word is sometimes used as synonymous with *larceny*, (q. v.) but

it is not so technical. Ayliffe's Pand. 581, 2 Swift's Dig. 309.

2. In the Scotch law, this is a proper and technical word, and signifies the secret and felonious abstraction of the property of another for sake of lucre, without his consent. Alison, Princ. Cr. Law of Scotl. 250.

THEFT-BOTE. The act of receiving a man's goods from the thief, after they had been stolen by him, with the intent that he shall escape punishment.

2. This is an offence punishable at common law by fine and imprisonment. Hale's P. C. 130. Vide *Compounding a felony*.

THEOCRACY. A species of government which claims to be immediately directed by God.

2. La religion qui, dans l'antiquité, s'associa souvent au despotisme, pour regner par son bras ou à son ombrage, a quelquefois tenté de regner seule. C'est ce qu'elle appelait le regne de Dieu, la *théocratie*. Matter, De l'influence des Mœurs sur les lois, et de l'influence des Lois sur les mœurs, 189. Religion, which in former times, frequently associated itself with despotism, to reign, by its power, or under its shadow, has sometimes attempted to reign alone, and this she has called the reign of God, theocracy.

THIEF, *crimes*. One who has been guilty of larceny or theft.

THING ADJUDGED. That which has been decided by a final judgment, by a tribunal of competent jurisdiction, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for the appealing has elapsed, or because it has been confirmed on the appeal. Vide *res judicata*.

2. The Roman law agrees with ours, for it requires a final judgment or sentence before the decision acquires the force of the thing adjudged. Dig. 42, 1; Code, 7, 52; Extravag. 2, 27.

THINGS. By this word is understood every object, except man, which may become an active subject of right. Code du Canton de Berne, art. 332. In this sense it is opposed, in the language of the law, to the word persons. (q. v.)

2. Things, by the common law, are divided into, 1. Things *real*, which are such as are permanent, fixed and immovable, and which cannot be carried from place to place; they are usually said to consist in lands, tenements and hereditaments. 2 Bl. Com. 16; Co. Litt. 4 a to 6 b. 2. Things *personal*, include all sorts of things movable

which attend a man's person wherever he goes. Things personal include not only things movable, but also something more, the whole of which is generally comprehended under the name of chattels. Chattels are distinguished into two kinds, namely, chattels real and chattels personal. See *Chattel*.

3. It is proper to remark that sometimes it depends upon the destination of certain objects, whether they are to be considered personal or real property. See Dalloz, *Dict. choses*, art 1, § 2. *Destination; Fixtures; Mill*.

4. Formerly, in England, a very low and contemptuous opinion was entertained of personal property, which was regarded as only a transient commodity. But of late years different ideas have been entertained of it; and the courts, both in that country, and in this, now regard a man's personal property in a light, nearly, if not quite equal to his realty; and have adopted a more enlarged and still less technical mode of considering the one than the other, frequently drawn from the rules which they found already established by the Roman law, wherever those rules appear to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times. 2 Bl. Com. 385.

5. By the Roman or civil law, things are either *in patrimonio*, capable of being possessed by single persons exclusive of others; or *extra patrimonium*, incapable of being so possessed.

9. Things *in patrimonio* are divided into corporeal and incorporeal, and the corporeal again into movable and immovable.

7. Corporeal things are those which are visible and tangible, as lands, houses, horses, jewels, and the like; incorporeal are not the object of sensation, but are the creatures of the mind, being rights issuing out of a thing corporeal, or concerning or exercisable within the same; as, an obligation, a hypothecation, a servitude, and, in general, that which consists only in a certain right. Domat, *Lois Civ. Liv. Prel. t. 3, s. 2, § 3*; Poth. *Traité des Choses, in princ.*

8. Corporeal things are either movable or immovable. The movable are those which have been separated from the earth, as felled trees, or gathered fruits, or stones dug out from quarries; or those which are naturally separated, as animals. Immovable things are those parts of the surface of the earth,

in whatever manner they may be distinguished, either as buildings, woods, meadows, fields, or otherwise, and to whomsoever they may belong. Under the name of immovables is included everything which adheres to the surface of the earth, either by its nature, as trees; or which has been erected by the hands of man, as houses and other buildings, although, by being separated, such things may become movables. Domat, *Lois Civ. Liv. Prel. tit. 3, s. 1, § 5* and 6. See *Movables; Immovables*.

9. Things *extra patrimonium* are, 1. Common. 2. Public. 3. *Res universitatis*. 4. *Res nullius*.

10.—1. Things common are, the heavens, light, air, and the sea, which cannot be appropriated by any man or set of men, so as to deprive others from the use of them. Domat, *Lois Civ. Liv. Prel. tit. 3, s. 1, § 1*; § 1 *Inst. de rer. div.*; L. 2, § 1, ff. *de rer. div.*; Ayliffe, *Pand. B. 2, t. 1, in med.*

11.—2. Things public, *res publicæ*, the property of which was in the state, and their use common to all the members of it, as navigable rivers, ways, bridges, harbors, banks, and the right of fishing.

12.—3. *Res universitatis*, or things belonging to cities or bodies politic. Such things belong to the corporation or body politic in respect of the *property* of them; but as to their *use*, they appertain to those persons that are of the corporation or body politic: such may be theatres, market houses, and the like. They differ from things public, inasmuch as the latter belong to a nation. The lands or other revenue belonging to a corporation, do not fall under this class, but are *juris privati*.

13.—4. *Res nullius*, or things which are not the property of any man or number of men, are principally those of divine right; they are of three sorts: things sacred, things religious, and things sanct. Things sacred were those which were duly and publicly consecrated by the priests, as churches, their ornaments, &c. Things religious were those places which became so by burying in them a dead body, even though no consecration of these spots by a priest had taken place. Things sanct were those which by certain reverential awe arising from their nature, sometimes augmented by religious ceremonies, were guarded and defended from the injuries of men; such were the gates and walls of a city, offences against which were capitally punished. 1 Bro. Civ. Law, B. 2, c. 1, p. 172.

See, in general, Domat, Lois Civ. Liv. Prel. tit. 3; 1 Bro. Civ. Law, B. 2, c. 1; Poth. Traité des Choses; Ersk. Pr. Law Scot. B. 2, tit. 1; Toullier, Droit Français, Liv. 2, tit. 1; Ayliffe, Pand. B. 3, t. 1; Inst. 2, 1, 2; Dig. 1, 8; Bouv. Inst. Index, h. t.

THIRD PARTIES. This term includes all persons who are not parties to the contract, agreement or instrument of writing, by which their interest in the thing conveyed is sought to be affected. 1 N. S. 384. See also 2 L. R. 425; 6 M. R. 528.

2. But it is difficult to give a very definite idea of *third persons*, for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons. See Duverg. tome 16, n. 34, 35, 36, et idem, tome 17, n. 190; 2 Bouv. Inst. n. 1385, et seq.

THIRLAGE, Scotch law. The name of a servitude by which lands are astricted or thirled to a particular mill, and the possessors bound to grind their grain there, for the payment of certain multures and sequels as the agreed price of grinding. Ersk. Prin. B. 2, t. 9, n. 18.

THOROUGHFARE. A street or way so open that one can go through and get out of it without returning. It differs from a *cul de sac*, (q. v.) which is open only at one end.

2. Whether a street which is not a thoroughfare is a highway, seems not fully settled. See 1 Campb. 260; 5 Taunt. 137; 11 East, 376, n.; Hawk. P. C. B. 1, c. 76, s. 1; 5 Barn. & Ald. 456. See *Dedication*.

THOUGHT. The operation of the mind. No one can be punished for his mere thoughts however wicked they may be. Human laws cannot reach them, first, because they are unknown; and, secondly, unless made manifest by some action, they are not injurious to any one; but when they manifest themselves, then the act, which is the consequence, may be punished. Dig. 50, 16, 225.

THREAD. A figurative expression used to signify the central line of a stream or water course. Harg. Tracts, 5; 4 Mason's Rep. 397; Holt's R. 490. Vide *Filum aquæ*; *Island*; *Water course*; *River*.

THREAT, crim. law. A menace of destruction or injury to the lives or property of those against whom it is made.

2. Sending threatening letters to persons for the purpose of extorting money, is said to be a misdemeanor at common law. Hawk. B. 1, c. 53, s. 1; 2 Russ. on Cr. 575; 2 Chit. Cr. L. 841; 4 Bl. Com. 126. To be indictable, the threat must be of a nature calculated to overcome a firm and prudent man. The party who makes a threat may be held to bail for his good behaviour. Vide Com. Dig. Battery, D; 13 Vin. Ab. 357.

THREAT, evidence. Menace.

2. When a confession is obtained from a person accused of crime, in consequence of a threat, evidence of such confession cannot be received, because, being obtained by the torture of fear, it comes in so questionable a shape, that no credit ought to be given to it; 1 Leach, 263; this is the general principle, but what amounts to a threat is not so easily defined. It is proper to observe, however, that the threat must be made by a person having authority over the prisoner, or by another in the presence of such authorized person, and not dissented from by the latter. 8 C. & P. 733. Vide *Confession*, and the cases there cited.

THROAT, med. jur. The anterior part of the neck. Dugl. Med. Dict. h. t.; Coop. Dict. h. t.; 2 Good's Study of Med. 302; 1 Chit. Med. Jur. 97, n.

2. The word *throat*, in an indictment which charged the defendant with murder, by "cutting the throat of the deceased," does not mean, and is not to be confined to that part of the neck which is scientifically called the throat, but signifies that which is commonly called the throat. 6 Carr. & Payne, 401; S. C. 25 Engl. Com. Law Rep. 458.

TICK, contracts. Credit; as, if a servant usually buy for the master upon tick, and the servant buy something without the master's order, yet, if the master were trusted by the trader, he is liable. 1 Show. 95; 3 Keb. 625; 10 Mod. 111; 3 Esp. R. 214; 4 Esp. R. 174.

TIDE. The ebb and flow of the sea.

2. Arms of the sea, bays, creeks, coves, or rivers, where the tide ebbs and flows, are public, and all persons may use the same for the purposes of navigation and for fishing, unless restrained by law. To give these rights at common law, the tide must ebb and flow: the flowing of the waters of a lake into a river, and their reflowing, being not the flux and reflux of the tides, but mere occasional and rare instances of a swell

in the lake, and a setting up of the waters into the river, and the subsiding of such swells, is not to be considered an ebb and flow of the tide, so as to constitute a river technically navigable. 20 John. R. 98. See 17 John. R. 195; 2 Conn. R. 481.

3. In Pennsylvania, the common law principle, that the flux and reflux of the tide ascertain the character of the river, has been rejected. 2 Binn. R. 475. Vide *Arm of the sea; Navigable river; Sea shore.*

TIE. When two persons receive an equal number of votes at an election, there is said to be a tie.

2. In that case neither is elected. When the votes are given on any question to be decided by a deliberative assembly, and there is a tie, the question is lost. Vide *Majority.*

TIEL. An old manner of spelling *tel.* Such as nul tiel record, no such record.

TIEMPO INHABIL. A Spanish phrase used in Louisiana, to express *a time when a man is not able to pay his debts.*

2. A man cannot dispose of his property, at such a time, to the prejudice of his creditors. 4 N. S. 292; 3 Mart. Lo. R. 270; 10 Mart. Lo. R. 704.

TIERCE, measures. A liquid measure containing the third part of a pipe, or forty-two gallons.

TIGNI IMMITTENDI, civil law. The name of a servitude; it is the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter, and that the wall of the latter may bear this weight. Dig. 8, 2, 36; Id. 8, 5, 14.

TIMBER TREES. According to Blackstone, oak, ash, elm, and such other trees as are commonly used for building, are considered timber. 2 Comm. 28. But it has been contended, *arguendo*, that to make it timber, the trees must be felled and severed from the stock. 6 Mod. 23; Stark on Slander, 79. Vide 12 Johns. R. 239; 2 Suppl. to Ves. jr.

TIME, contracts, evidence, practice. The measure of duration. It is divided into years, months, days, (q. v.) hours, minutes, and seconds. It is also divided into day and night. (q. v.)

2. Time is frequently of the essence of contracts and crimes, and sometimes it is altogether immaterial.

3. Lapse of time alone is often presumptive evidence of facts which are otherwise

unknown; an uninterrupted enjoyment of certain rights for twenty or twenty-one years, is evidence that the party enjoying them is legally entitled to them; after such a length of time, the law presumes payment of a bond or other specialty. 10 S. & R. 63, 383; 3 S. & R. 493; 6 Munf. R. 532; 2 Cranch, R. 180; 7 Wheat. R. 535; 2 W. C. C. R. 323; 4 John. R. 202; 7 John. R. 556; 5 Conn. 1; 3 Day, 289; 1 McCord, 145; 1 Bay, 482; 7 Wend. 94; 5 Verm. 236.

4. In the computation of time, it is laid down generally, that where the computation is to be made from an act done, the day when such act was done is included. Dougl. 463. But it will be excluded whenever such exclusion will prevent a forfeiture. 4 Greenl. 298. Sed vide 15 Ves. 248; 1 Ball & B. 196. In general, one day is taken inclusively and the other exclusively. 2 Browne; Rep. 18. Vide Chitt. Bl. 140 n. 2; 2 Evans' Poth. 50; 13 Vin. Abr. 52, 499; 15 Vin. Ab. 554; 20 Vin. Ab. 266; Com. Dig. Temps; 1 Rep. Legacy, 518; 2 Suppl. to Ves. jr. 229; Graham's Pract. 185; 1 Fonbl. Equity, 430; Wright, R. 580; 7 John. R. 476; 1 Bailey, R. 89; Coxe, Rep. 363; 1 Marsh. Keny. Rep. 321; 3 Marsh. Keny. Rep. 448; 3 Bibb, R. 330; 6 Munf. R. 394; vide *Computation.*

TIME, pleading. The averment of time is generally necessary in pleading; the rules are different in different actions.

2.—1. In *personal* actions, the pleadings must allege the time; that is, the day, month and year when each traversable fact occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown. The necessity of laying a time extends to traversable facts only; time is generally considered immaterial, and any time may be assigned to a given fact. This option, however, is subject to certain restrictions. 1st. Time should be laid under a videlicet, or the party pleading it will be required to prove it strictly. 2d. The time laid should not be intrinsically impossible, or inconsistent with the fact to which it relates. 3d. There are some instances in which time forms a material point in the merits of the case; and, in these instances, if a traverse be taken, the time laid is of the substance of the issue, and must be strictly proved. With respect to all facts of this description, they must be truly stated, at the peril of a failure for variance; Cowp. 671; and here

a videlicet will give no help. Id. 6 T. R. 463; 5 Taunt. 2; 4 Serg. & Rawle, 576; 7 Serg. & Rawle, 405. Where the time needs not to be truly stated, (as is generally the case,) it is subject to a rule of the same nature with one that applies to venues in transitory matters, namely, that the plea and subsequent pleadings should follow the day alleged in the writ or declaration; and if in these cases no time at all be laid, the omission is aided after verdict or judgment by confession or default, by operation of the statute of jeofails. But where, in the plea or subsequent pleadings, the time happens to be material, it must be alleged, and there the pleader may be allowed to depart from the day in the writ and declaration.

3.—2. In *real* or *mixed* actions, there is no necessity for alleging any particular day in the declaration. 3 Bl. Com. App. No. 1, § 6; Lawes' Pl. App. 212; 3 Chit. Pl. 620–635; Cro. Jac. 311; Yelv. 182 a, note; 2 Chitt. Pl. 396, n. r; Gould, Pl. c. 3, § 99, 100; Steph. Pl. 314; Com. Dig. Plead. C 19.

4.—3. In *criminal* pleadings, it is requisite, generally, to show both the day and the year on which the offence was committed; but the indictment will be good, if the day and year can be collected from the whole statement, though they be not expressly averred. Com. Dig. Indictm. G 2; 5 Serg. & Rawle, 315. Although it be necessary that a day certain should be laid in the indictment, the prosecutor may give evidence of an offence committed on any other day, previous to the finding of the indictment. 5 Serg. & Rawle, 316; Arch. Cr. Pl. 95; 1 Phil. Evid. 203; 9 East, Rep. 157. This rule, however, does not authorize the laying of a day subsequent to the trial. Addis. R. 36. See generally Bouv. Inst. Index, h. t.

TIPPLING HOUSE. A place where spirituous liquors are sold and drunk in violation of law. Sometimes the mere selling is considered as evidence of keeping a tippling house.

TIPSTAFF. An officer appointed by the marshal of the court of king's bench, to attend upon the judges with a kind of a rod or staff tipped with silver.

2. In the United States, the courts sometimes appoint an officer who is known by this name, whose duty it is to wait on the court and serve its process.

TITHES, Eng. law. A right to the tenth part of the produce of lands, the stocks

upon lands, and the personal industry of the inhabitants. These tithes are raised for the support of the clergy.

2. Fortunately, in the United States, the clergy can be supported by the zeal of the people for religion, and there are no tithes. Vide Cruise, Dig. tit. 22; Ayliffe's Parerg. 504.

TITHING, Eng. law. Formerly a district containing ten men with their families. In each tithing there was a tithingman whose duty it was to keep the peace, as a constable now is bound to do. St. Armand, in his Historical Essay on the Legislative Power of England, p. 70, expresses an opinion that the tithing was composed not of ten common families, but of ten families of lords of a manor.

TITLE, estates. A title is defined by Lord Coke to be the means whereby the owner of lands hath the just possession of his property. Co. Lit. 345; 2 Bl. Com. 195. Vide 1 Ohio Rep. 349. This is the definition of title to lands only.

2. There are several stages or degrees requisite to form a complete title to lands and tenements. 1st. The lowest and most imperfect degree of title is the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession; this happens when one man dispossesses another. 2 Bl. Com. 195. 2dly. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself, but in another. This right of possession is of two sorts; an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Idem. 196. 3dly. The mere *right of property*, the *jus proprietatis* without either possession or the right of possession. Id. 197.

3. A title is either good, marketable, doubtful or bad.

4. A *good* title is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

5. A *marketable* title is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser. The ordinary acceptance of the term *marketable title*, would convey but a very imperfect notion of its legal and technical import.

6. To common apprehension, unfettered by the technical and conventional distinc-

tion of lawyers, all titles being either good or bad, the former would be considered marketable, the latter non-marketable. But this is not the way they are regarded in courts of equity, the distinction taken there being, not between a title which is absolutely good or absolutely bad, but between a title, which the court considers to be so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so far as to declare a bad title, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it. 1 Jac. & Walk. R. 568. In short, whatever may be the private opinion of the court, as to the goodness of the title, yet if there be a reasonable doubt either as to a matter of law or fact involved in it, a purchaser will not be compelled to complete his purchase; and such a title, though it may be perfectly secure and unimpeachable as a holding title, is said, in the current language of the day, to be unmarketable. Atkins on Tit. 2.

7. The doctrine of marketable titles is purely equitable and of modern origin. Id. 26. At law every title not bad is marketable. 6 Taunt. R. 263; 5 Taunt. R. 625; S. C. 1 Marsh. R. 258. See Dalzell v. Crawford, 2 Penn. Law Journ. 17.

8. A *doubtful* title is one which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it. 1 Jac. & Walk. R. 568; 9 Cowen, R. 344; vide *Title, Marketable*.

9. At common law, doubtful titles are unknown; there every title must be either good or bad. Atkins on Tit. 17. See Dalzell v. Crawford, 2 Penn. Law Journ. 17.

10. A *bad* title is one which conveys no property to a purchaser of an estate.

11. Title to real estate is acquired by two methods, namely, by descent and by purchase. (See these words.)

12. Title to personal property may accrue in three different ways. 1. By original acquisition. 2. By transfer, by act of law. 3. By transfer, by act of the parties.

13.—§ 1. Title by original acquisition is acquired, 1st. By occupancy. This mode of acquiring title has become almost extinct in civilized governments, and it is permitted to exist only in those few special cases, in which it may be consistent with

the public good. First. Goods taken by capture in war, were, by the common law, adjudged to belong to the captor, but now goods taken from enemies in time of war, vest primarily in the sovereign, and they belong to the individual captors only to the extent and under such regulations, as positive laws may prescribe. Finch's Law, 28, 178; Bro. tit. Property, pl. 18, 38; 1 Wilson, 211; 2 Kent, Com. 290, 95. Secondly. Another instance of acquisition by occupancy, which still exists under certain limitations, is that of goods casually lost by the owner, and unreclaimed, or designedly abandoned by him; and in both these cases they belong to the fortunate finder. 1 Bl. Com. 296. See *Derelict*.

14.—2d. Title by original acquisition is acquired by accession. See *Accession*.

15.—3d. It is acquired by intellectual labor. It consists of literary property, as the construction of maps and charts, the writing of books and papers. The benefits arising from such labor are secured to the owner. 1. By patent-rights for inventions. See *Patents*. 2. By copyrights. See *Copyrights*.

16.—§ 2. The title to personal property is acquired and lost by transfer, by act of law, in various ways. 1. By forfeiture. 2. By succession. 3. By marriage. 4. By judgment. 5. By insolvency. 6. By intestacy.

17.—§ 3. Title is also acquired and lost by transfer by the act of the party. 1. By gift. 2. By contract or sale.

18. In general, possession constitutes the criterion of title of *personal* property, because no other means exist by which a knowledge of the fact to whom it belongs can be attained. A seller of a chattel is not, therefore, required to show the origin of his title, nor, in general, is a purchaser, without notice of the claim of the owner, compellable to make restitution; but, it seems, that a purchaser from a tenant for life of personal chattels, will not be secure against the claims of those entitled in remainder. Cowp. 432; 1 Bro. C. C. 274; 2 T. R. 376; 3 Atk. 44; 3 V. & B. 16.

19. To the rule that possession is the criterion of title of property may be mentioned the case of ships, the title of which can be ascertained by the register. 15 Ves. 60; 17 Ves. 251; 8 Price, R. 256, 277.

20. To convey a title the seller must

himself have a title to the property which is the subject of the transfer. But to this general rule there are exceptions. 1. The lawful coin of the United States will pass the property along with the possession. 2. A negotiable instrument endorsed in blank is transferable by any person holding it, so as by its delivery to give a good title "to any person honestly acquiring it." 3 B. & C. 47; 3 Burr. 1516; 5 T. R. 688; 7 Bing. 284; 7 Taunt. 265, 278; 13 East, 509; Bouv. Inst. Index, h. t.

TITLE, legislation. That part of an act of the legislature by which it is known, and distinguished from other acts; the name of the act.

2. A practice has prevailed of late years to crowd into the same act a mass of heterogeneous matter, so that it is almost impossible to describe, or even to allude to it in the title of the act. This practice has rendered the title of little importance, yet, in some cases, it is material in the construction of an act. 7 East, R. 132, 134; 2 Cranch, 386. See Lord Raym. 77; Hard. 324; Barr. on the Stat. 499, n.

TITLE, persons. Titles are distinctions by which a person is known.

3. The constitution of the United States forbids the grant by the United States or any state of any title of nobility. (q. v.) Titles are bestowed by courtesy on certain officers; the president of the United States sometimes receives the title of *excellency*; judges and members of congress that of *honorable*; and members of the bar and justices of the peace are called *esquires*. Cooper's Justinian, 416; Brackenridge's Law Miscell. Index, h. t.

3. Titles are assumed by foreign princes, and, among their subjects they may exact these marks of honor, but in their intercourse with foreign nations they are not entitled to them as a matter of right. Wheat. Intern. Law, pt. 2, c. 3, § 6.

TITLE, literature. The particular division of a subject, as a law, a book, and the like; for example, Digest, book 1, *title 2*; for the law relating to bills of exchange, see Bacon's Abridgment, *title Merchant*.

TITLE, rights. The name of a newspaper, a book, and the like.

3. The owner of a newspaper, having a particular title, has a right to such title, and an injunction will lie to prevent its use unlawfully by another. 8 Paige, 75. See Pardess. n. 170.

TITLE, pleading, rights. The right of

action which the plaintiff has; the declaration must show the plaintiff's title, and if such title be not shown in that instrument, the defect cannot be cured by any of the future pleadings. Bac. Ab, Pleas, &c. B 1.

TITLE DEEDS. Those deeds which are evidences of the title of the owner of an estate.

2. The person who is entitled to the inheritance has a right to the possession of the title deeds. 1 Carr. & Marsh. 653.

TITLE OF A DECLARATION, pleading. At the top of every declaration the name of the court is usually stated, with the term of which the declaration is filed, and in the margin the venue, namely, the city or county where the cause is intended to be tried is set down. The first two of these compose what is called the title of the declaration. 1 Tidd's Pr. 366.

TO WIT. That is to say; namely; *scilicet*; (q. v.) *videlicet*. (q. v.)

TOFT. A place or piece of ground on which a house formerly stood, which has been destroyed by accident or decay; it also signifies a message.

TOGATI, Rom. civ. law. Under the empire, when the *toga* had ceased to be the usual costume of the Romans, advocates were nevertheless obliged to wear it whenever they pleaded a cause. Hence they were called *togati*. This denomination received an official or legal sense in the imperial constitutions of the fifth and sixth centuries, and the words *togati*, *consortium* (*corpus*, *ordo*, *collegium*), *togatorum*, frequently occur in those acts.

TOKEN, contracts, crimes. A document or sign of the existence of a fact.

2. Tokens are either public or general, or privy tokens. They are true or false. When a token is false and indicates a general intent to defraud, and it is used for that purpose, it will render the offender guilty of the crime of cheating; 12 John. 292; but if it is a mere privy token, as counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable. 9 Wend. Rep. 182; 1 Dall. R. 47; 2 Rep. Const. Cr. 139; 2 Virg. Cas. 65; 4 Hawks, R. 348; 6 Mass. R. 72; 1 Virg. Cas. 150; 12 John. 293; 2 Dev. 199; 1 Rich. R. 244.

TOKEN, commercial law. In England, this name is given to pieces of metal, made in the shape of money, passing among private persons by consent at a certain value.

2 Adolph. P. S. 175; 2 Chit. Com. Law, 182.

TOLERATION. In some countries, where religion is established by law, certain sects who do not agree with the established religion are nevertheless permitted to exist, and this permission is called toleration. Those are permitted and allowed to remain rather as a matter of favor than a matter of right.

2. In the United States, there is no such a thing as toleration, all men have an equal right to worship God according to the dictates of their own consciences. See *Christianity; Conscience; Religious test.*

TOLL, contracts. A sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature. Toll is also the compensation paid to a miller for grinding another person's grain.

2. The rate of taking toll for grinding is regulated by statute in most of the states. See 2 Hill. Ab. ch. 17; 6 Ad. & Ell. N. S. 31; 6 Q. B. 31.

To **TOLL, estates, rights.** To bar, defeat, or take away; as to toll an entry into lands, is to deny or take away the right of entry.

TOLLS. In a general sense, tolls signify any manner of customs, subsidy, presentation, imposition, or sum of money demanded for exporting or importing of any wares or merchandise, to be taken of the buyer. 2 Inst. 58.

TON. Twenty hundred weight, each hundred weight being one hundred and twelve pounds avoirdupois. See act of congress of Aug. 30, 1842, c. 270, s. 20.

TONNAGE, mar. law. The capacity of a ship or vessel.

2. The act of congress of March 2, 1799, s. 64, 1 Story's L. U. S. 630, directs that to ascertain the tonnage of any ship or vessel, the surveyor, &c. shall, if the said ship or vessel be double decked, take the length thereof from the forepart of the main stem, to the afterpart of the stern post, above the upper deck, the breadth thereof, at the broadest part above the mainwales, half of which breadth shall be accounted the depth of such vessel, and then deduct from the length three-fifths of the breadth, multiply the remainder by the breadth and the product of the depth, and shall divide this last product by ninety-five, the quotients whereof shall be deemed the true contents

or tonnage of such ship or vessel. And if such ship or vessel shall be single decked, the said surveyor shall take the length and breadth as above directed, in respect to a double deck ship or vessel, and shall deduct from the length three-fifths of the breadth, and taking the depth from the under-side of the deck plank to the ceiling of the hold, shall multiply and divide as aforesaid, and the quotient shall be deemed the tonnage of such ship or vessel.

3. The duties paid on the tonnage of a ship or vessel are also called *tonnage*.

4. These duties are altogether abolished in relation to American vessels by the act of May 31, 1830, s. 1, 4 Story's Laws U. S. 2216. And by the second section of the same act, all tonnage duties on foreign vessels are abolished, provided the president of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished.

5. The constitution of the United States provides, art. 1, s. 10, n. 2, that no state shall, without the consent of congress, lay any duty on tonnage.

TONTINE, French law. The name of a partnership composed of creditors or recipients of perpetual or life-rents, or annuities, formed on the condition that the rents of those who may die, shall accrue to the survivors, either in whole or in part.

2. This kind of partnership took its name from *Tonti*, an Italian, who first conceived the idea and put it in practice. Merl. Répert. h. t.; Dall. Dict. h. t.; 5 Watts, 351.

TOOK AND CARRIED AWAY, pleadings. In an indictment for simple larceny, the words "feloniously took and carried away" the goods stolen, are indispensable. Bac. Abr. Indictment, G 1; Com. Dig. Indictment, G 6; Cro. C. C. 37; 1 Chit. Cr. Law, *244. Vide *Taking*.

TOOLS. The Massachusetts act of assembly of 1805, c. 100, which provided that "the tools of any debtor necessary for his trade and occupation, should be exempted from execution," was held to designate those implements which are commonly used by the hand of one man, in some manual labor necessary for his subsistence. The apparatus of a printing office, such as typecases, presses, &c. are not therefore included under the term *tools*. 13 Mass. Rep. 82; 10

Pick. 423; 3 Verm. 133; and see 2 Pick. 80; 5 Mass. 313.

2. By the forty-sixth section of the act of March 2, 1789, 1 Story's Laws U. S. 612, the tools or implements of a mechanical trade of persons who arrive in the United States, are free and exempted from duty.

TORT. An injury; a wrong; (q. v.) hence the expression an executor *de son tort*, of his own wrong. Co. Lit. 158.

2. Torts may be committed with force, as trespasses, which may be an injury to the person, such as assault, battery, imprisonment; to the property in possession; or they may be committed without force. Torts of this nature are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion: these injuries may be either by nonfeasance, malfeasance, or misfeasance. 1 Chit. Pl. 133-4. Vide 1 Fonb. Eq. 4; Bouv. Inst. Index, h. t.; and the article *Injury*.

TORTFEASOR. A wrong-doer, one who does wrong; one who commits a trespass or is guilty of a tort.

TORTURE, punishments. A punishment inflicted in some countries on supposed criminals to induce them to confess their crimes, and to reveal their associates.

2. This absurd and tyrannical practice never was in use in the United States; for no man is bound to accuse himself. An attempt to torture a person accused of crime, in order to extort a confession, is an indictable offence. 2 Tyler, 380. Vide *Question*.

TOTAL. Complete; containing the whole; as the total amount of an account is all the items of such account added together; total incapacity, is an absolute and complete incapacity to do a thing. A married woman is totally incapable to make a contract, because, although having intelligence, she has not legal capacity; and an idiot is totally incapable to enter into a contract, because he has no will.

TOTAL LOSS. A technical expression, importing an utter loss of the property for the voyage, and no more. 1 T. R. 187. Vide *Loss*, and 2 Phil. Ev. 54, n.; 16 East, R. 214; Park's Ins. Index, h. t.; Marsh. Ins. 486.

TOTALITY. The whole sum or quantity.

2. In making a tender, it is requisite that the totality of the sum due should be

offered, together with the interest and costs. Vide *Tender*.

TOTIDEM VERBIS. In so many words.

TOTIES QUOTIES. As often as the thing shall happen.

TOUCH AND STAY. These words are frequently introduced in policies of insurance, giving the party insured the right to stop and stay at certain designated points in the course of the voyage. A vessel which has the power to touch and stay at a place in the course of the voyage, must confine herself strictly to the terms of the liberty so given; for any attempt to trade at such a port during such a stay, as by shipping or landing goods, will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade, as well as to touch and stay at such a place. 1 Marsh. Ins. 275; 1 Esp. R. 610; 5 Esp. R. 96.

TOUJOURS ET UNCORE PRIST. Always, and still ready. This is the name of a plea of tender, as where a man is indebted to another, and he tenders the amount due, and afterwards the creditor brings a suit, the defendant may plead the tender, and add that he has always been and is still ready to pay what he owes, which may be done by the formula *toujours et uncore prist*. He must then pay the money into court, and if the issue be found for him, the defendant will be exonerated from costs, and the plaintiff made justly liable for them. 3 Bouv. Inst. n. 2923. Vide *Tout temps prist*.

TOUR D'ECHELLE, French law. Tour d'échelle is a right which the owner of an estate has of placing ladders on his neighbor's property to facilitate the reparation of a party wall, or of buildings which are supported by that wall. It is a species of servitude. Lois des Bât. part 1, c. 3, sect. 2, art. 9, § 1.

2. In another sense by this term, or *échellage*, is understood the space of ground left unoccupied around a building for the purpose of enabling the owner to repair it with convenience; this is not a servitude, but an actual corporeal property. Id. part 1, c. 3, sect. 2, art. 9, § 2.

TOUT TEMPS PRIST, pleading. These old French words signify *always ready*. The name of a plea to an action where the defendant alleges that he has always been ready to perform what is demanded of him; and he adds that he is still ready, *uncore prist*. (q. v.) 3 Bl. Com. 303;

20 Vin. Ab. 306; Com. Dig. Pleader, 2 Y 5.

TOWAGE, contracts. That which is given for towing ships in rivers. Guidon de la Mer, ch. 16; Poth. Des Avaries, n. 147; 2 Chit. Com. Law, 16.

TOWN. This word is used differently in different parts of the United States. In Pennsylvania and some other of the middle states, it signifies a village or a city. In some of the northeastern states it denotes a subdivision of a county, called in other places a township.

TRADE. In its most extensive signification this word includes all sorts of dealings by way of sale or exchange. In a more limited sense it signifies the dealings in a particular business, as the India trade; by trade is also understood the business of a particular mechanic, hence boys are said to be put apprentices to learn a trade, as the trade of a carpenter, shoemaker, and the like. Bac. Ab. Master and Servant, D 1. Trade differs from art. (q. v.)

2. It is the policy of the law to encourage trade, and therefore all contracts which restrain the exercise of a man's talents in trade are detrimental to the commonwealth, and therefore void; though he may bind himself not to exercise a trade in a particular place, for, in this last case, as he may pursue it in another place, the commonwealth has the benefit of it. 8 Mass. 223; 9 Mass. 522. Vide Ware, R. 257, 260; Com. Dig. h. t.; Vin. Ab. h. t.

TRADE MARKS. Signs, writings or tickets put upon manufactured goods, to distinguish them from others.

2. It seems at one time to have been thought that no man acquired a right in a particular mark or stamp. 2 Atk. 484. But it was afterwards considered that for one man to use as his own another's name or mark, would be a fraud for which an action would lie. 3 Dougl. 293; 3 B. & C. 541; 4 B. & Ad. 410. A court of equity will restrain a party from using the marks of another. Eden, Inj. 814; 2 Keene, 213; 3 Mylne & C. 388.

3. The Monthly Law Magazine for December 1840, in an article copied into the American Jurist, vol. 25, p. 279, says, "The principle to be extracted, after an examination of these cases, appear to be the following:

First, that the first producer or vendor of any article gains no right of property in that article so as to prevent others

from manufacturing, producing or vending it.

4. Secondly, that although any other person may manufacture, produce, and sell any such article, yet he must not, in manner, either by using the same or similar marks, wrappers, labels, or devices, or colorable imitations thereof, or otherwise, hold out to the public that he is manufacturing, producing, or selling the identical article, prepared, manufactured, produced, or sold by the other; that is to say, he may not make use of the name or reputation of the other in order to sell his own preparation.

5. Thirdly, the right to use or restrain others from using any mark or name of a firm, is in the nature of goodwill, and therefore goes to the surviving or continuing partner in such firm, and the personal representative of a deceased partner has an interest in it.

6. Fourthly, that courts of equity in these cases only act as auxiliary to the legal right, and to prevent injury, and give a relief by account, when damages at law would be inadequate to the injury received; and they will not interfere by injunction in the first instance, unless a good legal title is shown, and even then they never preclude the parties from trying the right at law, if desired.

7. Fifthly, if the legal title be so doubtful as not to induce the court to grant the injunction, yet it will put the parties in a position to try the legal right at law, notwithstanding the suit.

8. Sixthly, that before the party is entitled to relief in equity, he must truly represent his title, and the mode in which he became possessed of the article for the vending of which he claims protection; it being a clear rule of courts of equity not to extend their protection to persons whose case is not founded on truth."

9. In France the law regulates the rights of merchants and manufacturers as to their trade marks with great minuteness. Dall. Dict. mot Propriété Industrielle.

See, generally, 4 Mann. & Gr. 357; 3 B. & C. 541; 5 D. & R. 292; 2 Keen, 213; and *Deceit*.

TRADER. One who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit. The *quantum* of dealing is immaterial, when an intention to deal generally exists. 3 Stark. 56; 2 C. & P. 135; 1 T. R. 572.

2. Questions as to who is a trader most frequently arise under the bankrupt laws, and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales.

3. To show who is a trader will be best illustrated by a few examples:

A farmer who in addition to his usual business, occasionally buys a horse not calculated for his usual occupation, and sells him again to make a profit, and who in the course of two years had so bought and sold five or six horses, two of which had been sold after he had bought them for the sake of a guinea profit, was held to be a trader. 1 T. R. 537, n.; 1 Price, 20. Another farmer who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again for a profit, was also declared to be a trader. 1 Str. 513. See 7 Taunt. 409; 2 N. R. 78; 11 East, 274.

A butcher who kills only such cattle as he has reared himself is not a trader, but if he buy them and kill and sell them with a view to profit, he is a trader. 4 Burr. 21, 47. See 2 Rose, 38; 3 Camp. 233; Cooke, B. L. 48, 73; 2 Wils. 169; 1 Atk. 128; Cowp. 745.

A brickmaker who follows the business, for the purpose of enjoying the profits of his real estate merely, is not a trader; but when he buys the earth by the load or otherwise, and manufactures it into bricks, and sells them with a view to profit, he is a trader. Cook, B. L. 52, 63; 7 East, 442; 3 C. & P. 500; Mood. & M. 263; 2 Rose, 422; 2 Glyn & J. 183; 1 Bro. C. C. 173.

For further examples, the reader is referred to 4 M. & R. 486; 9 B. & C. 577; 1 T. R. 34; 1 Rose, 316; 2 Taunt. 178; 2 Marsh. 286; 3 M. & Scott. 761; 10 Bing. 292; Peake, 76; 1 Vent. 270; 3 Brod. & B. 2; 6 Moore, 56.

TRADITIO BREVIS MANUS. This term is used in the civil law to designate the delivery of a thing, by the mere consent of the parties; as, when Peter holds the property of Paul as bailee, and, afterwards, he buys it, it is not necessary that Paul should deliver the property to Peter, and he should re-deliver it to Paul, the mere consent of the parties transfers the title to Paul. 1 Duverg. n. 252; 6 Shipl. R. 231; Poth. Pand. lib. 50, ONLXXIV.; 1 Bouv. Inst. n. 944.

TRADITION, contracts, civil law. The

act by which a thing is delivered by one or more persons to one or more others.

2. In sales it is the delivery of possession by the proprietor with an intention to transfer the property to the receiver. Two things are therefore requisite in order to transmit property in this way: 1. The intention or consent of the former owner to transfer it; and, 2. The actual delivery in pursuance of that intention.

3. Tradition is either real or symbolical. The first is where the *ipsa corpora* of movables are put into the hands of the receiver: symbolical tradition is used where the thing is incapable of real delivery, as, in immovable subjects, such as lands and houses; or such as consist *in jure* (things incorporeal) as things of fishing and the like. The property of certain movables, though they are capable of real delivery, may be transferred by symbol. Thus, if the subject be under lock and key, the delivery of the key is considered as a legal tradition of all that is contained in the repository. Cujas, Observations, liv. 11, ch. 10; Inst. lib. 2, t. 1, § 40; Dig. lib. 41, t. 1, l. 9; Ersk. Princ. Laws of Scotl. bk. 2, t. 1, s. 10, 11; Civil Code Lo. art. 2452, et seq.

4. In the common law the term used in the place of tradition is *delivery*. (q. v.)

TRAFFIC. Commerce, trade, sale or exchange of merchandise, bills, money and the like.

TRAITOR, crimes. One guilty of treason.

2. The punishment of a traitor is death.

TRAITOROUSLY, pleadings. This is a technical word, which is essential in an indictment for treason in order to charge the crime, and which cannot be supplied by any other word, or any kind of circumlocution. Having been well laid in the statement of the treason itself, it is not necessary to state every overt act to have been traitorously committed. Vide Bac. Ab. Indictment, G 1; Com. Dig. Indictment, G. 6; Hawk. B. 2, c. 25, s. 55; 1 East's P. C. 115; 2 Hale, 172, 184; 4 Bl. Com. 307; 3 Inst. 15; Cro. C. C. 37; Carth. 319; 2 Salk. 683; 4 Harg. St. Tr. 701; 2 Ld. Raym. 870; Comb. 259; 2 Chit. Cr. Law, 104, note (b).

TRANSACTION, contracts, civil law. An agreement between two or more persons, who for the purpose of preventing or putting an end to a law-suit, adjust their differences by mutual consent, in the manner which they agree on; in Louisiana this contract must be reduced to writing. Civil Code of Louis. 3038.

2. Transactions regulate only the differences which appear to be clearly comprehended in them by the intentions of the parties, whether they be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them. *Id.* 3040.

3. To transact, a man must have the capacity to dispose of the things included in the transaction. *Id.* 3039; 1 Domat, *Lois Civiles*, liv. 1, t. 13, s. 1; *Dig. lib.* 2, t. 15, l. 1; *Code lib.* 2, t. 4, l. 41. In the common law this is called a compromise. (q. v.)

TRANSCRIPT. A copy of an original writing or deed.

2. In Pennsylvania, the act of assembly of March 20th, 1810, s. 10, calls a copy of the proceedings before a justice of the peace in any case, a transcript: the proper term would be an exemplification.

TRANSFER, cont. The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter.

2. It is a rule founded on the plainest dictates of common sense, adopted in all systems of law, that no one can transfer a right to another which he has not himself: *nemo plus juris ad alienum transferre potest quam ipse habet.* *Dig.* 50, 17, 54; 10 *Pet. R.* 161, 175; *Co. Litt.* 305.

3. To transfer means to change; for example, one may transfer a legacy, either, 1st. By the change of the person of the legatee, as, I bequeath to Primus a horse which I before bequeathed to Secundus. 2d. By the change of the thing bequeathed, as, I bequeath to Tertius my History of the United States instead of my copy of the Life of Washington. 3d. By the change of the person who was bound to pay the legacy, as, I direct that the sum of one hundred dollars, which I directed should be charged upon my house which I gave to Quartus, shall be paid by my executors.

TRANSFEREE. He to whom a transfer is made.

TRANSFERENCE, Scotch law. The name of an action by which a suit, which was pending at the time the parties died, is transferred from the deceased to his representatives, in the same condition in which it stood formerly. If it be the pursuer who is dead, the action is called a *transference active*; if the defender, it is a *transference passive.* *Ersk. Prin. B.* 4, t. 1, n. 32.

TRANSFEROR. One who makes a transfer.

TRANSGRESSION. The violation of a law.

TRANSHIPMENT, mar. law. The act of taking the cargo out of one ship and loading it in another.

2. When this is done from necessity, it does not affect the liability of an insurer on the goods. 1 *Marsh. Ins.* 166; *Abbott on Shipp.* 240. But when the master tranships goods without necessity, he is answerable for the loss of them by capture by public enemies. 1 *Gallis. R.* 448.

TRANSIRE, Eng. law. A warrant for the custom-house to let goods pass; a permit. (q. v.) See, for a form of a *transire*, *Harg. L. Tr.* 104.

TRANSITORY. That which lasts but a short time, as transitory facts; that which may be laid in different places, as a transitory action.

TRANSITORY ACTION, pract., plead. Actions are transitory when the venue may lawfully be laid in any county, though the cause of action arose out of the jurisdiction of the court. *Vide Actions*, and 1 *Chit. Pl.* 273; *Com. Dig. Actions*, N 12; *Cowp.* 161; 9 *Johns. R.* 67; 14 *Johns. R.* 134; 3 *Bl. Com.* 294; 3 *Bouv. Inst. n.* 2645. *Vide Bac. Ab. Actions local and transitory.*

TRANSITUS. The act of going, or of removing goods, from one place to another. The transitus of goods from a seller commences the moment he has delivered them to an agent for the purpose of being carried to another place, and ends when the delivery is complete, which delivery may be by putting the purchaser into actual possession of the goods, or by making him a symbolical delivery. 2 *Hill, S. C.* 587; 5 *John. R.* 335; 2 *Pick. 599*; 11 *Pick. 352*; 2 *Aik. 79*; 5 *Ham. 88*; 6 *Rand. 473.* See *Stoppage in transitu.*

TRANSLATION. The copy made in one language of what has been written or spoken in another.

2. In pleading, when a libel or an agreement, written in a foreign language, must be averred, it is necessary that a translation of it should also be given.

3. In evidence, when a witness is unable to speak the English language so as to convey his ideas, a translation of his testimony must be made. In that case, an interpreter should be sworn to translate to him, on oath, the questions propounded to him, and to translate to the court and jury

his answers. 4 Mass. 81; 5 Mass. 219; 2 Caines' Rep. 155; Louis. Code of Pr. 784, 5.

4. It has been determined that a copy-right may exist in a translation, as a literary work. 3 Ves. & Bea. 77; 2 Meriv. 441, n.

5. In the ecclesiastical law, translation denotes the removal from one place to another; as, the bishop was translated from the diocese of A, to that of B. In the civil law, translation signifies the transfer of property. Clef des Lois Rom. h. t.

6. Swinburne applies the term translation to the bestowing of a legacy which had been given to one, on another; this is a species of ademption, (q. v.) but it differs from it in this, that there may be an ademption without a translation, but there can be no translation without an ademption. Bac. Ab. Legacies, C.

7. By translation is also meant the transfer of property, but in this sense it is seldom used. 2 Bl. Com. 294. Vide *Interpreter*.

TRANSMISSION, *civ. law*. The right which heirs or legatees may have of passing to their successors, the inheritance or legacy to which they were entitled, if they happen to die without having exercised their rights. Domat, liv. 3, t. 1, s. 10; 4 Toull. n. 186; Dig. 50, 17, 54; Code, 6, 51.

TRANSPORTATION, *punishment*. In the English law, this punishment is inflicted by virtue of sundry statutes; it was unknown to the common law. 2 H. Bl. 223. It is a part of the judgment or sentence of the court, that the party shall be transported or sent into exile. 1 Ch. Cr. Law, 789 to 796; Princ. of Pen. Law, c. 4 § 2.

TRAVAIL. The act of child-bearing.

2. A woman is said to be in her travail from the time the pains of child-bearing commence until her delivery. 5 Pick. 63; 6 Greenl. R. 460.

3. In some states, to render the mother of a bastard child a competent witness in the prosecution of the alleged father, she must have accused him of being the father during the time of her travail. 2 Root, R. 490; 1 Root, R. 107; 2 Mass. R. 443; 5 Mass. R. 518; 8 Greenl. R. 163; 3 N. H. Rep. 135; 6 Greenl. R. 460. But in Connecticut, when the state prosecutes, the mother is competent, although she did not accuse the father during her travail. 1 Day, R. 278.

TRAVERSE, *crim. law, practice*. This is a technical term, which means to turn

over: it is applied to an issue taken upon an indictment for a misdemeanor, and means nothing more than turning over or putting off the trial to a following sessions or assize; it has, perhaps with more propriety, been applied to the denying or taking issue upon an indictment, without reference to the delay of trial. Dick. Sees. 151; Burn's Just. h. t.; 4 Bl. Com. 351.

TRAVERSE, *pleading*. This term, from the French *traverser*, signifies to deny or controvert anything which is alleged in the declaration, plea, replication or other pleadings; Lawes' Civ. Plead. 116, 117; there is no real distinction between traverses and denials, they are the same in substance. Willes. R. 224. However, a traverse, in the strict technical meaning, and more ordinary acceptation of the term, signifies a direct denial in formal words, "*without this that*," &c. Summary of Pleadings, 75; 1 Chit. Pl. 576, n. a.

2. All issues are traverses, although all traverses cannot be said to be issues, and the difference is this; issues are where one or more facts are affirmed on one side, and directly and merely denied on the other; but special traverses are where the matter asserted by one party is not directly and merely denied or put in issue by the other, but he alleges some new matter or distinction inconsistent with what is previously stated, and then distinctly excludes the previous statement of his adversary. The new matter so alleged is called the inducement to the traverse, and the exclusion of the previous statement, the traverse itself. Lawes' Civ. Pl. 117. See, in general, 20 Vin. Abr. 339; Com. Dig. Pleader, G; Bac. Abr. Pleas, H; Yelv. R. 147, 8; 1 Saund. 22, n. 2; Gould. on Pl. ch. 7; Bouv. Inst. Index, h. t.

3. A traverse upon a traverse is one growing out of the same point, or subject matter, as is embraced in a preceding traverse on the other side. Gould on Pl. ch. 7, § 42, n. It is a general rule, that a traverse, well tendered on one side, must be accepted on the other. And hence it follows, as a general rule, that there cannot be a traverse upon a traverse, if the first traverse is material. The meaning of the rule is, that when one party has tendered a material traverse, the other cannot leave it and tender another of his own to the same point upon the inducement of the first traverse, but must join in that first tendered; otherwise the parties might alter-

nately tender traverses to each other, in unlimited succession, without coming to an issue. Gould on Pl. ch. 7, § 42.

4. In cases where the first traverse is immaterial, there may be a traverse upon a traverse. Id. ch. 7, § 43. And where the plaintiff might be ousted of some right or liberty the law allows him, there may be a traverse upon a traverse, although the first traverse include what is material. Poph. 101; Mo. 350; Com. Dig. Pleader, G 18; Bac. Abr. Pleas, H 4; Hob. 104, marg.; Cro. Eliz. 99, 418; Gould on Pl. ch. 7, § 44.

5. Traverses may be divided into general traverses, (q. v.) and special traverses. (q. v.) There is a third kind called a common traverse. (q. v.)

TREASON, *crim. law*. This word imports a betraying, treachery, or breach of allegiance. 4 Bl. Com. 75.

2. The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war (q. v.) against them, or in adhering to their enemies, giving them aid or comfort. This offence is punished with death. Act of April 30th, 1790, 1 Story's Laws U. S. 83. By the same article of the constitution, no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. Vide, generally, 3 Story on the Const. ch. 39, p. 667; Serg. on the Const. ch. 30; United States v. Fries, Pamph.; 1 Tucker's Blackst. Comm. Appen. 275, 276; 3 Wils. Law Lect. 96 to 99; Foster, Disc. I; Burr's Trial; 4 Cranch, R. 126, 469 to 508; 2 Dall. R. 246, 355; 1 Dall. Rep. 35; 8 Wash. C. C. Rep. 234; 1 John. Rep. 553; 11 Johns. R. 549; Com. Dig. Justices, K; 1 East, P. C. 37 to 158; 2 Chit. Crim. Law, 60 to 102; Arch. Cr. Pl. 378 to 387.

TREASURE TROVE. Found treasure.

2. This name is given to such money or coin, gold, silver, plate, or bullion, which having been hidden or concealed in the earth or other private place, so long that its owner is unknown, has been discovered by accident. Should the owner be found it must be restored to him; and in case of not finding him, the property, according to the English law, belongs to the king. In the latter case, by the civil law, when the treasure was found by the owner of the soil, he was considered as entitled to it by the double title of owner and finder; when

found on another's property, one-half belonged to the owner of the estate, and the other to the finder; when found on public property, it belonged one-half to the public treasury, and the other to the finder. Leçons du Dr. Rom. § 350-352. This includes not only gold and silver, but whatever may constitute riches, as vases, urns, statues, &c.

3. The Roman definition includes the same things under the word *pecunia*; but the thing found must have a commercial value; for ancient tombs would not be considered a treasure. The thing must have been hidden or concealed in the earth; and no one must be able to establish his right to it. It must be found by a pure accident, and not in consequence of search. Dall. Dict. Propriété, art. 3, s. 3.

4. According to the French law, le trésor est toute chose cachée ou enfouie, sur laquelle personne ne peut justifier sa propriété, et qui est decouverte par le pur effet du hasard. Code Civ. 716. Vide 4 Toull. n. 34. Vide, generally, 20 Vin. Abr. 414; 7 Com. Dig. 649; 1 Bro. Civ. Law, 237; 1 Blackstone's Comm. 295; Poth. Traité du Dr. de Propriété, art. 4.

TREASURER. An officer entrusted with the treasures or money either of a private individual, a corporation, a company, or a state.

2. It is his duty to use ordinary diligence in the performance of his office, and to account with those whose money he has.

TREASURER OF THE MINT. An officer created by the act of January 18, 1837, whose duties are prescribed as follows: The treasurer shall receive and safely keep all moneys which shall be for the use and support of the mint; shall keep all the current accounts of the mint, and pay all moneys due by the mint, on warrants from the director. He shall receive all bullion brought to the mint for coinage; shall be the keeper of all bullion and coin in the mint, except while the same is legally placed in the hands of other officers, and shall, on warrants from the director, deliver all coins struck at the mint to the persons to whom they shall be legally payable. And he shall keep regular and faithful accounts of all the transactions of the mint, in bullion and coins, both with the officers of the mint and the depositors; and shall present, quarterly, to the treasury department of the United States, according to such forms as shall be prescribed by that department, an

account of the receipts and disbursements of the mint, for the purpose of being adjusted and settled.

2. This officer is required to give bond to the United States with one or more sureties to the satisfaction of the secretary of the treasury, in the sum of ten thousand dollars. His salary is two thousand dollars.

TREASURER OF THE UNITED STATES, government. Before entering on the duties of his office, the treasurer is required to give bond with sufficient sureties, approved by the secretary of the treasury and the first comptroller, in the sum of one hundred and fifty thousand dollars, payable to the United States, with condition for the faithful performance of the duties of his office, and for the fidelity of the persons by him employed. Act of 2d September, 1789, s. 4.

2. His principal duties are, 1. To receive and keep the moneys of the United States, and disburse the same by warrants drawn by the secretary of the treasury, countersigned by the proper officer, and recorded according to law. Id. s. 4. 2. To take receipts for all moneys paid by him. 3. To render his account to the comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the secretary of the treasury. 4. To lay before each house, on the third day of each session of congress, fair and accurate copies of all accounts by him, from time to time, rendered to and settled with the comptroller, and a true and perfect account of the state of the treasury. 5. To submit at all times, to the secretary of the treasury and the comptroller, or either of them, the inspection of the moneys in his hands. Id. s. 4.

3. His compensation is three thousand dollars per annum. Act of 20th February, 1804, s. 1.

TREASURY. The place where treasure is kept; the office of a treasurer. The term is more usually applied to the public than to a private treasury. Vide *Department of the Treasury of the United States*.

TREATY, international law. A treaty is a compact made between two or more independent nations with a view to the public welfare; treaties are for a perpetuity, or for a considerable time. Those matters which are accomplished by a single act, and are at once perfected in their execution, are called agreements, conventions and pactions.

2. On the part of the United States, treaties are made by the president, by and with the consent of the senate, provided two-

thirds of the senators present concur. Const. article 2, s. 2, n. 2.

3. No state shall enter into any treaty, alliance or confederation; Const. art. 1, s. 10, n. 1; nor shall any state, without the consent of congress, enter into any agreement or compact with another state, or with a foreign power. Id. art. 1, sec. 10, n. 2; 3 Story on the Const. § 1395.

4. A treaty is declared to be the supreme law of the land, and is therefore obligatory on courts; 1 Cranch, R. 103; 1 Wash. C. C. R. 322; 1 Paine, 55; whenever it operates of itself without the aid of a legislative provision; but when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule of the court. 2 Pet. S. C. Rep. 314. Vide Story on the Constitut. Index, h. t.; Serg. Constit. Law, Index, h. t.; 4 Hall's Law Journal, 461; 6 Wheat. 161; 3 Dall. 199; 1 Kent, Comm. 165, 284.

5. Treaties are divided into personal and real. The *personal* relate exclusively to the persons of the contracting parties, such as family alliances, and treaties guarantying the throne to a particular sovereign and his family. As they relate to the persons they expire of course on the death of the sovereign or the extinction of his family. *Real* treaties relate solely to the subject-matters of the convention, independently of the persons of the contracting parties, and continue to bind the state, although there may be changes in its constitution, or in the persons of its rulers. Vattel, Law of Nat. b. 2, c. 12, §§ 183-197.

TREATY OF PEACE. A treaty of peace is an agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace, and regulate the manner in which it is to be restored and supported Vatt. lib. 4, c. 2, § 9.

TREBLE COSTS, remedies. By treble costs, in the English law, is understood, 1st. The usual taxed costs. 2d. Half thereof. 3d. Half the latter; so that in effect the treble costs amount only to the taxed costs, and three-fourths thereof. 1 Chitty, R. 137; 1 Chitt. Pract. 27.

2. Treble costs are sometimes given by statutes, and this is the construction put upon them.

3. In Pennsylvania the rule is different; when an act of assembly gives treble costs, the party is allowed three times the usual costs, with the exception, that the fees of the officers are not to be trebled, when they are not regularly or usually payable by the defendant. 2 Rawle, R. 201.

4. And in New York the directions of the statute are to be strictly pursued, and the costs are to be trebled. 2 Duni. Pr. 731.

TREBLE DAMAGES, remedies. In actions arising *ex contractu* some statutes give treble damages; and these statutes have been liberally construed to mean actually treble damages; for example, if the jury give twenty dollars damages for a forcible entry, the court will award forty dollars more, so as to make the total amount of damages sixty dollars. 4 B. & C. 154; McClell. Rep. 567.

2. The construction on the words *treble damages*, is different from that which has been put on the words *treble costs*. (q. v.) Vide 6 S. & R. 288; 1 Browne, R. 9; 1 Cowen, B. 160, 175, 176, 584; 8 Cowen, 115.

TREBUCKET. The name of an engine of punishment, said to be synonymous with *tumbrel*. (q. v.)

TREE. A woody plant, which in respect of thickness and height grows greater than any other plant.

2. Trees are part of the real estate while growing, and before they are severed from the freehold; but as soon as they are cut down, they are personal property.

3. Some trees are timber trees, while others do not bear that denomination. Vide *Timber*, and 2 Bl. Com. 281.

4. Trees belong to the owner of the land where they grow, but if the roots go out of one man's land into that of another, or the branches spread over the adjoining estates, such roots or branches may be cut off by the owner of the land into which they thus grow. Rolle's R. 394; 3 Bulstr. 198; Vin. Ab. Trees, E; and tit. Nuisance, W 2, pl. 3; 8 Com. Dig. 988; 2 Com. Dig. 274; 10 Vin. Ab. 142; 20 Vin. Ab. 415; 22 Vin. Ab. 583; 1 Supp. to Ves. jr. 138; 2 Supp. to Ves. jr. 162, 448; 6 Ves. 109.

5. When the roots grow into the adjoining land, the owner of such land may lawfully claim a right to hold the tree in common with the owner of the land where it was planted; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belongs to the

owner of the estate where the roots grow. 1 Swift's Dig. 104; 1 Hill. Ab. 6; 1 Ld. Raym. 787. Vide 18 Pick. R. 44; 1 Pick. R. 224; 4 Mass. R. 286; 6 N. H. Rep. 430; 3 Day, 476; 11 Co. 50; Hob. 310; 2 Rolle, R. 141; Moo. & Mal. 112; 11 Conn. R. 177; 7 Conn. 125; 8 East, R. 394; 5 B. & Ald. 600; 1 Chit. Gen. Pr. 625; 2 Phil. Ev. 138; Gale & Wheat. on Easem. 210; Code Civ. art. 671; Pardes. Tr. des Servitudes, 297; Bro. Ab. Demand, 20; Dall. Dict. mot Servitudes, art. 3, § 8; 2 P. Wms. 606; Moor, 812; Hob. 219; Plowd. 470; 5 B. & C. 897; S. C. 8 D. & R. 651. When the tree grows directly on the boundary line, so that the line passes through it, it is the property of both owners, whether it be marked as a boundary or not. 12 N. H. Rep. 454.

TRESAILE or **TRESAYLE**, *domestic relations*. The grandfather's grandfather. 1 Bl. Com. 186.

TRESPASS, torts. An unlawful act committed with violence, *vi et armis*, to the person, property or relative rights of another. Every felony includes a trespass; in common parlance, such acts are not in general considered as trespasses, yet they subject the offender to an action of trespass after his conviction or acquittal. See *civil remedy*.

2. There is another kind of trespass, which is committed without force, and is known by the name of trespass on the case. This is not generally known by the name of trespass. See *Case*.

3. The following rules characterize the injuries which are denominated trespasses, namely: 1. To determine whether an injury is a trespass, due regard must be had to the nature of the right affected. A wrong with force can only be offered to the absolute rights of personal liberty and security, and to those of property corporeal; those of health, reputation and in property incorporeal, together with the relative rights of persons, are, strictly speaking, incapable of being injured with violence, because the subject-matter to which they relate, exists in either case only in idea, and is not to be seen or handled. An exception to this rule, however, often obtains in the very instance of injuries to the relative rights of persons; and wrongs offered to these last are frequently denominated trespasses, that is, injuries with force.

4.—2. Those wrongs alone are characterized as trespasses the immediate consequences of which are injurious to the plain-

tiff; if the damage sustained is a remote consequence of the act, the injury falls under the denomination of trespass on the case.

5.—3. No act is injurious but that which is unlawful; and, therefore, where the force applied to the plaintiff's property or person is the act of the law itself, it constitutes no cause of complaint. Hamm. N. P. 84; 2 Phil. Ev. 181; Bac. Abr. h. t.; 15 East, R. 614; Bouv. Inst. Index, h. t. As to what will justify a trespass, see *Battery*.

TRESPASS, *remedies*. The name of an action, instituted for the recovery of damages, for a wrong committed against the plaintiff, with immediate force; as an assault and battery against the person; an unlawful entry into his land, and an unlawful injury with direct force to his personal property. It does not lie for a mere non-feasance, nor when the matter affected was not tangible.

2. The subject will be considered with regard, 1. To the injuries for which trespass may be sustained. 2. The declaration. 3. The plea. 4. The judgment.

3.—§ 1. This part of the subject will be considered with reference to injuries, 1. To the person. 2. To personal property. 3. To real property. 4. When trespass can or cannot be justified by legal proceedings.

4.—1. Trespass is the proper remedy for an assault and battery, wounding, imprisonment, and the like; and it also lies for an injury to the relative rights when occasioned by force; as, for beating, wounding, and imprisoning a wife or servant, by which the plaintiff has sustained a loss. 9 Co. 113; 10 Co. 130. Vide *Parties to actions*; *Per quod*, and 1 Chit. Pr. 37.

5.—2. The action of trespass is the proper remedy for injuries to personal property, which may be committed by the several acts of unlawfully striking, chasing, if alive, and carrying away to the damage of the plaintiff, a personal chattel, 1 Saund. 84, n. 2, 3; F. N. B. 86; Bro. Trespass, pl. 407; Toll. Executors, 112; Cro. Jac. 362, of which another is the owner and in possession; but a naked possession or right to immediate possession, is a sufficient title to support this action. 1 T. R. 480; and see 8 John. R. 432; 7 John. R. 535; 11 John. R. 377; Cro. Jac. 46; 1 Chit. Pl. 165.

6.—3. Trespass is the proper remedy for the several acts of breaking through an enclosure, and coming into contact with any corporeal hereditament, of which another is

the owner and in possession, and by which a damage has ensued. There is an ideal fence, reaching in extent upwards, a *superficie terræ usque ad cælum*, which encircles every man's possessions, when he is owner of the surface, and downwards as far as his property descends; the entry, therefore, is breaking through this enclosure, and this generally constitutes, by itself, a right of action. The plaintiff must be the owner, and in possession. 5 East, R. 485; 9 John. R. 61; 12 John. R. 183; 11 John. R. 385; Id. 140; 3 Hill, R. 26. There must have been some injury, however, to entitle the plaintiff to recover, for a man in a balloon may legally be said to break the close of the plaintiff, when passing over it, as he is wafted by the wind, yet as the owner's possession is not by that act incommoded, trespass could not probably be maintained; yet, if any part of the machinery were to fall upon the land, the aeronaut could not justify an entry into it to remove it, which proves that the act is not justifiable. 19 John. 881. But the slightest injury, as treading down the grass, is sufficient. Vide 1 Chit. Pl. 173; 2 John. R. 357; 9 John. R. 113, 377; 2 Mass. R. 127; 4 Mass. R. 266; 4 John. R. 150.

7.—4. It is a general rule that when the defendant has acted under regular process of a court of competent jurisdiction, or of a single magistrate having jurisdiction of the subject-matter, it is a sufficient justification to him; but when the court has no jurisdiction and the process is wholly void, the defendant cannot justify under it.

8. But there are some cases, where an officer will not be justified by the warrant or authority of a court having jurisdiction. These exceptions are generally founded on some matter of public policy or convenience; for example, when a warrant was issued against a mail carrier, though the officer was justified in serving the warrant, he was liable to an indictment for *detaining* such mail carrier under the warrant, for by thus detaining him, he was guilty of "wilfully obstructing or retarding the passage of the mail, or of the driver or carrier," contrary to the provisions of the act of congress of 1825, ch. 275, s. 9. 8 Law Rep. 77. See *Ambassador; Justification*.

9.—§ 2. The declaration should contain a concise statement of the injury complained of, whether to the person, personal or real property, and it must allege that the injury was committed *vi et armis* and *contra pacem*;

in which particulars it differs from a declaration in case. See *Case, remedies*.

10.—§ 3. The general issue is not guilty. But as but few matters can be given in evidence under this plea, it is proper to plead special matters of defence.

11.—§ 4. The judgment is generally for the damages assessed by the jury, and for costs. When the judgment is for the defendant, it is that he recover his costs. Vide *Irregularity; Regular and Irregular process*.

Vide, generally, Bro. Ab. h. t.; Nelson's Ab. h. t.; Bac. Ab. h. t.; Dane's Ab. h. t.; Com. Dig. h. t.; Vin. Ab. h. t.; the various American and English Digests, h. t.; 2 Phil. Ev. 131; Ham. N. P. 33 to 265; Chit. Pr. Index, h. t.; Rosc. Civ. Ev. h. t.; Stark. Ev. h. t.; Bouv. Inst. Index, h. t.

TRESPASS DE BONIS ASPORTATIS, practice. The action brought by the owner of goods for unlawfully taking and carrying them away, is so called. This action will lie for taking away another's goods, even though he should return them, because by such taking he has deprived the owner of his right to enjoy them. 1 Bouv. Inst. n. 3611.

TRESPASS ON THE CASE, practice. The technical name of an action, instituted for the recovery of damages caused by an injury unaccompanied with force, or where the damages sustained are only consequential. See *Case*, and 3 Bouv. Inst. n. 3482 to 3509.

TRESPASS QUARE CLAUSUM FREGIT, practice. This is the name of a remedy which lies to recover damages when the defendant has unlawfully and wrongfully trespassed upon the real estate of the plaintiff.

2. This action must be brought by the tenant in possession, for the injury is done to his possession. A remainder-man or reversioner cannot sustain it.

3. As the injury must be committed to the possession, one who has a mere incorporeal right cannot maintain this action. 4 Bouv. Inst. n. 3600.

TRESPASS VI ET ARMIS, practice. This is the remedy brought by the plaintiff for an immediate injury committed with force. It is distinguished from an action of trespass on the case, in this, that in the latter the injury is consequential, and not committed with direct force. 3 Bouv. Inst. n. 2871, 3482; 4 Bouv. Inst. n. 3583.

TRESPASSER. One who commits a trespass.

2. A man is a trespasser by his own direct act when he acts without any excuse; or he may be a trespasser in the execution

of a legal process in an illegal manner; 1 Chit. Pl. 183; 2 John. Cas. 27; or when the court has no jurisdiction over the subject-matter; when the court has jurisdiction but the proceeding is defective and void; when the process has been misapplied, as, when the defendant has taken A's goods on an execution against B; when the process has been abused; 1 Chit. Pl. 183-187; in all these cases a man is a trespasser *ab initio*. And a person capable of giving his assent may become a trespasser, by an act subsequent to the tort. If, for example, a man take possession of land for the use of another, the latter may afterwards recognize and adopt the act; by so doing, he places himself in the situation of one who had previously commanded it, and consequently is himself a trespasser, if the other had no right to enter, nor he to command the entry. 4 Inst. 317; Ham. N. P. 215. Vide 1 Rawle's R. 121.

TRET, weights and measures. An allowance made for the water or dust that may be mixed with any commodity. It differs from *tare*. (q. v.)

TRIAL, practice. The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. 4 Mason, 232.

2. There are various kinds of trial, the most common of which is

Trial by jury. To insure fairness this mode of trial must be in public; it is conducted by selecting a jury in the manner prescribed by the local statutes, who must be sworn to try the matter in dispute according to law, and the evidence. Evidence is then given by the party on whom rests the *onus probandi* or burden of the proof; as the witnesses are called by a party they are questioned by him, and after they have been examined, which is called an examination in chief, they are subject to a cross-examination by the other party as to every part of their testimony. Having examined all his witnesses, the party who supports the affirmative of the issue closes; and the other party then calls his witnesses to explain his case or support his part of the issue; these are in the same manner liable to a cross-examination. In case the parties should differ as to what is to be given in evidence, the judge must decide the matter, and his decision is conclusive upon the parties so far as regards the trial; but, in civil cases, a *bill of exceptions* (q. v.) may be taken, so

that the matter may be examined before another tribunal. When the evidence has been closed, the counsel for the party who supports the affirmative of the issue, then addresses the jury, by recapitulating the evidence and applying the law to the facts, and showing on what particular points he rests his case. The opposite counsel then addresses the jury, enforcing in like manner the facts and the law as applicable to his side of the case; to which the other counsel has a right to reply. It is then the duty of the judge to sum up the evidence and explain to the jury the law applicable to the case; this is called his charge. (q. v.) The jurors then retire to deliberate upon their verdict, and, after having agreed upon it, they come into court and deliver it in public. In case they cannot agree they may, in cases of necessity, be discharged; but, it is said, in capital cases they cannot be. Very just and merited encomiums have been bestowed on this mode of trial, particularly in criminal cases. Livingston's Rep. on the Plan of a Penal Code, 13; 3 Story, Const. § 1773. The learned Duponceau has given a beautiful sketch of this tribunal; "twelve invisible judges," said he, "whom the eye of the corrupter cannot see, and the influence of the powerful cannot reach, for they are nowhere to be found, until the moment when the balance of justice being placed in their hands, they hear, weigh, determine, pronounce, and immediately disappear, and are lost in the crowd of their fellow citizens." Address at the opening of the Law Academy at Philadelphia. Vide, generally, 4 Com. Dig. 783; 7 Id. 522; 21 Vin. Ab. 1; Bac. Ab. h. t.; 1 Sell. Pr. 405; 4 Bl. Com. ch. 27; Chit. Pr. Index, h. t.; 3 Bl. Com. ch. 22; 15 Serg. & R. 61; 22 Vin. Ab. h. t. See *Discharge of a jury; Jury*.

3. *Trial by certificate.* By the English law, this is a mode of trial allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averments or information of persons in such station, as affords them the most clear and complete knowledge of the truth.

4. As therefore such evidence, if given to a jury, must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. 3 Bl. Com. 333; Steph. Pl. 122.

5. *Trial by the grand assise.* This kind of trial is very similar to the common trial by jury. There is only one case in which it appears ever to have been applied, and there it is still in force.

6. In a writ of right, if the defendant by a particular form of plea appropriate to the purpose, (see the plea, 3 Chitty, 652,) denied the right of the demandant, as claimed, he had the option, till the recent abolition of the extravagant and barbarous method of wager by battel, of either *offering battel* or *putting himself on the grand assise*, to try whether he or the demandant "had the greater right." The latter course he may still take; and, if he does, the court award a writ for summoning four knights to make the election of twenty other recognitors. The four knights and twelve of the recognitors so elected, together making a jury of sixteen, constitute what is called the grand assise; and when assembled, they proceed to try the issue, or (as it is called in this case) the mise, upon the question of right. The trial, as in the case of a common jury, may be either at the bar or nisi prius; and if at nisi prius, a nisi prius record is made up; and the proceedings are in either case, in general, the same as where there is a common jury. See Wils. R. 419, 541; 1 Holt's N. P. Rep. 657; 3 Chitty's Pl. 635; 2 Saund. 45 e; 1 Arch. 402. Upon the issue or mise of right, the wager of battel or the grand assise was, till the abolition of the former, and the latter still is, the only legitimate method of trial; and the question cannot be tried by a jury in the common form. 1 B. & P. 192. See 3 Bl. Com. 351.

7. *Trial by inspection or examination.* This trial takes place when for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of dubious facts, and, therefore, when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment

alone. For example, if a defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies; in this case the judges shall determine by inspection and examination whether he be the plaintiff or not. 9 Co. 80; 3 Bl. Com. 331; Steph. Pl. 123.

8. Judges of courts of equity frequently decide facts upon mere inspection. The most familiar examples are those of cases where the plaintiff prays an injunction on an allegation of piracy or infringement of a patent or copyright. 5 Ves. 709; 12 Ves. 270, and the cases there cited. And see 2 Atk. 141; 2 B. & C. 80; 4 Ves. 681; 2 Russ. R. 385; 1 V. & B. 67; Cro. Jac. 280; 1 Dall. 166.

9. *Trial by the record.* This trial applies to cases where an issue of *nil tiel record* is joined in any action. If, on one side, a record be asserted to exist, and the opposite party deny its existence, under the form of traverse, that there is no such record remaining in court, as alleged, and issue be joined thereon, this is called an issue of *nil tiel record*; and the court awards, in such case, a trial by inspection and examination of the record. Upon this the party affirming its existence, is bound to produce it in court, on a day given for the purpose, and if he fail to do so, judgment is given for his adversary.

10. The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue, and the parties cannot put themselves upon the country. Steph. Pl. 122; 2 Bl. Com. 830.

11. *Trial by wager of battel.* In the old English law, this was a barbarous mode of trying facts, among a rude people, founded on the supposition that heaven would always interpose, and give the victory to the champions of truth and innocence. This mode of trial was abolished in England as late as the stat. 59 Geo. III., c. 46, A. D. 1818. It never was in force in the United States. See 3 Bl. Com. 337; 1 Hale's Hist. 188; see a modern case, 1 B. & A. 405.

12. *Trial by wager of law.* This mode of trial has fallen into complete disuse; but in point of law, it seems, in England, to be still competent in most cases to which it anciently applied. The most important and best established of these cases, is, the issue of *nil debet*, arising in action of debt on

simple contract, or the issue of *non detinet*, in an action of detinue. In the declaration in these actions, as in almost all others, the plaintiff concludes by offering *his suit* (of which the ancient meaning was *followers* or witnesses, though the words are now retained as mere form,) to prove the truth of his claim. On the other hand, if the defendant, by a plea of *nil debet* or *non detinet*, deny the debt or detention, he may conclude by offering to establish the truth of such plea, "*against* the plaintiff and his suit, in such manner as the court shall direct." Upon this the court awards the wager of law; Co. Ent. 119 a; Lill. Ent. 467; 3 Chit. Pl. 479; and the form of this proceeding, when so awarded, is that the defendant brings into court with him eleven of his neighbors, and for himself, makes oath that he does not owe the debt or detain the property alleged; and then the eleven also swear that they believe him to speak the truth; and the defendant is then entitled to judgment. 3 Bl. Com. 343; Steph. Pl. 124. Blackstone compares this mode of trial to the canonical purgation of the catholic clergy, and to the decisory oath of the civil law. See *Oath, decisory*.

13. *Trial by witnesses.* This species of trial by witnesses, or *per testes*, is without the intervention of a jury.

14. This is the only method of trial known to the civil law, in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but it is very rarely used in the common law, which prefers the trial by jury in almost every instance.

15. In England, when a widow brings a writ of dower, and the tenant pleads that the tenant is not dead, this being looked upon as a dilatory plea, is, in favor of the widow, and for greater expedition, allowed to be tried by witnesses examined before the judges; and so, says Finch, shall no other case in our law. Finch's Law, 428. But Sir Edward Coke mentions others; as to try whether the tenant in a real action was duly summoned; or the validity of a challenge to a juror; so that Finch's observation must be confined to the trial of direct and not collateral issues. And in every case, Sir Edward Coke lays it down, that the affirmative must be proved by two witnesses at least. 3 Bl. Com. 336.

TRIAL LIST. A list of cases marked down for trial for any one term.

TRIBUNAL. The seat of a judge; the

place where he administers justice; but by this term is more usually understood the whole body of judges who compose a jurisdiction; sometimes it is taken for the jurisdiction which they exercise.

2. This term is Latin, and derives its origin from the elevated seat where the tribunes administered justice.

TRIBUTE. A contribution which is sometimes raised by the sovereign from his subject, to sustain the expenses of the state. It is also a sum of money paid by one nation to another under some pretended right. Wolff, § 1145.

TRINEPOS. This term was used among the Romans to denote the male descendant in the sixth degree in a direct line. It is still employed in making genealogical tables.

TRINITY TERM, Eng. law. One of the four terms of the courts; it begins on the 22d day of May, and ends on the 12th of June. St. 11 G. IV., and 1 W. IV., c. 70. It was formerly a movable term.

TRIALS, practice. Persons appointed according to law to try whether a person challenged to the favor is or is not qualified to serve on the jury. They do not exceed two in number without the consent of the prosecutor and defendant, or some special case is alleged by one of them, or when only one juror has been sworn and two trials are appointed with him. Co. Litt. 158 a; Bac. Ab. Juries, E 12.

2. Where the challenge is made to the first juror, the court will appoint two indifferent persons to be triors; if they find him indifferent he shall be sworn, and join the triors in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triors will cease, and every subsequent challenge will be decided upon by the jurymen. If more than two jurymen have been sworn, the court may assign any two of them to determine the challenges. To the triors thus chosen no challenges can be admitted.

3. The following oath or affirmation is administered to them: "You shall well and truly try whether A B, the juror challenged, stands indifferent between the parties to this issue, so help you God;" or to this you affirm. The trial then proceeds by witnesses before them; and they may examine the jurymen challenged on his *voire dire*, but he cannot be interrogated as to circumstances which may tend to his own disgrace, discredit, or the injury of his character.

The finding of the triors is final. Being officers of the court, the triors may be punished for any misbehaviour in their office. Vide 2 Hale, 275; 4 Bl. Com. by Chitty, 353, n. 8; Tr. per Pais, 200; 1 Chit. Cr. Law, 549, 450; 4 Harg. St. Tr. 740, 750; 15 Serg. & Rawle, 156; 21 Wend. 509; 2 Green, 195.

TRIPARTITE. Consisting of three parts, as a deed *tripartite*, between A of the first part, B of the second part, and C of the third part.

TRIPLICATION, pleading. This was formerly used in pleading instead of rebutter. 1 Bro. Civ. Law, 469, n.

TRITAVUS. The male ascendant in the sixth degree was so called among the Romans. For the female ascendant in the same degree, the term is *tritavia*. In forming genealogical tables this convenient term is still used.

TRIUMVIRI CAPITALES or TREVIRI or TRESVIRI, Rom. civ. law. Officers who had charge of the prison, through whose intervention punishments were inflicted. Sallust in *Catalin*. They had eight lictors to execute their orders. Vicat, ad voc.

TRIVIAL. Of small importance. It is a rule in equity that a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. 4 Bouv. Inst. n. 4237. See Hopk. R. 112; 4 John. Ch. 183; 4 Paige, 364.

TRONAGE, Engl. law. A customary duty or toll for weighing wool, so called because it was weighed by a common *trona*, or beam. Fleta, lib. 2, c. 12.

TROVER, remedies. Trover signifies finding. The remedy is called an action of trover; it is brought to recover the value of personal chattels, wrongfully converted by another to his own use; the form supposed that the defendant might have acquired the possession of the property lawfully, namely, by finding, but if he did not, by bringing the action the plaintiff waives the trespass; no damages can therefore be recovered for the taking, all must be for the conversion. 17 Pick. 1; Anthon, 156; 21 Pick. 559; 7 Monr. 209; 1 Metc. 172.

2. It will be proper to consider the subject with reference, 1. To the thing converted. 2. The plaintiff's right. 3. The nature of the injury. 4. The pleadings. 5. The verdict and judgment.

3.—1. The property affected must be some personal chattel; 3 Serg. & Rawle, 513; and it has been decided that trover lies for title deeds; 2 Yeates, R. 537; and for a copy of a record. Hardr. 111. Vide 2 T. R. 788; 2 Salk. 654; 2 New Rep. 170; 3 Campb. 417; 3 Johns. R. 432; 10 Johns. R. 172; 12 Johns. R. 484; 6 Mass. R. 394; 17 Serg. & Rawle, 285; 2 Rawle, R. 241. Trover will be sustained for animals *feræ nature*, reclaimed. Hugh. Ab. Action upon the case of Trover and Conversion, pl. 3. But trover will not lie for personal property in the custody of the law, nor when the title to the property can be settled only by a peculiar jurisdiction; as, for example, property taken on the high seas, and claimed as lawful prize, because in such case, the courts of admiralty have exclusive jurisdiction. Cam. & N. 115, 143; but see 14 John. 273. Nor will it lie where the property bailed has been lost by the bailee, or stolen from him, or been destroyed by accident or from negligence; case is the proper remedy. 2 Iredell, 98.

4.—2. The plaintiff must at the time of the conversion have had a property in the chattel either general or special; 1 Yeates, R. 19; 3 S. & R. 509; 15 John. R. 205, 349; 16 John. R. 159; 1 Humph. R. 199; he must also have had actual possession or right to immediate possession. The person who has the absolute or general property in a personal chattel may support this action, although he has never had possession, for it is a rule that the general property of personal chattels creates a constructive possession. 2 Saund. 47 a, note 1; Bac. Ab. Trover, C; 4 Rawle, R. 185. One who has a special property, which consists in the lawful custody of goods with a right of detention against the general owner, may maintain trover. Story, Bailm. § 93 n.

5.—3. There must have been a conversion, which may have been effected, 1st. By the wrongful taking of a personal chattel. 2d. By some other illegal assumption of ownership, or by illegally using or misusing it; or, 3d. By a wrongful detention. Vide *Conversion*.

6.—4. The declaration should state that the plaintiff was possessed of the goods (describing them) as of his own property, and that they came to the defendant's possession by finding; and the conversion should be properly averred, as that is the gist of the action. It is not indispensable to state

the price or value of the thing converted. 2 Wash. 192. See 2 Cowen, 592; 13 S. & R. 99; 3 Watts, 333; 1 Blackf. 51; 1 South 211; 2 South. 509. Vide form, 2 Chitty's Pl. 370, 371. The usual plea is not guilty, which is the general issue. Bull. N. P. 48.

7.—5. The verdict should be for the damages sustained, and the measure of such damages is the value of the property at the time of the conversion, with interest. 17 Pick. 1; 7 Monr. 209; 1 Metc. 172; 8 Port. R. 191; 2 Hill, 132; 8 Dana, 192. The judgment, when for the plaintiff, is that he recover his damages and costs; 1 Chit. Pl. 157; when for the defendant, the judgment is that he recover his costs.

Vide, generally, 1 Chit. Pl. 147 to 157; Chit. Pr. Index, h. t.; Bac. Ab. h. t.; Dane's Ab. h. t.; Vin. Ab. h. t.; Com. Dig. Action upon the case upon trover; Id. Pleader, 2 I; Doct. Pl. 494; Amer. Digests, h. t.; Bouv. Inst. Index, h. t. As to the evidence to be given in actions of trover, see Rosc. Civ. Ev. 395 to 412.

TROY WEIGHT. A weight less ponderous than the avoirdupois weight, in the proportion of seven thousand, for the latter, to five thousand seven hundred and sixty, to the former. Dane's Ab. Index, h. t. Vide *Weights*.

TRUCE, *intern. law*. An agreement between belligerent parties, by which they mutually engage to forbear all acts of hostility against each other for some time, the war still continuing. Burlamaqui's N. & P. Law, part 4, c. 11, § 1.

2. Truces are of several kinds: *general*, extending to all the territories and dominions of both parties; and *particular*, restrained to particular places; as, for example, by sea, and not by land, &c. Id. part 4, c. 11, § 5. They are also *absolute*, *indeterminate* and *general*; or *limited* and *determined* to certain things, for example, to bury the dead. Ib. idem. Vide 1 Kent, Com. 159; Com. Dig. Admiralty, E 8; Bac. Ab. Prerogative, D 4; *League*; *Peace*; *War*.

TRUE BILL, *practice*. These words are endorsed on a bill of indictment, when a grand jury, after having heard the witnesses for the government, are of opinion that there is sufficient cause to put the defendant on his trial. Formerly, the endorsement was *Billa vera*, when legal proceedings were in Latin; it is still the practice to write on the back of the bill *Ignoramus*,

when the jury do not find it to be a true bill. Vide *Grand Jury*.

TRUST, contracts, devises. An equitable right, title or interest in property, real or personal, distinct from its legal ownership; or it is a personal obligation for paying, delivering or performing anything, where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted. This is its most general meaning, and includes deposits, bailments, and the like. In its more technical sense, it may be defined to be an obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully, and according to such confidence. Willis on Trustees, 1; 4 Kent, Com. 295; 2 Fonb. Eq. 1; 1 Saund. Uses and Tr. 6; Coop. Eq. Pl. Introd. 27; 3 Bl. Com. 431.

2. Trusts were probably derived from the civil law. The *fidei commissum*, (q. v.) is not dissimilar to a trust.

3. Trusts are either express or implied. 1st. Express trusts are those which are created in express terms in the deed, writing or will. The terms to create an express trust will be sufficient, if it can be fairly collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as marriage settlements, terms for years, mortgages, assignments for the payment of debts, raising portions or other purposes; and in wills and testaments, when the bequests involve fiduciary interests for private benefit or public charity; they may be created even by parol. 6 Watts & Serg. 97.

4.—2d. Implied trusts are those which, without being expressed, are deducible from the nature of the transaction, as matters of intent; or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties.

5. The most common form of an implied trust is where property or money is delivered by one person to another, to be by the latter delivered to a third person. These implied trusts greatly extend over the business and pursuits of men: a few examples will be given.

6. When land is purchased by one man in the name of another, and the former pays the consideration money, the land will in

general be held by the grantee in trust for the person who so paid the consideration money. Com. Dig. Chancery, 3 W 3; 2 Fonbl. Eq. book 2, c. 5, § 1, note a; Story, Eq. Jur. § 1201.

7. When real property is purchased out of partnership funds, and the title is taken in the name of one of the partners, he will hold it in trust for all the partners. 7 Ves. jr. 458; Montague on Partn. 97, n.; Colly. Partn. 68.

8. When a contract is made for the sale of land, in equity the vendor is immediately deemed a trustee for the vendee of the estate; and the vendee, a trustee for the vendor of the purchase money; and by this means there is an equitable conversion of the property. 1 Fonbl. Eq. book 1, ch. 6, § 9, note t; Story, Eq. Jur. §§ 789, 790, 1212. See *Conversion*. For the origin of trusts in the civil law, see 5 Toull. Dr. Civ. Fr. liv. 3, t. 2, c. 1, n. 18; 1 Brown's Civ. Law, 190. Vide *Resulting Trusts*. See, generally, Bouv. Inst. Index, h. t.

TRUSTEE, estates. A trustee is one to whom an estate has been conveyed in trust.

2. The trust estate is not subject to the specialty or judgment debts of the trustee, to the dower of his wife, or the curtesy of the husband of a female trustee.

3. With respect to the duties of trustees, it is held, in conformity to the old law of uses, that pernanacy of the profits, execution of estates, and defence of the land, are the three great properties of a trust, so that the courts of chancery will compel trustees, 1. To permit the cestui que trust to receive the rents and profits of the land. 2. To execute such conveyances, in accordance with the provisions of the trust, as the *cestui que trust* shall direct. 3. To defend the title of the land in any court of law or equity. Cruise, Dig. tit. 12, c. 4, s. 4.

4. It has been judiciously remarked by Mr. Justice Story, 2 Eq. Jur. § 1267, that in a great variety of cases, it is not easy to say what the duty of a trustee is; and that therefore, it often becomes indispensable for him, before he acts, to seek the aid and direction of a court of equity. Fonbl. Eq. book 2, c. 7, § 2, and note c. Vide Vin. Ab. tit. Trusts, O, P, Q, R, S, T; Bouv. Inst. Index, h. t.

TRUSTEE PROCESS, practice. In Massachusetts, this is a process given by statute, in imitation of the foreign attachment of the English law.

2. By this process, a creditor may attach any property or credits of his debtor in the hands of a third person. This third person is, in the English law, called the *garnishee*; in Massachusetts, he is the *trustee*. White's Dig. tit. 148. Vide *Attachment*.

TRUSTER. He who creates a trust. A convenient term used in the laws of Scotland. 1 Bell's Com. 321, 5th ed.

TRUTH. The actual state of things.

2. In contracts, the parties are bound to tell the truth in their dealings, and a deviation from it will generally avoid the contract; Newl. on Contr. 352-3; 2 Burr. 1011; 3 Campb. 285; and even concealment, or *suppressio veri*, will be considered fraudulent in the contract of insurance. 1 Marsh. on Ins. 464; Peake's N. P. C. 115; 3 Campb. 154, 506.

3. In giving his testimony, a witness is required to tell the truth, the whole truth, and nothing but the truth; for the object in the examination of matters of fact, is to ascertain truth.

4. When a defendant is sued civilly for slander or a libel, he may justify by giving the truth in evidence; but when a criminal prosecution is instituted by the commonwealth for a libel, he cannot generally justify by giving the truth in evidence.

5. The constitutions of several of the United States have made special provisions in favor of giving the truth in evidence in prosecutions for libels, under particular circumstances. In the constitutions of Pennsylvania, Delaware, Tennessee, Kentucky, Ohio, Indiana and Illinois, it is declared, that in publications for libels on men in respect to their public official conduct, the truth may be given in evidence, when the matter published was proper for public information. The constitution of New York declares, that in all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous, is true, and was published with good motives and for justifiable ends, the party shall be acquitted. By constitutional provision in Mississippi and Missouri, and by legislative enactment in New Jersey, Arkansas, Tennessee, Act of 1805, c. 6; and Vermont, Rev. Stat. tit. 11, c. 25, s. 68; the right to give the truth in evidence has been more extended; it applies to all prosecutions or indictments for libels, without any qualifications annexed in restraint of the privilege. Cooke on Def. 61.

TUB, measures. In mercantile law, a tub is a measure containing sixty pounds weight of tea; and from fifty-six to eighty-six pounds of camphor. Jacob's Law Dict. h. t.

TUB-MAN, Eng. law. A barrister who has a pre-audience in the Exchequer, and also one who has a particular place in court, is so called.

TUMBREL, punishment. A species of cart; according to Lord Coke, a dung-cart.

2. This instrument, like the pillory, was used as a means of exposure; and according to some authorities, it seems to have been synonymous with the trebucket or ducking stool. 1 Chit. Cr. Law, 797; 3 Inst. 219; 12 Serg. & Rawle, 220. Vide Com. Dig. h. t.; Burn's Just. Pillory and Tumbrel.

TUN, measure. A vessel of wine or oil, containing four hogsheads.

TURBARY, Eng. law. A right to dig turf; an easement.

TURNKEY. A person under the superintendence of a jailor, whose employment is to open and fasten the prison doors and to prevent the prisoners from escaping.

2. It is his duty to use due diligence, and he may be punished for gross neglect or wilful misconduct in permitting prisoners to escape.

TURNPIKE. A public road paved with stones or other hard substance.

2. Turnpike roads are usually made by corporations to which a power to make them has been granted. The grant of such power passes not only an easement for the road itself, but also so much land as is connected with it; as, for instance, for a toll house and a cellar under it, and a well for the use of the family. 9 Pick. R. 109. A turnpike is a public highway, and a building erected before the turnpike was made, though upon a part out of the travelled path, if continued there is a nuisance. 16 Pick. R. 175. Vide *Road*; *Street*; *Way*.

TURPIS CAUSA, contracts. A base or vile consideration, forbidden by law, which makes the contract void; as a contract, the consideration of which is the future illegal cohabitation of the obligee with the obligor.

TURPITUDE. Everything done contrary to justice, honesty, modesty or good morals, is said to be done with turpitude.

TUTELAGE. State of guardianship; the condition of one who is subject to the control of a guardian.

TUTOR, civil law. A person who has

been lawfully appointed to the care of the person and property of a minor.

2. By the laws of Louisiana minors under the age of fourteen years, if males, and under the age of twelve years, if females, are both, as to their persons and their estates, placed under the authority of a tutor. Civ. Code, art. 263. Above that age, and until their majority or emancipation, they are placed under the authority of a curator. *Ibid.*

TUTOR ALIENUS, *Eng. law*. The name given to a stranger who enters into the lands of an infant within the age of fourteen, and takes the profits.

2. He may be called to an account by the infant, and be charged as guardian in socage. Litt. s. 124; Co. Litt. 89 b, 90 a; Hargr. n. 1.

TUTOR PROPRIUS. The name given to one who is rightly a guardian in socage, in contradistinction, to a *tutor alienus*. (q. v.)

TUTORSHIP. The power which an individual, *sui juris*, has to take care of the person of one who is unable to take care of himself. Tutorship differs from curatorship, (q. v.) Vide *Pro-curator*; *Pro-tutor*; *Under-tutor*.

TUTRIX. A woman who is appointed to the office of a tutor.

TWELVE TABLES. The name given to a code of Roman laws, commonly called the *Law of the Twelve Tables*. (q. v.)

TWENTY YEARS. The lapse of twenty years raises a presumption of certain facts, and after such a time, the party against whom the presumption has been raised, will be required to prove a negative to establish his rights.

2.—After twenty years from the time it became due, a bond will be presumed to have been paid. 2 Cranch, 180; 3 Day, 289; 1 McCord, 145; 2 N. & McC. 160; 1 Bay. 482; 9 Watts, 441; 2 Speers, 357. And the same presumption arises that a judgment has been paid, if no steps have been taken by the plaintiff for twenty years after its rendition. 3 Brev. 476; 5 Conn. 1.

3.—But the presumption of such payment is easily rebutted, by showing that interest has been regularly paid. 1 Bailey, 148; that the obligor has admitted it has not been paid; 2 Harring, 124; 9 N. H. Rep. 398; or other circumstances calculated to rebut the presumption. The proof of facts which show that the obligor was poor and

not likely to be able to pay the debt, is not sufficient. 5 Verm. 236.

4. When a debt is payable in instalments and secured by a penal bond, the presumption of payment arising from lapse of time applies to each instalment as it falls due. 3 Harring. 421.

5. By the English act of limitation, 21 Jac. 1, c. 16, the period during which a possessory action for land can be sustained is fixed at twenty years, so that an adverse possession of twenty years is a bar to an action of ejectment, and such lapse of time gives a possessory title to the land. This period has been adopted in many of the states of the Union, but there has been some variation in others. See *Limitation of actions*.

6. But this statute did not affect incorporeal hereditaments, which remained as before. In analogy to the act of limitation the courts presumed a grant after twenty years adverse possession. And new grants are presumed upon proof of an adverse, exclusive, and uninterrupted enjoyment of an incorporeal hereditament at the end of twenty years. And the burden of proving that the possession was adverse, that is, under a claim of title, with the knowledge or acquiescence of the owner of the land; and also that it was uninterrupted, rests on the party claiming such incorporeal hereditaments. 3 Kent, 441; 1 Cheves, R. 2; 4 Mason, 402; 2 Roll. Ab. 269; 2 Greenl. Ev. 444.

7. The time of enjoyment of a former owner who is in privity with the claimant, can, in general, be joined to his own in order to make up the period of twenty years, as in the case of the heir and ancestor, of grantor and grantee. 9 Pick. 251. But the enjoyment of a former owner whose title has escheated to the state by forfeiture, cannot be added to the time of the enjoyment of the grantee of the state. 2 Greenl. Ev. § 543.

TYBURN TICKET, *Eng. law*. A certificate given to the prosecutor of a felon to conviction, is so called.

2. By the 10 & 11 W. III., c. 23, the original proprietor or first assignee of such certificate is exempted from all and all manner of parish and ward offices within the parish or ward where the felony shall have been committed. Bac. Ab. Constable, C.

TYRANNY, *government*. The violation of those laws which regulate the division and the exercises of the sovereign power

of the state. It is a violation of its constitution.

TYRANT, government. The chief magistrate of the state, whether legitimate or otherwise, who violates the constitution to act arbitrarily contrary to justice. Toull. tit. prel. n. 32.

2. The term tyrant and usurper are sometimes used as synonymous, because usurpers are almost always tyrants; usurpation is itself a tyrannical act, but properly

speaking, the words usurper and tyrant convey different ideas. A king may become a tyrant, although legitimate, when he acts despotically; while a usurper may cease to be a tyrant by governing according to the dictates of justice.

3. This term is sometimes applied to persons in authority who violate the laws and act arbitrarily towards others. Vide *Despotism*.

U.

UBERRIMA FIDES. Perfect good faith; abundant good faith.

2. This phrase is used to express that a contract must be made in perfect good faith, concealing nothing; as in the case of insurance, the insured must observe the most perfect good faith towards the insurer. 1 Story, Eq. Jur. § 317; 3 Kent, Com. 283, 4th ed.

UKAAS, or UKASE. The name of a law or ordinance emanating from the czar of Russia.

ULLAGE, com. law. When a cask is gauged, what it wants of being full is called ullage.

ULTIMATUM. The last proposition made in making a contract, a treaty, and the like; as, the government of the United States has given its *ultimatum*, has made the last proposition it will make to complete the proposed treaty. The word also means the result of a negotiation, and it comprises the final determination of the parties concerned in the object in dispute.

ULTIMUM SUPPLICIUM. The last or extreme punishment; the penalty of death.

ULTIMUS HÆRES. The last or remote heir; the lord. So called in contradistinction to the *hæredes proximus*, (q. v.) and the *hæredes remotiores*. (q. v.) Dalr. Feud. Pr. 110.

UMPIRAGE. The decision of an umpire. This word is used for the judgment of an umpire, as the word award is employed to designate that of arbitrators.

UMPIRE. A person selected by two or more arbitrators, when they are authorized

to do so by the submission of the parties, and they cannot agree as to the subject-matter referred to them, whose duty it is to decide the matter in dispute. Sometimes the term is applied to a single arbitrator, selected by the parties themselves. Kyd on Awards, 6, 75, 77; Cald. on Arb. 38; Dane's Ab. Index, h. t.; 3 Vin. Ab. 93; Com. Dig. Arbitrament, F; 4 Dall. 271, 432; 4 Sco. N. S. 378; Bouv. Inst. Index, h. t.

UNA VOCE. With one voice; unanimously.

UNALIENABLE. The state of a thing or right which cannot be sold.

2. Things which are not in commerce, as public roads, are in their nature unalienable. Some things are unalienable, in consequence of particular provisions in the law forbidding their sale or transfer, as pensions granted by the government. The natural rights of life and liberty are unalienable.

UNANIMITY. The agreement of all the persons concerned in a thing in design and opinion.

2. Generally a simple *majority* (q. v.) of any number of persons is sufficient to do such acts as the whole number can do; for example, a majority of the legislature can pass a law: but there are some cases in which unanimity is required; for example, a traverse jury, composed of twelve individuals, cannot decide an issue submitted to them, unless they are unanimous.

UNCERTAINTY. That which is unknown or vague. Vide *Certainty*.

UNCONDITIONAL. That which is without condition; that which must be per-

formed without regard to what has happened or may happen.

UNCONDITIONAL CONTRACT, contracts. One which does not depend upon any condition whatever. 1 Bouv. Inst. n. 730.

UNCONSCIONABLE BARGAIN, contracts. A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. 4 Bouv. Inst. n. 3848.

UNCONSTITUTIONAL. That which is contrary to the constitution.

2. When an act of the legislature is repugnant or contrary to the constitution, it is, *ipso facto*, void. 2 Pet. R. 522; 12 Wheat. 270; 3 Dall. 286; 4 Dall. 18.

3. The courts have the power, and it is their duty, when an act is unconstitutional, to declare it to be so; but this will not be done except in a clear case; and, as an additional guard against error, the supreme court of the United States refuses to take up a case involving constitutional questions, when the court is not full. 9 Pet. 85. Vide 6 Cranch, 128; 1 Binn. 419; 5 Binn. 355; 2 Pennsylv. 184; 3 S. & R. 169; 7 Pick. 466; 13 Pick. 60; 2 Yeates, 493; 1 Virg. Cas. 20; 1 Blackf. 206; 6 Rand. 245; 1 Murph. 58; Harper, 385; 1 Breese, 209; Pr. Dec. 64, 89; 1 Rep. Cons. Ct. 267; 1 Car. Law Repos. 246; 4 Munr. 43; 5 Hayw. 271; 1 Cowen, 550; 1 South. 192; 2 South. 466; 7 N. H. Rep. 65, 66; 1 Chip, 237, 257; 10 Conn. 522; 7 Gill & John. 7; 2 Litt. 90; 3 Desaus. 476.

UNCORE PRIT, pleading. This barbarous phrase of old French, which is the same with *encore prêt*, yet ready, is used in a plea in bar to an action of debt on a bond due at a day past; when the defendant pleads a tender on the day it became due, and adds that he is *uncore prit*, still ready to pay the same. 3 Bl. Com. 303; Doot. Pl. 526; Dane's Ab. Index, h. t. Vide *tout temps prist*.

UNDE NIHIL HABET. Of which she has nothing. When no dower had been assigned to the widow during the time prescribed by law, she could, at common law, sue out a writ of dower *unde nihil habet*. 3 Bl. Com. 183.

UNDERLEASE, contracts. An alienation by a tenant of a part of his lease, reserving to himself a reversion; it differs from an assignment, which is a transfer of all the tenant's interest in the lease. 3 Wils.

234; S. C. Bl. Rep. 766. And even a conveyance of the whole estate by the lessee, reserving to himself the rent, with a power of reentry for non-payment, was held to be, not an assignment, but an underlease. Str. 405. In Ohio it has been decided that the transfer of only a part of the lands, though for the whole term, is an underlease; 2 Ohio, R. 216; in Kentucky, such a transfer, on the contrary, is considered as an assignment. 4 Bibb. R. 538.

2. In leases there is frequently introduced a covenant, on the part of the lessee, that he will not underlet the premises, nor assign the lease. This refers to the voluntary act of the tenant, and the covenant is not broken when the lease is transferred without any act on his part; as, if it be sold by the sheriff on execution, or by assignees in bankruptcy, or by an executor. 8 T. R. 57; 3 M. & S. 353; 1 Ves. 295.

3. The underlessor has a right to distrain for the rent due to him, which the assignor of a lease has not. The underlessee is not liable personally to the original lessor, nor is his property subject to his claim for rent longer than while it is on the leased premises, when it may be distrained upon. The assignee of the lessee stands in a different situation. He is liable to an action by the landlord or his assignee for the rent, upon the ground of privity of estate. 1 Hill. Ab. 125, 6; 4 Kent, Com. 95; 9 Pick. R. 52; 14 Mass. 487; 5 Watts, R. 134. Vide 2 Bl. R. 766; 3 Wils. 234; 4 Campb. 73; Bouv. Inst. Index, tit. *Underletting*. Vide *Estate for years*; *Lease*; *Lessee*; *Notice to quit*; *Tenant for years*.

UNDER-SHERIFF. A deputy of a sheriff. The principal is called high-sheriff, and the deputy the under-sheriff. Vide 1 Phil. Ev. Index, h. t.

UNDER-TENANT. One who holds by virtue of an underlease. (q. v.) See *Sub-tenant*.

UNDERTAKING, contracts. An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise. 5 East, R. 17; 2 Leon. 224, 5; 4 B. & A. 595.

UNDERTOOK. Assumed; promised.

2. This is a technical word which ought to be inserted in every declaration of assumpsit, charging that the defendant undertook to perform the promise which is the foundation of the suit; and this though the promise be founded on a legal liability, or

would be implied in evidence. *Bac. Ab. Assumpsit, F*; 1 *Chit. Pl.* 88, note p.

UNDER-TUTOR, law of Louisiana. In every tutorship, there shall be an under-tutor, whom it shall be the duty of the judge to appoint at the time letters of tutorship are certified for the tutor.

2. It is the duty of the under-tutor to act for the minor, whenever the interest of the minor is in opposition to the interest of the tutor. *Civil Code, art. 300, 301*; 1 *N. S.* 462; 9 *M. R.* 648; 11 *L. R.* 189; *Poth. Des Personnes, partie prém. tit. 6, s. 5, art. 2. Vide Pro-curator; Pro-tutor.*

UNDERWRITER, insurances. One who signs a policy of insurance, by which he becomes an insurer.

2. By this act he places himself, as to his responsibility, in the place of the insured. He may cause a re-insurance (q. v.) to be made for his benefit; and it is his duty to act with good faith, and, without quibbling, to pay all just demands against him for losses. *Marsh. Ins.* 45.

UNDIVIDED. That which is held by the same title by two or more persons, whether their rights are equal, as to value or quantity, or unequal.

2. Tenants in common, joint-tenants, and partners, hold an undivided right in their respective properties, until partition has been made. The rights of each owner of an undivided thing extends over the whole and every part of it, *totum in toto, et totum in qualibet parte. Vide Partition; Per my et per tout.*

UNICA TAXATIO, practice. The ancient language of a special award of *venire*, where of several defendants, one pleads, and one lets judgment go by default, whereby the jury, who are to try and assess damages on the issue, are also to assess damages against the defendant suffering judgment by default. *Lee's Dict. h. t.*

UNILATERAL CONTRACT, civil law. When the party to whom an engagement is made, makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. *Civ. Code of Lo. art. 1758. Code Nap. 1103.* A loan of money, and a loan for use, are of this kind. *Poth. Obl. part 1, c. 1, s. 1, art. 2*; *Lec. Elemen. § 781.*

UNINTELLIGIBLE. That which cannot be understood.

2. When a law, a contract, or will, is

unintelligible, it has no effect whatever. *Vide Construction*, and the authorities there referred to.

UNIO PROLIUM. A species of adoption used among the Germans; it signifies *union of descent*. It takes place when a widower, having children, marries a widow, who also has children. These parents then agree that the children of both marriages shall have the rights to their succession, as those which may be the fruits of their marriage. *Lec. Elem. § 187.*

UNION. By this word is understood the United States of America; as, all good citizens will support the Union.

UNITED STATES OF AMERICA. The name of this country. The United States, now thirty-one in number, are Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Wisconsin, and California.

2. The territory of which these states are composed was at one time dependent generally on the crown of Great Britain, though governed by the local legislatures of the country. It is not within the plan of this work to give a history of the colonies; on this subject the reader is referred to *Kent's Com. sect. 10*; *Story on the Constitution, Book 1*; 8 *Wheat. Rep.* 543; *Marshall, Hist. Colon.*

3. The neglect of the British government to redress grievances which had been felt by the people, induced the colonies to form a closer connexion than their former isolated state, in the hopes that by a union they might procure what they had separately endeavored in vain to obtain. In 1774, Massachusetts recommended that a congress of the colonies should be assembled to deliberate upon the state of public affairs; and on the fourth of September of the following year, the delegates to such a congress assembled in Philadelphia. Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia, were represented by their delegates; Georgia alone was not represented. This congress, thus organized, exercised *de facto* and *de jure*, a sovereign authority, not as the dele-

gated agents of the governments *de facto* of the colonies, but in virtue of the original powers derived from the people. This, which was called the revolutionary government, terminated only when superseded by the confederated government under the articles of confederation, ratified in 1781. Serg. on the Const. Intr. 7, 8.

4. The state of alarm and danger in which the colonies then stood induced the formation of a second congress. The delegates, representing all the states, met in May, 1775. This congress put the country in a state of defence, and made provisions for carrying on the war with the mother country; and for the internal regulations of which they were then in need; and on the fourth day of July, 1776, adopted and issued the Declaration of Independence. (q. v.) The articles of confederation, (q. v.) adopted on the first day of March, 1781, 1 Story on the Const. § 225; 1 Kent's Comm. 211, continued in force until the first Wednesday in March, 1789, when the present constitution was adopted. 5 Wheat. 420.

5. The United States of America are a corporation endowed with the capacity to sue and be sued, to convey and receive property. 1 Marsh. Dec. 177, 181. But it is proper to observe that no suit can be brought against the United States without authority of law.

6. The states, individually, retain all the powers which they possessed at the formation of the constitution, and which have not been given to congress. (q. v.)

7. Besides the states which are above enumerated, there are various territories, (q. v.) which are a species of dependencies of the United States. New states may be admitted by congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of congress. Const. art. 4, s. 3. And the United States shall guaranty to every state in this union, a republican form of government. Id. art. 4, s. 4.

See the names of the several states; and *Constitution of the United States*.

UNITY, estates. An agreement or coincidence of certain qualities in the title of a joint estate or an estate in common.

2. In a joint estate there must exist four unities; that of *interest*, for a joint-

tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years: that of *title*, and therefore their estate must be created by one and the same act; that of *time*, for their estates must be vested at one and the same period, as well as by one and the same title; and lastly, the unity of *possession*: hence joint-tenants are seised *per my et per tout*, or by the *half* or *moiety* and by *all*: that is, each of them has an entire possession, as well of every *parcel* as of the *whole*. 2 Bl. Com. 179-182; Co. Litt. 188.

3. Coparceners must have the unities of interest, title, and possession.

4. In tenancies in common, the unity of possession is alone required. 2 Bl. Com. 192; 2 Bouv. Inst. n. 1861-83. Vide *Estate in Common*; *Estate in Joint-tenancy*; *Joint-tenants*; *Tenant in Common*; *Tenants, Joint*.

UNITY OF POSSESSION. This term is used to designate the possession by one person of several estates or rights. For example, a right to an estate to which an easement is attached, or the dominant estate, and to an estate which an easement encumbers, or the servient estate, in such case the easement is extinguished. 3 Mason, Rep. 172; Poph. 166; Latch, 153; and vide Cro. Jac. 121. But a distinction has been made between a thing that has being by prescription, and one that has its being *ex jure nature*; in the former case unity of possession will extinguish the easement; in the latter, for example, the case of a water course, the unity will not extinguish it. Poth. 166.

2. By the civil code of Louisiana, art. 801, every servitude is extinguished, when the estate to which it is due, and the estate owing it, are united in the same hands. But it is necessary that the whole of the two estates should belong to the same proprietor; for if the owner of one estate only acquires the other in part or in common with another person, confusion does not take effect. Vide *Merger*.

UNIVERSAL LEGACY. A term used among civilians. An universal legacy is a testamentary disposition, by which the testator gives to one or several persons the whole of the property which he leaves at his decease. Civil Code of Lo. art. 1599; Code Civ. art. 1003; Poth. Donations testamentaires, c. 2, sect. 1, § 2.

UNIVERSAL PARTNERSHIP. The name of a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Poth. Du Contr. de Société, n. 29.

2. In Louisiana, universal partnerships are allowed, but property which may accrue to one of the parties, after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void. Civ. Code, art. 2800.

UNIVERSITY. The name given to certain societies or corporations which are seminaries of learning where youth are sent to finish their education. Among the civilians by this term is understood a corporation.

UNJUST. That which is done against the perfect rights of another; that which is against the established law; that which is opposed to a law which is the test of right and wrong. 1 Toull. tit. prel. n. 5; Aust. Jur. 276, n.; Hein. Lec. El. § 1080.

UNKNOWN. When goods have been stolen from some person unknown, they may be so described in the indictment; but if the owner be really known, an indictment alleging the property to belong to some person unknown is improper. 2 East's P. C. 651; 1 Hale, P. C. 512; Holt's N. P. C. 596; S. C. 3 Engl. Common Law Rep. 191; 8 C. & P. 773. Vide *Indictment*; *Quidam*.

UNLAWFUL. That which is contrary to law.

2. There are two kinds of contracts which are unlawful; those which are void, and those which are not. When the law expressly prohibits the transaction in respect of which the agreement is entered into and declares it to be void, it is absolutely so. 3 Binn. R. 533. But when it is merely prohibited, without being made void, although unlawful, it is not void. 12 Serg. & Rawle, 237; Chitty, Contr. 230; 23 Amer. Jur. 1 to 23; 1 Mod. 35; 8 East, R. 236, 237; 3 Taunt. R. 244; Hob. 14. Vide *Condition*; *Void*.

UNLAWFUL ASSEMBLY, crim. law. A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature, with force and violence; if

they move forward towards its execution, it is then a rout; (q. v.) and if they actually execute their design, it amounts to a riot. (q. v.) 4 Bl. Com. 140; 1 Russ. on Cr. 254; Hawk. c. 65, s. 9; Com. Dig. Forcible Entry, D 10; Vin. Abr. Riots, &c., A.

UNLAWFULLY, pleadings. This word is frequently used in indictments in the description of the offence; it is necessary when the crime did not exist at common law, and when a statute, in describing an offence which it creates, uses the word; 1 Moody, Cr. Cas. 339; but it is unnecessary whenever the crime existed at common law, and is manifestly illegal. 1 Chitty, Crim. Law, *241; Hawk. B. 2, c. 25, s. 96; 2 Roll. Ab. 82; Bac. Abr. Indictment, G 1; Cro. C. C. 38, 43.

UNLIQUIDATED DAMAGES. Such damages as are unascertained. In general such damages cannot be set off. No interest will be allowed on unliquidated damages. 1 Bouv. Inst. n. 1108. See *Liquidated*, *Liquidated Damages*.

UNQUES, law French. Yet. This barbarous word is frequently used in pleas; as, Ne unques executor, Ne unques guardian, Ne unques accouple; and the like.

UNSOUND MIND; UNSOUND MEMORY. These words have been adopted in several statutes, and sometimes indiscriminately used to signify, not only lunacy, which is periodical madness, but also a permanent adventitious insanity as distinguished from idiocy. 1 Ridg. Parl. Cases, 518; 3 Atk. 171.

2. The term *unsound mind* seems to have been used in those statutes in the same sense as insane; but they have been said to import that the party was in some such state as was contradistinguished from idiocy and from lunacy, and yet such as made him a proper subject of a commission to inquire of idiocy and lunacy. Shelf. on Lun. 5; Ray, Med. Jur. Prel. § 8; Hals. Med. Jur. 336; 8 Ves. 66; 19 Ves. 286; 1 Beck's Med. Jur. 573; Coop. Ch. Cas. 108; 12 Ves. 447; 2 Mad. Ch. Pr. 731, 732.

UNSOUNDNESS. Vide *Crib-biting*; *Roaring*; *Soundness*.

UNWHOLESOME FOOD. Food not fit to be eaten; food which, if eaten, would be injurious.

2. Although the law does not in general consider a sale to be a warranty or goodness of the quality of a personal chattel, yet it is otherwise with regard to food and liquor

when sold for consumption. 1 Roll. Ab. 90, pl. 1 and 2.

UPLIFTED HAND. When a man accused of a crime is arraigned, he is required to raise his hand, probably in order to identify the person who pleads. Perhaps for the same reason when a witness adopts a particular mode of taking an oath, as when he does not swear upon the gospel, but upon Almighty God, he is requested to hold up his hand.

URBAN. Relating to a city; but in a more general sense it signifies relating to houses.

2. It is used in this latter sense in the civil code of Louisiana, articles 706 and 707. All servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called rural servitudes.

3. The principal kinds of urban servitudes are the following: the right of support; that of drip; that of drain, or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls; or of preventing them from being raised; that of passage; and that of drawing water. Vide 3 Toull. p. 441; Poth. Introd. au tit. 13 de la Coutume d'Orléans, n. 2; Introd. Id. n. 2.

USAGE. Long and uniform practice. In its most extensive meaning this term includes custom and prescription, though it differs from them; in a narrower sense, it is applied to the habits, modes, and course of dealing which are observed in trade generally, as to all mercantile transactions, or to some particular branches of trade.

2. Usage of trade does not require to be immemorial to establish it; if it be known, certain, uniform, reasonable, and not contrary to law, it is sufficient. But evidence of a few instances that such a thing has been done does not establish a usage. 3 Watts, 178; 3 Wash. C. C. R. 150; 1 Gallis. 443; 5 Binn. 287; 9 Pick. 426; 4 B. & Ald. 210; 7 Pet. 1; 2 Wash. C. C. R. 7.

3. The usages of trade afford ground upon which a proper construction may be given to contracts. By their aid the indeterminate intention of parties and the nature and extent of their contracts arising from mere implications or presumptions, and acts

of an equivocal character may be ascertained; and the meaning of words and doubtful expressions may become known. 2 Metc. 65; 2 Sumn. 569; 2 G. & J. 136; 13 Pick. 182; Story on Ag. § 77; 2 Kent, Com. 662, 3d ed.; 5 Wheat. 326; 2 Car. & P. 525; 3 B. & Ald. 728; Park. on Ins. 30; 1 Marsh. Ins. 186, n. 20; 1 Caines, 45; Gilp. 356, 486; 1 Edw. Ch. R. 146; 1 N. & M. 519; 15 Mass. 433; 1 Hill, R. 270; Wright, R. 573; Pet. C. C. R. 230; 5 Hamm. 436; 6 Pet. 715; 2 Pet. 148; 6 Porter, 123; 1 Hall, 612; 9 Mass. 155; 9 Wheat. 582; 11 Wheat. 430; 1 Pet. 25, 89.

4. Courts will not readily adopt these usages, because they are not unfrequently founded in mistake. 2 Sumn. 377.

See 3 Chitt. Pr. 55; Story, Confl. of Laws, § 270; 1 Dall. 178; Vaugh. 169, 383; Bouv. Inst. Index, h. t.

USANCE, commercial law. The term *usance* comes from *usage*, and signifies the time which by usage or custom is allowed in certain countries, for the payment of a bill of exchange. Poth. Contr. du Change, n. 15.

2. The time of *one, two or three months* after the date of the bill, according to the custom of the places between which the exchanges run.

3. Double or treble, is double or treble the usual time, and half *usance* is half the time. Where it is necessary to divide a month upon a half *usance*, which is the case when the *usance* is for one month or three, the division, notwithstanding the difference in the length of the months, contains fifteen days.

USE, estates. A confidence reposed in another, who was made tenant of the land or terre tenant, that he should dispose of the land according to the intention of the *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. Plowd. 352; Gilb. on Uses, 1; Bac. Tr. 150, 306; Cornish on Uses, 13; 1 Fonb. Eq. 363; 2 Id. 7; Sanders on Uses, 2; Co. Litt. 272, b; 1 Co. 121; 2 Bl. Com. 328; 2 Bouv. Inst. n. 1885, et seq.

2. In order to create a use, there must always be a good consideration; though, when once raised, it may be passed by grant to a stranger, without consideration. Doct. & Stu., Dial. ch. 22, 23; Rob. Fr. Conv. 87, n.

8. Uses were borrowed from the *fides commissum* (q. v.) of the civil law; it was

the duty of a Roman magistrate, the prætor *fidei commissarius*, whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence. Inst. 2, 23, 2.

4. Uses were introduced into England by the ecclesiastics in the reign of Edward III. or Richard II., for the purpose of avoiding the statutes of mortmain; and the clerical chancellors of those times held them to be *fidei commissa*, and binding in conscience. To obviate many inconveniencies and difficulties, which had arisen out of the doctrine and introduction of uses, the statute of 27 Henry VIII., c. 10, commonly called the statute of uses, or in conveyances and pleadings, the statute for transferring uses into possession, was passed. It enacts, that "when any person shall be seised of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estate as they have in the use, trust or confidence; and that the estates of the persons so seised to the uses, shall be deemed to be in him or them that have the use, in such quality, manner, form and condition, as they had before in the use." The statute thus executes the use; that is, it conveys the possession to the use, and transfers the use to the possession; and, in this manner, making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity. 2 Bl. Com. 333; 1 Saund. 254, note 6.

5. A modern use has been defined to be an estate of right, which is acquired through the operation of the statute of 27 Henry VIII., c. 10; and which, when it may take effect according to the rules of the common law, is called the legal estate; and when it may not, is denominated a use, with a term descriptive of its modification. Cornish on Uses, 35.

6. The common law judges decided, in the construction of this statute, that a use could not be raised upon a use; Dyer, 155 A; and that on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that, as the statute mentioned only such persons as were seised to the use of others, it did not extend to a term of years, or other

chattel interests, of which a termor is not seised but only possessed. Bac. Tr. 335; Poph. 76; Dyer, 369; 2 Bl. Com. 336. The rigid literal construction of the statute by the courts of law again opened the doors of the chancery courts. 1 Madd. Ch. 448, 450.

USE, *civil law*. A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance; it differs from usufruct, which is a right not only to use but to enjoy. 1 Browne's Civ. Law, 184; Leçons Elem. du Dr. Civ. Rom. § 414, 416.

USE AND OCCUPATION. When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of assumpsit for use and occupation. 1 Munf. R. 407; 2 Aik. R. 252; 7 J. J. Marsh. 6; 4 Day, R. 228; 13 John. R. 240; 13 John. R. 297; 4 H. & M. 161; 15 Mass. R. 270; 2 Whart. R. 42; 10 S. & R. 251.

2. The action for use and occupation is founded not on a privity of estate, but on a privity of contract; 3 S. & R. 500; C. & N. 19; therefore it will not lie where the possession is tortious. 2 N. & M. 156; 3 S. & R. 500; 6 N. H. Rep. 298; 6 Ham. R. 371; 14 Mass. R. 95. See Arch. L. & T. 148.

USEFUL. That which may be put into beneficial practice.

2. The patent act of congress of July 4, 1836, sect. 6, in describing the subjects of patents, mentions "new and useful art," and "new and useful improvement." To entitle the inventor to a patent, his invention must, to a certain extent, be beneficial to the community, and not be for an unlawful object, or frivolous, or insignificant. 1 Mason, 182; 1 Pet. C. C. R. 322; 1 Bald. 303; 14 Pick. 217; Paine, 203.

USHER. This word is said to be derived from *huissier*, and is the name of an inferior officer in some English courts of law Archb. Pr. 25.

USUCAPTION, *civil law*. The manner of acquiring property in things by the lapse of time required by law.

2. It differs from prescription, which has the same sense, and means, in addition, the manner of acquiring and losing, by the effect of time regulated by law, all sorts of rights and actions. Merl. Répert. mot

Prescription, tom. xii. page 671; Ayl. Pand. 320; Wood's Inst. Civ. Law, 165; Leçons Elem. du Dr. Rom. § 437; 1 Browne's Civ. Law, 264, n.; Vattel, B. 2, c. 2, § 140.

USUFRUCT, civil law. The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing.

2. The obligation of not altering the substance of the thing, however, takes place only in the case of a complete usufruct.

3. Usufructs are of two kinds; perfect and imperfect. *Perfect usufruct*, which is of things which the usufructuary can enjoy without altering their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied; as a house, a piece of land, animals, furniture and other movable effects. *Imperfect or quasi usufruct*, which is of things which would be useless to the usufructuary if he did not consume and expend them, or change the substance of them, as money, grain, liquors. Civ. Code of Louis. art. 525, et seq.; 1 Browne's Civ. Law, 184; Poth. Tr. du Douaire, n. 194; Ayl. Pand. 319; Poth. Pand. tom. 6, p. 91; Leçons El. du Dr. Civ. Rom. § 414; Inst. lib. 2, t. 4; Dig. lib. 7, t. 1, l. 1; Code, lib. 3, t. 38; 1 Bouv. Inst. Theolo. ps. 1, c. 1, art. 2, p. 76.

USUFRUCTUARY, civil law. One who has the right and enjoyment of an usufruct.

2. Domat, with his usual clearness, points out the duties of the usufructuary, which are, 1. To make an inventory of the things subject to the usufruct, in the presence of those having an interest in them. 2. To give security for their restitution; when the usufruct shall be at an end. 3. To take good care of the things subject to the usufruct. 4. To pay all taxes, and claims which arise while the thing is in his possession, as a ground-rent. 5. To keep the thing in repair at his own expense. Lois Civ. liv. 1, t. 11, s. 4. See *Estate for life*.

USURPATION, torts. The unlawful assumption of the use of property which belongs to another; an interruption of the disturbing a man in his right and possession. Toml. Law Dict. h. t.

2. According to Lord Coke, there are

two kinds of usurpation. 1. When a stranger, without right, presents to a church, and his clerk is admitted; and, 2. When a subject uses a franchise of the king without lawful authority. Co. Litt. 277 b.

USURPATION, government. The tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.

USURPED POWER, insurance. By an article of the printed proposals which are considered as making a part of the contract of insurance it is provided, that "No loss of damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever will be made good by this company." Lord Chief J. Wilmot, Mr. Justice Clive, and Mr. Justice Bathurst, against the opinion of Mr. Justice Gould, determined that the true import of the words *usurped power* in the proviso, was an invasion from abroad, or an internal rebellion, where armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable; but that those words could not mean the power of a common mob. 2 Marsh. Ins. 390.

USURPER, government. One who assumes the right of government by force, contrary to and in violation of the constitution of the country. Toull. Dr. Civ. n. 32. Vide *Tyranny*.

USURY, contracts. The illegal profit which is required and received by the lender of a sum of money from the borrower, for its use. In a more extended and improper sense, it is the receipt of any profit whatever for the use of money: it is only in the first of these senses that usury will be here considered.

2. To constitute a usurious contract the following are the requisites: 1. A loan express or implied. 2. An agreement that the money lent shall be returned at all events. 3. Not only that the money lent shall be returned, but that for such loan a greater interest than that fixed by law shall be paid.

3.—1. There must be a loan in contemplation of the parties; 7 Pet. S. C. Rep. 109, 1 Clarke, R. 252; and, if there be a loan, however disguised, the contract will be usurious, if it be so in other respects. Where a loan was made of depreciated bank notes to be repaid in sound funds, to enable the borrower to pay a debt he owed dollar for dollar, it was considered as not being usu-

rious. 1 Meigs, R. 585. The bona fide sale of a note, bond or other security at a greater discount than would amount to legal interest, is not, per se, a loan, although the note may be endorsed by the seller, and he remains responsible. 9 Pet. S. C. Rep. 103; 1 Clarke, R. 30. But if a note, bond or other security be made with a view to evade the laws of usury, and afterwards sold for a less amount than the interest, the transaction will be considered a loan; 2 Johns. Cas. 60; 3 Johns. Cas. 66; 15 Johns. R. 44; 2 Dall. 92; 12 Serg. & Rawle, 46; and a sale of a man's own note, endorsed by himself, will be considered a loan. It is a general rule that a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction. 7 Pet. S. C. Rep. 109. On the contrary, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious. 15 Mass. R. 96.

4.—2. There must be a contract for the return of the money at all events; for if the return of the principal with interest, or of the principal only, depend upon a contingency, there can be no usury; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury, if he received interest beyond the amount allowed by law. As the principal is put to hazard in insurances, annuities and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious.

5.—3. To constitute usury the borrower must not only be obliged to return the principal at all events, but more than lawful interest: this part of the agreement must be made with full consent and knowledge of the contracting parties. 3 Bos. & Pull. 154. When the contract is made in a foreign country the rate of interest allowed by the laws of that country may be charged, and it will not be usurious, although greater

than the amount fixed by law in this. Story, Conf. of Laws, § 292.

Vide, generally, Com. Dig. h. t.; Bac. Ab. h. t.; 8 Com. Dig. h. t.; Lilly's Reg. h. t.; Dane's Ab. h. t.; Petersdorff's Ab. h. t.; Vin. Ab. h. t.; 2 Bl. Com. 454; Comyn on Usury, *passim*; 1 Pet. S. C. Rep. Index, h. t.; 1 Supp. to Ves. jr. 307, 337; Yelv. 47; 1 Ves. jr. 527; 1 Saund 295, note 1; Poth. h. t.; and the article *Anatocism; Interest*.

UTERINE BROTHER, *domestic relations*. A brother by the mother's side.

UTI POSSIDETIS. This phrase, which means *as you possess*, is used in international law, to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war.

TO UTTER, *crim. law*. To offer; to publish.

2. To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be *passed* in order to complete the offence of uttering. 2 Binn. R. 338, 9. It seems that reading out a document, although the party refuses to show it, is a sufficient uttering. Jebb's Ir. Cr. Cas. 282. Vide East, P. C. 179; Leach, 251; 2 Stark. Ev. 378; 1 Moody, C. C. 166; 2 East, P. C. 974; Russ. & Ry. 113; 1 Phil. Ev. Index, h. t.; Roscoe's Cr. Ev. 301. The merely showing a false instrument with intent to gain a credit, when there was no intention or attempt made to pass it, it seems would not amount to an uttering. Russ. & Ry. 200. Vide *Ringling the change*.

UTTER BARRISTER, *English law*. Those barristers who plead without the bar, and are distinguished from benchers, or those who have been readers and who are allowed to plead within the bar, as the king's counsel are. The same as *ouster barrister*. See *Barrister*.

UXOR, *civil law*. A woman lawfully married.

V.

VACANCY. A place which is empty. The term is principally applied to cases where an office is not filled.

2. By the constitution of the United States, the president has the power to fill up vacancies that may happen during the recess of the senate. Whether the president can create an office and fill it during the recess of the senate, seems to have been much questioned. Story, Const. § 1553. See Serg. Const. Law, ch. 31; 1 Breese, R. 70.

VACANT POSSESSION, estates. An estate which has been abandoned by the tenant; the abandonment must be complete in order to make the possession vacant, and therefore if the tenant have goods on the premises, it will not be so considered. 2 Chit. Rep. 177; 2 Str. 1064; Bull. N. P. 97; Comyn on Landl. & Ten. 507, 517.

VACANT SUCCESSION. An inheritance for which the heirs are unknown.

VACANTIA BONA, civil law. Goods without an owner. Such goods escheat.

TO VACATE. To annul, to render an act void; as to vacate an entry which has been made on a record when the court has been imposed upon by fraud, or taken by surprise.

VACATION. That period of time between the end of one term and beginning of another. During vacation, rules and orders are made in such cases as are urgent, by a judge at his chambers.

VACCARIA, old Engl. law. A word which is derived from *vacca*, a cow, and signifies a dairy-house. Co. Litt. 5 b.

VADIUM, contracts. A pledge or surety.

VADIUM MORTUUM, contracts. A mortgage or dead pledge; it is a security given by the borrower of a sum of money, by which he grants to the lender an estate in fee, on condition that if the money be not repaid at the time appointed, the estate so put in pledge shall continue to the lender as dead or gone from the mortgagor. 2 Bl. Com. 257; 1 Pow. Mortg. 4.

VADIUM VIVUM, contracts. A species of security by which the borrower of a sum of money, made over his estate to the lender,

until he had received that sum out of the issues and profits of the land; it was so called because neither the money nor the lands were lost, and were not left in dead pledge, but this was a *living* pledge, for the profits of the land were constantly paying off the debt. Litt. sect. 206; 1 Pow. on Mort. 3; Termes de la Ley, h. t.

VAGABOND. One who wanders about idly, who has no certain dwelling. The ordinances of the French define a vagabond almost in the same terms. Dalloz, Dict. Vagabondage. See Vattel, liv. 1, § 219, n.

VAGRANT. Generally by the word vagrant is understood a person who lives idly, without any settled home; but this definition is much enlarged by some statutes, and it includes those who refuse to work, or go about begging. See 1 Wils. R. 331; 5 East, R. 339; 8 T. R. 26.

VAGUENESS. Uncertainty.

2. Certainty is required in contracts, wills, pleadings, judgments, and indeed in all the acts on which courts have to give a judgment, and if they be vague, so as not to be understood, they are in general invalid. 5 B. & C. 583; 1 Russ. & M. 116; 1 Ch. Pract. 123. A charge of "frequent intemperance" and "habitual indolence" are vague and too general. 2 Mart. Lo. Rep. N. S. 530. See *Certainty*; *Nonsense*; *Uncertainty*.

VALID. An act, deed, will, and the like, which has received all the formalities required by law, is said to be valid or good in law.

VALUABLE CONSIDERATION, contracts. An equivalent for a thing purchased. Vide Vin. Ab. Consideration, B; 2 Bl. Com. 297; *Consideration*.

VALUATION. The act of ascertaining the worth of a thing; or it is the estimated worth of a thing.

2. It differs from price, which does not always afford a true criterion of value, for a thing may be bought very dear or very cheap. In some contracts, as in the case of bailments or insurances, the thing bailed or insured is sometimes valued at the time of making the contract, so that if lost, no dispute may arise as to the amount of the

loss. 2 Marsh. Ins. 620; 1 Caines, 80; 2 Caines, 30; Story, Bailm. § 253, 4; Park. Ins. 98; Weak. Ins. h. t.; Stev. on Av. part 2; Ben. on Ins. ch. 4.

VALUE, common law. This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called value in use, the latter value in exchange.

2. Value differs from price. The latter is applied to live cattle and animals; in a declaration, therefore, for taking cattle, they ought to be said to be of such a price; and in a declaration for taking dead chattels or those which never had life, it ought to lay them to be of such a value. 2 Lilly's Ab. 629.

VALUE RECEIVED. This phrase is usually employed in a bill of exchange or promissory note, to denote that a consideration has been given for it.

2. The expression value received, when put in a bill of exchange, will bear two interpretations: the drawer of the bill may be presumed to acknowledge the fact that he has received value of the payee; 3 M. & S. 351; or when the bill has been made payable to the order of the drawer, it implies that value has been received by the acceptor. 5 M. & S. 65. In a promissory note, the expression imports value received from the payee. 5 B. & C. 360.

VALUED POLICY. A valued policy is one where the value has been set on the ship or goods insured, and this value has been inserted in the policy in the nature of liquidated damages, to save the necessity of proving it in case of loss. 1 Bouv. Inst. n. 1230.

VARIANCE, pleading, evidence. A disagreement or difference between two parts of the same legal proceeding, which ought to agree together. Variances are between the writ and the declaration, and between the declaration and the evidence.

2.—1. When the variance is a matter of *substance*, as if the writ sounds in contract, and the other in tort, and *et converso*, or if the writ demands one thing or subject, and the declaration another, advantage may be taken of it, even in arrest of judgment; for it is the writ which gives authority to the court to proceed in any given suit, and, therefore, the court can have no authority to hear and determine a cause substantially different from that in the writ. Hob. 279; Cro. Eliz. 722. But if the variance is in matter of mere *form*, as in time or place,

when that circumstance is immaterial, advantage can only be taken of it by plea in abatement. Yelv. 120; Latch. 173; Bac. Ab. Abatement, I; Gould, Pl. c. 5, § 98; 1 Chit. Pl. 438.

3.—2. A variance by disagreement in some particular point or points only between the allegation and the evidence, when upon a *material* point, is as fatal to the party on whom the proof lies, as a total failure of evidence. For example; the plaintiff declared in covenant for not repairing, pursuant to the covenant in a lease, and stated the covenant, as a covenant to "repair when and as need should require;" and issue was joined on a traverse of the deed alleged. The plaintiff at the trial produced the deed in proof, and it appeared that the covenant was to "repair when and as need should require, and at farthest after notice;" the latter words having been omitted in the declaration. This was held to be a variance, because the additional words were material, and qualified the effect of the contract. 7 Taunt. 385. But a variance in mere *form* or in *matter quite immaterial*, will not be regarded. Str. 690. Vide 1 Vin. Ab. 41; 12 Vin. Ab. 63; 21 Vin. Ab. 538; Com. Dig. Abatement, G 8, H 7; Id. Amendment, D 7, 8, V 3; Bail, R 7; Obligation, B 4; Pleader, C 14, 15, L 24, 30; Record, C, D, F; Phil. Ev. Index, h. t.; Stark. Ev. Index, h. t., Roscoe's Ev. Index, h. t.; 18 E. C. L. R. 139, 149, 153; 1 Dougl. 194; 2 Salk. 659; Harr. Dig. h. t.; Chit. Pl. Index, h. t.; United States Dig. Pleading II, d and e; Bouv. Inst. Index, h. t.

VASSAL, feudal law. This was the name given to the holder of a fief, bound to perform feudal service; this word was then always correlative to that of lord, entitled to such service.

2. The vassal himself might be lord of some other vassal.

3. In aftertimes, this word was used to signify a species of slave who owed servitude, and was in a state of dependency on a superior lord. 2 Bl. Com. 53; Merl. Répert. h. t.

VECTIGALIA. Among the Romans this word signified duties which were paid to the prince for the importation and exportation of certain merchandise. They differed from tribute, which was a tax paid by each individual. Code, 4, 61, 5 and 13.

VEJOURS. An obsolete word, which signified viewers or experts. (q. v.)

VENAL. Something that is bought. The term is generally applied in a bad sense; as, a venal office, is an office which has been purchased.

VENDEE, contr. A purchaser; (q. v.) a buyer.

VENDITION. A sale; the act of selling.

VENDITIONI EXPONAS, practice. That you expose to sale. The name of a writ of execution, directed to the sheriff, commanding him to sell goods or chattels, and in some states, lands, which he has taken in execution by virtue of a *fieri facias*, and which remain unsold.

2. Under this writ the sheriff is bound to sell the property in his hands, and he cannot return a second time, that he can get no buyers. Cowp. 406; and see 2 Saund. 47, l. 1; 2 Chit. Rep. 390; Com. Dig. Execution, C 8; Grah. Pr. 359; 3 Bouv. Inst. n. 3395.

VENDOR, contracts. A seller. (q. v.) One who disposes of a thing in consideration of money. Vide *Purchaser; Seller*.

VENIRE FACIAS, practice, crim. law. According to the English law, the proper process to be issued on an indictment for any petit misdemeanor, on a penal statute, is a writ called *venire facias*.

2. It is in the nature of a summons to cause the party to appear. 4 Bl. Com. 18; 1 Chit. Cr. Law, 351.

VENIRE, or VENIRE FACIAS JURATORES, practice. The name of a writ directed to the sheriff, commanding him to cause to come from the body of the county, before the court from which it issued, on some day certain and therein specified, a certain number of qualified citizens who are to act as jurors in the said court. Steph. Pl. 104; 2 Graydon's Forms, 314; and see 6 Serg. & Rawle, 414; 21 Vin. Ab. 291; Com. Dig. Enquest, C 1, &c.; Id. Pleader, 2 S 12, 3 O 20; Id. Process, D 8; 3 Chit. Pr. 797.

VENIRE FACIAS DE NOVO, practice. The name of a new writ of *venire facias*; this is awarded when, by reason of some irregularity or defect in the proceeding on the first *venire*, or the trial, the proper effect of that which has been frustrated, or the verdict become void in law; as, for example, when the jury has been improperly chosen, or an uncertain, ambiguous or defective verdict has been rendered. Steph. Pl. 120; 21 Vin. Ab. 466; 1 Sell. Pr. 495.

VENTE A REMERE. A term used in Lopisiana, which signifies a sale made

reserving a right to the seller to repurchase the property sold by returning the price paid for it.

2. The time during which a repurchase may be made cannot exceed ten years, and, if by the agreement it so exceed, it shall be reduced to ten years. The time fixed for redemption must be strictly adhered to, and cannot be enlarged by the judge, nor exercised afterwards. Code 1545-1549.

3. The following is an instance, of a *vente à réméré*. A sells to B, for the purpose of securing B against endorsements, with a clause that "whenever A should relieve B from such endorsements, without B's having recourse on the land, then B would reconvey the same to A, for A's own use." This is a *vente à réméré*, and until A releases B from his endorsements, the property is B's, and forms no part of A's estate. 7 N. S. 278. See 1 N. S. 528; 3 L. R. 153; 4 L. R. 142; Troplong, Vente, ch. 6; 6 Toull. p. 257.

VENTER or VENTRE. Signifies literally the belly. In law it is used figuratively for the wife: for example, a man has three children by the first, and one by the second venter.

2. A child is said to be *in ventre sa mere* before it is born; while it is a fetus.

VENTER INSPECIENDO, Eng. law. A writ directed to the sheriff, commanding him that, in the presence of twelve men, and as many women, he cause examination to be made, whether a woman therein named is with child or not; and if with child, then about what time it will be born; and that he certify the same. It is granted in a case when a widow, whose husband had lands in fee simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir. Cro. Eliz. 506; Fleta, lib. 1, c. 15.

VENUE, pleading. The venue is the county from which the jury are to come, who are to try the issue. Gould, Pl. c. 3, § 102; Archb. Civ. Pl. 86.

2. As it is a general rule, that the place of every traversable fact stated in the pleadings must be distinctly alleged, or at least that some certain place must be alleged for every such fact, it follows that a venue must be stated in every declaration.

3. In local actions, in which the subject or thing to be recovered is local, the true venue must be laid; that is, the action must be brought in that county where the cause

of action arose: among these are all real actions, and actions which arise out of some local subject, or the violation of some local rights or interest; as the common law action of waste, trespass *quare clausum fregit*, trespass for nuisances to houses or lands, disturbance of right of way, obstruction or diversion of ancient water-courses, &c. Com. Dig. Action, N 4; Bac. Abr. Actions, Local, A a.

4. In a transitory action, the plaintiff may lay the venue in any county he pleases; that is, he may bring suit wherever he may find the defendant, and lay his cause of action to have arisen there, even though the cause of action arose in a foreign jurisdiction. Cowp. 161; Cro. Car. 444; 9 Johns. R. 67; Steph. Pl. 306; 1 Chitty, Pl. 273; Archb. Civ. Pl. 86. Vide, generally, Chit. Pl. Index, h. t.; Steph. Pl. Index, h. t.; Tidd's Pr. Index, h. t.; Graham's Practice, Index, h. t.; Com. Dig. Abatement, H 13; Id. Action, N 13; Id. Amendment, H 1; Id. Pleader, S 9; 21 Vin. Ab. 85 to 169; 1 Vern. 178; Yelv. 12 a; Bac. Ab. Actions, Local and Transitory, B; *Local Actions; Transitory Actions*.

VERAY. This is an ancient manner of spelling *vrai*, true.

2. In the English law, there are three kinds of tenants: 1. *Veray*, or true *tenant*, who is one who holds in fee simple. 2. *Tenant by the manner*, (q. v.) who is one who has a less estate than a fee which remains in the reversioner. 3. *Veray tenant by the manner*, who is the same as tenant by the manner, with this difference only, that the fee simple, instead of remaining in the lord, is given by him or by the law to another. Hamm. N. P. 394.

VERAY TENANT, or TRUE TENANT, *Eng. law*. One who holds a fee simple; in pleadings, he is called simply tenant. He differs from a tenant by the manner in this, that the latter holds a less estate than a fee which remains in the reversioner.

2. A veray tenant by the manner is the same as tenant by the manner, with this difference only, that the fee simple, instead of remaining in the land, is given by him or by the law, to another. Ham. N. P. 394.

VERBAL. Parol; by word of mouth; as verbal agreement; verbal evidence. Not in writing.

VERBAL NOTE. In diplomatic language, a memorandum or note not signed, sent when an affair has continued a long time without any reply, in order to avoid the ap-

pearance of an urgency, which, perhaps, the affair does not require; and, on the other hand, not to afford any ground for supposing that it is forgotten, or that there is no intention of not prosecuting it any further, is called a *verbal note*.

VERBAL PROCESS. In Louisiana, by this term is understood a written account of any proceeding or operation required by law, signed by the person commissioned to perform the duty, and attested by the signature of witnesses. Vide *Procès Verbal*.

VERDICT, *practice*. The unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of the trial of a cause.

2. Verdicts are of several kinds, namely, privy and public, general, partial, and special.

3. A *privy* verdict is one delivered privily to a judge out of court. A verdict of this kind is delivered to the judge after the jury have agreed, for the convenience of the jury, who after having given it, separate. This verdict is of no force whatever; and this practice being exceedingly liable to abuse, is seldom if ever allowed in the United States.

4. A *public* verdict is one delivered in open court. This verdict has its full effect, and unless set aside is conclusive on the facts, and when judgment is rendered upon it, bars all future controversy, in personal actions. A private verdict must afterwards be given publicly in order to give it any effect.

5. A *general* verdict is one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or defendant. Co. Lit. 228; 4 Bl. Com. 461; Code of Prac. of Lo. art. 519. The jury may find such a verdict whenever they think fit to do so.

6. A *partial* verdict in a criminal case, is one by which the jury acquit the defendant of a part of the accusation against him, and find him guilty of the residue: the following are examples of this kind of a verdict, namely: when they acquit the defendant on one count and find him guilty on another, which is indeed a species of general verdict, as he is generally acquitted on one charge, and generally convicted on another; when the charge is of an offence of a higher, and includes one of an inferior degree, the jury may convict of the less atrocious by finding a partial verdict. Thus, upon an indictment for burglary, the defendant may be

convicted of larceny, and acquitted of the nocturnal entry; upon an indictment for murder, he may be convicted of manslaughter; robbery may be softened to simple larceny; a battery, into a common assault. 1 Chit. Cr. Law, 638, and the cases there cited.

7. A *special* verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges. Lit. Sel. Cas. 376; Breese, 176; 4 Rand. 504; 1 Hen. & Munf. 235; 1 Wash. C. C. 499; 2 Mason, 31. The jury have an option, instead of finding the negative or affirmative of the issue, as in a general verdict, to find all the facts of the case as disclosed by the evidence before them, and, after so setting them forth, to conclude to the following effect: "that they are ignorant, in point of law, on which side they ought upon those facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the court are of an opposite opinion, then they find vice versa." This form of finding is called a *special verdict*. In practice they have nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and, with respect to other particulars, according to the state of facts, which it is agreed, that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record; and the question of law, arising on the facts found, is argued before the court in bank, and decided by that court as in case of a demurrer. If either party be dissatisfied with their decision, he may afterwards resort to a court of error. Steph. Pl. 113; 1 Archb. Pr. 189; 3 Bl. Com. 377; Bac. Abr. Verdict, D, E.

8. There is another method of finding a special verdict; this is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the

judges or the court above on a *special case* stated by the counsel on both sides with regard to a matter of law. 3 Bl. Com. 378; and see 10 Mass. R. 64; 11 Mass. R. 858. See, generally, Bouv. Inst. Index, h. t.

VERIFICATION, pleading. Whenever new matter is introduced on either side, the plea must conclude with a verification or averment, in order that the other party may have an opportunity of answering it. Carth. 337; 1 Lutw. 201; 2 Wils. 66; Dougl. 60; 2 T. R. 576; 1 Saund. 103, n. 1; Com. Dig. Pleader, E.

2. The usual verification of a plea containing matter of fact, is in these words, "*And this he is ready to verify*," &c. See 1 Chit. Pl. 537, 616; Lawes, Civ. Pl. 144; 1 Saund. 103, n. 1; Willes, R. 5; 3 Bl. Com. 309.

3. In one instance, however, new matter need not conclude with a verification, and then the pleader may pray judgment without it; for example, when the matter pleaded is merely negative. Willes, R. 5; Lawes on Pl. 145. The reason of it is evident, a negative requires no proof; and it would therefore be impertinent or nugatory for the pleader, who pleads a negative matter, to declare his readiness to prove it.

VERIFICATION, practice. The examination of the truth of a writing; the certificate that the writing is true. Vide *Authentication*.

VERMONT. The name of one of the new states of the United States of America. It was admitted by virtue of "An act for the admission of the state of Vermont into this Union," approved February, 18, 1791, 1 Story's L. U. S. 169, by which it is enacted, that the state of Vermont having petitioned the congress to be admitted a member of the United States, Be it enacted, &c., That on the fourth day of March, one thousand seven hundred and ninety-one, the said state, by the name and style of "the state of Vermont," shall be received and admitted into this Union, as a new and entire member of the United States of America.

2. The constitution of this state was adopted by a convention holden at Windsor, on the ninth day of July, one thousand seven hundred and ninety-three. The powers of the government are divided into three distinct branches; namely, the legislative, the executive, and the judicial.

3.—1. The supreme legislative power is vested in a house of representatives of the

freemen of the commonwealth or state of Vermont, ch. 2, § 2. The house of representatives of the freemen of this state shall consist of persons most noted for wisdom and virtue, to be chosen by ballot, by the freemen of every town in this state respectively, on the first Tuesday in September, annually forever. Ch. 2, § 8. The representatives so chosen, a majority of whom shall constitute a quorum for transacting any other business than raising a state tax, for which two-thirds of the members elected shall be present, shall meet on the second Thursday of the succeeding October, and shall be styled The General Assembly of the State of Vermont: they shall have power to choose their speaker, secretary of state, their clerk, and other necessary officers of the house—sit on their own adjournments—prepare bills, and enact them into laws—judge of the elections and qualifications of their own members; they may expel members, but not for causes known to their own constituents antecedent to their elections; they may administer oaths and affirmations in matters depending before them, redress grievances, impeach state criminals, grant charters of incorporation, constitute towns, boroughs, cities, and counties: they may, annually, on their first session after their election, in conjunction with the council, or oftener if need be, elect judges of the supreme and several county and probate courts, sheriffs, and justices of the peace; and also, with the council may elect major generals and brigadier generals, from time to time, as often as there shall be occasion; and they shall have all other powers necessary for the legislature of a free and sovereign state: but they shall have no power to add to, alter, abolish, or infringe any part of this constitution. Ch. 2 § 9.

4.—2. The supreme executive power is vested in a governor, or in his absence a lieutenant-governor, and council. Ch. 2, § 3. The duties of the executive are pointed out by the second chapter of the constitution as follows:

5.—§ 10. The supreme executive council of this state shall consist of a governor, lieutenant-governor,* and twelve persons, chosen in the following manner, viz. The freemen of each town shall, on the day of the election, for choosing representatives to attend the general assembly, bring in their votes for governor, with his name fairly written, to the constable, who shall seal them up, and write on them, *votes for the governor*,

and deliver them to the representatives chosen to attend the general assembly; and at the opening of the general assembly there shall be a committee appointed out of the council and assembly, who, after being duly sworn to the faithful discharge of their trust, shall proceed to receive, sort, and count the votes for the governor, and declare the person who has the major part of the votes to be governor for the year ensuing. And if there be no choice made, then the council and general assembly, by their joint ballot, shall make choice of a governor. The lieutenant-governor and treasurer shall be chosen in the manner above directed. And each freeman shall give in twelve votes, for twelve counsellors, in the same manner, and the twelve highest in nomination shall serve for the ensuing year as counsellors.

6.—§ 11. The governor, and, in his absence, the lieutenant-governor, with the council, a major part of whom, including the governor, or lieutenant-governor, shall be a quorum to transact business, shall have power to commission all officers, and also to appoint officers, except where provision is, or shall be otherwise made by law, or this frame of government; and shall supply every vacancy in any office, occasioned by death, or otherwise, until the office can be filled in the manner directed by law or this constitution.

7. They are to correspond with other states, transact business with officers of government, civil and military, and to prepare such business as may appear to them necessary to lay before the general assembly. They shall sit as judges to hear and determine on impeachments, taking to their assistance, for advice only, the judges of the supreme court. And shall have power to grant pardons, and remit fines, in all cases whatsoever, except in treason and murder; in which they shall have power to grant reprieves, but not to pardon, until after the end of the next session of the assembly; and except in cases of impeachment, in which there shall be no remission or mitigation of punishment, but by act of the legislature.

8. They are also to take care that the laws be faithfully executed. They are to expedite the execution of such measures as may be resolved upon by the general assembly. And they may draw upon the treasury for such sums as may be appropriated by the house of representatives. They may also lay embargoes, or prohibit the exporta-

tion of any commodity, for any time not exceeding thirty days, in the recess of the house only. They may grant such licenses as shall be directed by law; and shall have power to call together the general assembly, when necessary, before the day to which they shall stand adjourned. The governor shall be captain general and commander-in-chief of the forces of the state, but shall not command in person, except advised thereto by the council, and then only so long as they shall approve thereof. And the lieutenant-governor shall, by virtue of his office, be lieutenant-general of all the forces of the state. The governor or lieutenant-governor, and council shall meet at the time and place with the general assembly; the lieutenant-governor shall, during the presence of the commander-in-chief, vote and act as one of the council: and the governor, and, in his absence, the lieutenant-governor, shall, by virtue of their offices, preside in council, and have a casting, but no other vote. Every member of the council shall be a justice of the peace, for the whole state, by virtue of his office. The governor and council shall have a secretary, and keep fair books of their proceedings, wherein any councillor may enter his dissent, with his reasons to support it; and the governor may appoint a secretary for himself and his council.

9.—§ 16. To the end that laws, before they are enacted, may be more maturely considered, and the inconvenience of hasty determinations, as much as possible, prevented, all bills which originate in the assembly shall be laid before the governor and council for their revision and concurrence, or proposals of amendment; who shall return the same to the general assembly, with their proposals of amendment, if any, in writing; and if the same are not agreed to by the assembly, it shall be in the power of the governor and council to suspend the passing of such bill until the next session of the legislature: Provided, that if the governor and council shall neglect or refuse to return any such bill to the assembly, with written proposals of amendment, within five days, or before the rising of the legislature, the same shall become a law.

10.—§ 24. Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office or after his resignation or removal, for mal-administration. All impeachments shall be before the governor, or

lieutenant governor and council, who shall hear and determine the same, and may award costs; and no trial or impeachment shall be a bar to a prosecution at law.

11.—3. The judicial power is regulated by the second chapter of the constitution, as follows:

12.—§ 4. Courts of justice shall be maintained in every county in this state, and also in new counties, when formed; which courts shall be open for the trial of all causes proper for their cognizance; and justice shall be therein impartially administered, without corruption or unnecessary delay. The judges of the supreme court shall be justices of the peace throughout the state; and the several judges of the county courts, in their respective counties, by virtue of their office, except in the trial of such causes as may be appealed to the county court.

13.—§ 5. A future legislature may, when they shall conceive the same to be expedient and necessary, erect a court of chancery, with such powers as are usually exercised by that court or as shall appear for the interest of the commonwealth: Provided, they do not constitute themselves the judges of the said court.

VERSUS. Against; as A B *versus* C D. This is usually abbreviated v.

VERT. Everything bearing green leaves in a forest. Bac. Ab. Courts of the Forest; Manwood, 146.

VESSEL, *mar. law*. A ship, brig, sloop or other craft used in navigation. 1 Boul. Paty, tit. 1, p. 100. See *Ship*.

2. By an act of congress, approved July 29, 1850, it is provided that any person, not being an owner, who shall on the high seas, wilfully, with intent to burn or destroy, set fire to any ship or other vessel, or otherwise attempt the destruction of such ship or other vessel, being the property of any citizen or citizens of the United States, or procure the same to be done, with the intent aforesaid, and being thereof lawfully convicted, shall suffer imprisonment to hard labor, for a term not exceeding ten years, nor less than three years, according to the aggravation of the offence.

TO VEST, *estates*. To give an immediate fixed right of present or future enjoyment; an estate is vested in possession, when there exists a right of present enjoyment; and an estate is vested in interest, when there is a present fixed right of future enjoyment. Fearne on Rem. 2; vide 2 Rop.

on Leg. 757; 8 Com. Dig. App. h. t.; 1 Vern. 323, n.; 10 Vin. Ab. 230; 1 Suppl. to Ves. jr. 200, 242, 315, 434; 2 Id. 157; 5 Ves. 511.

VESTED REMAINDER, estates. One by which a present interest passes to the party, though to be enjoyed in *futuro*, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate has been spent. 2 Bouv. Inst. n. 1831. Vide *Remainder*.

VESTURE OF LAND. By this phrase is meant all things, trees excepted, which grow upon the surface of the land, and clothe it externally.

2. He who has the vesture of land has a right, generally, to exclude others from entering upon the superficies of the soil. 1 Inst. 4, b; Hamm. N. P. 151; see 7 East, R. 200; 1 Vent. 393; 2 Roll. Ab. 2.

VETERA STATUTA. The name of *vetera statuta*, ancient statutes, has been given to the statutes commencing with Magna Charta, and ending with those of Edward II. Crabb's Eng. Law, 222.

VETO, legislation. This is a Latin word signifying, *I forbid*.

2. It is usually applied to the power of the president of the United States to negative a bill which has passed both branches of the legislature. The act of refusing to sign such a bill, and the message which is sent to congress assigning the reasons for a refusal to sign it, are each called a veto.

3. When a bill is engrossed, and has received the sanction of both houses, it is transmitted to the president for his approbation. If he approves of it, he signs it. If he does not, he sends it, with his objections, to the house in which it originated, and that house enter the objections on their journals, and proceed to reconsider the bill. Const. U. S. art. I, s. 7, cl. 2. Vide *Story* on the Const. § 878; 1 Kent, Com. 239.

4. The governors of the several states have generally a negative on the acts of the legislature. When exercised with due caution, the veto power is some additional security against inconsiderate and hasty legislation, or where bills have passed through prejudice or want of due reflection. It was, however, mainly intended as a weapon in the hands of the chief magistrate to defend the executive department from encroachment and usurpation, as well as a just balance of the constitution.

5. The veto power of the British sovereign has not been exercised for more than

a century. It was exercised once during the reign of Queen Anne. Edinburgh Rev. 10th vol. 411, &c.; Parke's Lectures, 126. But anciently the king frequently replied *Le roy s'avisera*, which was in effect withholding his assent. In France the king had the initiative of all laws, but not the *veto*. See 1 Toull. art. 39; and see Nos. 42, 52, note 3.

VEXATION. The injury or damage which is suffered in consequence of the tricks of another.

VEXATIOUS SUITS, torts. A vexatious suit is one which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant.

2. The suit is either a criminal prosecution, a conviction before a magistrate, or a civil action. The suit need not be altogether without foundation; if the part which is groundless has subjected the party to an inconvenience, to which he would not have been exposed had the valid cause of complaint alone have been insisted on, it is injurious. 4 Taunt. 616; 4 Rep. 14; 1 Pet. C. C. Rep. 210; 4 Serg. & Rawle, 19, 23.

3. To make it vexatious, the suit must have been instituted *maliciously*. As malice is not in any case of injurious conduct necessarily to be inferred from the total absence of probable cause for exciting it, and in the present instance the law will not allow it to be inferred from that circumstance, for fear of being mistaken, it casts upon the suffering party the *onus* of proving express malice. 2 Wils. R. 307; 2 Bos. & Pull. 129; Carth. 417; but see what Gibbs, C. J., says in *Berley v. Bethune*, 5 Taunt. 583; see also 1 Pet. C. C. R. 210; 2 Browne's R. Appx. 42, 49; Add. R. 270.

4. It is necessary that the prosecution should have been carried on *without probable cause*. The law presumes that probable cause existed until the party aggrieved can show to the contrary. Hence he is bound to show the total absence of probable cause. 5 Taunt. 580; 1 Campb. R. 199. See 3 Dow. Rep. 160; 1 T. Rep. 520; Rul. N. P. 14; 4 Burr. 1974; 2 Bar. & C. 693; 4 Dow. & R. 107; 1 Car. R. 138, 204; 1 Gow. Rep. 20; 1 Wils. 232; Cro. Jac. 194. He is also under the same obligation when the original proceeding was a civil action. 2 Wils. 307.

5. The damage which the party injured sustains from a vexatious suit for a crime,

is either to his person, his reputation, his estate or his relative rights. 1. Whenever imprisonment is occasioned by a malicious unfounded criminal prosecution, the injury is complete, although the detention may have been momentary, and the party released on bail. Carth. 416. 2. When the bill of indictment contains scandalous aspersions likely to impair the reputation of the accused, the damage is complete. See 12 Mod. 210; 2 B. & A. 494; 3 Dow. & R. 669. 3. Notwithstanding his person is left at liberty, and his character is unstained by the proceedings, (as where the indictment is for a trespass, Carth. 416,) yet if he necessarily incurs expense in defending himself against the charge, he has a right to have his losses made good. 10 Mod. 148; Id. 214; Gilb. 185; S. C. Str. 978. 4. If a master loses the services and assistance of his domestics, in consequence of a vexatious suit, he may claim a compensation. Ham. N. P. 275. With regard to a damage resulting from a *civil* action, when prosecuted in a court of competent jurisdiction, the only detriment the party can sustain, is the imprisonment of his person, or the seizure of his property, for as to any expense he may be put to, this, in contemplation of law, has been fully compensated to him by the costs adjudged. 4 Taunt. 7; 2 Mod. 306; 1 Mod. 4. But where the original suit was *coram non judice*, the party as the law formerly stood, necessarily incurred expense without the power of remuneration, unless by this action, because any award of costs the court might make would have been a nullity. However, by a late decision such an adjudication was holden unimpeachable, and that the party might well have an action of debt to recover the amount. 1 Wils. 816. So that the law, in this respect, seems to have taken a new turn, and, perhaps, it would now be decided, that no action can under any other circumstances but imprisonment of the person or seizure of the property, be maintained for suing in an improper court. Vide Carth. 189.

See, in general, Bac. Abr. Action on the case, H; Vin. Abr. Actions, H c; Com. Dig. Action upon the case upon deceit; 5 Amer. Law Journ. 514; Yelv. 105, a note 2; Bull. N. P. 13; 3 Selw. N. P. 535; Notes on Co. Litt. 161, a, (Day's edit.); 1 Saund. 230, n. 4; 3 Bl. Com. 126, n. 21, (Chit. edit.); this Dict. tit. *Malicious Prosecution*.

VEXED QUESTION, *verata questio*. A question or point of law often discussed or agitated, but not determined nor settled.

VI ET ARMIS. With force and arms. When a man breaks into another's close *vi et armis*, he may be opposed force by force, for there is no time to request him to go away. 2 Salk. 641; 8 T. R. 78, 357.

2. These words are universally inserted in a writ of trespass, because they point out that the act has been done with force, and they are technical words to designate this offence. Ham. N. P. 4, 10, 12; 1 Chit. Pl. 122 to 125; and article *Force*.

VIA. A cart-way, which also includes a foot-way and a horse-way. Vide *Way*.

VIABLE, *Vita habilis*, capable of living. This is said of a child who is born alive in such an advanced state of formation as to be capable of living. Unless he is born viable he acquires no rights and cannot transmit them to his heirs, and is considered as if he had never been born.

2. This term is used in the French law, Toull. Dr. Civ. Fr. tome 4, p. 101; it would be well to engraft it on our own. Vide Traill. Med. Jur. 46, and *Dead Born*.

VIABILITY, *med. jur.* An aptitude to live after birth; extra uterine life. 1 Briand. Méd. Lég. 1ere partie, c. 6, art. 2. See 2 Sav. Dr. Rom. Append. III. for a learned discussion of this subject.

VICE. A term used in the civil law and in Louisiana, by which is meant a defect in a thing; an imperfection. For example, epilepsy in a slave, roaring and crib-biting in a horse, are vices. Redhibitory vices are those for which the seller will be compelled to annul a sale, and take back the thing sold. Poth. Vente, 203; Civ. Code of Lo. art. 2498 to 2507; 1 Duv. n. 396.

VICE-ADMIRAL. The title of an officer in the navy; the next in rank after the admiral. In the United States we have no officer by this name.

VICE-CHANCELLOR. The title of a judicial officer who decides causes depending in the court of chancery; his opinions may be reversed, discharged or altered by the chancellor.

VICE-CONSUL. An officer who performs the duties of a consul within a part of the district of a consul, or who acts in the place of a consul. Vide 1 Phil. Ev. 306.

VICE-PRESIDENT OF THE UNITED STATES. The title of the second officer, in point of

rank, in the government of the United States.

2. To obtain a correct idea of the law relating to this officer, it is proper to consider, 1. His election. 2. The duration of his office. 3. His duties.

3.—1. He is to be elected in the manner pointed out under the article President of the United States. (q. v.) See, also, 3 Story on the Const. § 1447, et seq.

4.—2. His office in point of duration is coëxtensive with that of the president.

5.—3. The fourth clause of the third section of the first article of the constitution of the United States, directs, that "the vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided." And by article 2, s. 1, clause 6, of the constitution, it is provided, that "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

6. When the vice-president exercises the office of president, he is called the President of the United States.

VICE VERSA. On the contrary; on opposite sides.

VICECOMES. The sheriff.

VICECOMES NON MISIT BREVE. The sheriff did not send the writ. An entry made on the record when nothing has been done by virtue of a writ which has been directed to the sheriff.

VICENAGE. The neighborhood; the venue. (q. v.)

VICINETUM. The neighborhood; vicinage; the venue. Co. Litt. 158 b.

VICONTIEL. Belonging to the sheriff.

VIDELICET. A Latin adverb signifying to wit, that is to say, namely, *scilicet*. (q. v.) This word is usually abbreviated *viz*.

2. The office of the videlicet is to mark, that the party does not undertake to prove the precise circumstances alleged, and in such case he is not required to prove them. Steph. Pl. 309; 7 Cowen, R. 42; 4 John. R. 450; 3 T. R. 67, 643; 8 Taunt. 107; Greenl. Ev. § 60; 1 Litt. R. 209. Vide Yelv. 94; 3 Saund. 291 a, note; New Rep. *465, note; Dane's Ab. Index, h. t.; 2 Pick. 214, 222; 16 Mass. 129.

VIEW. A prospect.

2. Every one is entitled to a view from his premises, but he thereby acquires no right over the property of his neighbors.

The erection of buildings which obstruct a man's view, therefore, is not unlawful, and such buildings cannot be considered a nuisance. 9 Co. R. 58 b. Vide *Ancient Lights; Nuisance*.

VIEW, DEMAND OF, practice. In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to demand a view of the land in question; or if the subject of claim be rent, or the like, a view of the land out of which it issues. Vin. Abr. View; Com. Dig. View; Booth, 37; 2 Saund. 45 b; 1 Reeves' Hist. 435. This, however, is confined to real or mixed actions; for in personal actions the view does not lie. In the action of dower unde nihil habet, it has been much questioned whether the view be demandable or not; 2 Saund. 44, n. 4; and there are other real and mixed actions in which it is not allowed. The view being granted, the course of proceeding is to issue a writ, commanding the sheriff to cause the defendant to have a view of the land. It being the interest of the demandant to expedite the proceedings, the duty of suing out the writ lies upon him, and not upon the tenant; and when, in obedience to its exigency, the sheriff causes view to be made, the demandant is to show to the tenant, in all ways possible, the thing in demand with its metes and bounds. On the return of the writ into court, the demandant must count de novo; that is, declare again; Com. Dig. Pleader, 2 Y 3; Booth, 40; and the pleadings proceed to issue.

2. This proceeding of demanding view, is, in the present rarity of real actions, unknown in practice.

VIEWERS. Persons appointed by the courts to see and examine certain matters, and make a report of the facts together with their opinion to the court. In practice they are usually appointed to lay out roads and the like. Vide *Experts*.

VIGILANCE. Proper attention in proper time.

2. The law requires a man who has a claim to enforce it in proper time, while the adverse party has it in his power to defend himself; and if by his neglect to do so, he cannot afterwards establish such claim, the maxim *vigilantibus non dormientibus leges subserviunt*, acquires full force in such case. For example, a claim not sued for within the time required by the

acts of limitation, will be presumed to be paid; and the mere possession of corporeal real property, as if in fee simple, and without admitting any other ownership for sixty years, is a sufficient title against all the world, and cannot be impeached by any dormant claim. See 3 Bl. Com. 196, n; 4 Co. 11 b. Vide *Twenty years*.

VILL. In England this word was used to signify the parts into which a hundred or wapentake was divided. Fortesc. De Laud. ch. 24. See Co. Litt. 115 b. It also signifies a town or city. Barr. on the Stat. 133.

VILLAIN. An epithet used to cast contempt and contumely on the person to whom it is applied.

2. To call a man a villain in a letter written to a third person, will entitle him to an action without proof of special damages. 1 Bos. & Pull. 331.

VILLEIN, Engl. law. A species of slave during the feudal times.

2. The feudal villein of the lowest order was unprotected as to property, and subjected to the most ignoble services; but his circumstances were very different from the slave of the southern states, for no person was, in the eye of the law, a villein, except as to his master; in relation to all other persons he was a freeman. Litt. Ten. s. 189, 190; Hallam's View of the Middle Ages, vol. i. 122, 124; vol. ii. 199.

VILLENOUS JUDGMENT, punish-ments. In the English law it was a judgment given by the common law in attain, or in cases of conspiracy.

2. Its effects were to make the object of it lose his *liberam legem*, and become infamous. He forfeited his goods and chattels, and his lands during life; and this barbarous judgment further required that his lands should be wasted, his houses razed, his trees rooted up, and that his body should be cast into prison. He could not be a juror or witness. Burr. 996, 1027; 4 Bl. Com. 136.

VINCULO MATRIMONII. A divorce à vinculo matrimonii, is one from the bonds of matrimony. Such a divorce generally enables the parties to marry again.

VINDICATION, civil law. The claim made to property by the owner of it. 1 Bell's Com. 281, 5th ed. See *Revendication*.

VIOLATION. An act done unlawfully and with force. In the English stat. of 25 E. III., st. 5, c. 2, it is declared to be high treason in any person who shall violate the

king's companion; and it is equally high treason in her to suffer willingly such violation. This word has been construed under this statute to mean carnal knowledge. 3 Inst. 9; Bac. Ab. Treason, E.

VIOLENCE. The abuse of force. Théorie des Lois Criminelles, 32. That force which is employed against common right, against the laws, and against public liberty. Merl. h. t.

2. In cases of robbery, in order to convict the accused, it is requisite to prove that the act was done with violence; but this violence is not confined to an actual assault of the person, by beating, knocking down, or forcibly wresting from him; on the contrary, whatever goes to intimidate or overawe, by the apprehension of personal violence, or by fear of life, with a view to compel the delivery of property, equally falls within its limits. Alison, Pr. Cr. Law of Scotl. 228; 4 Binn. R. 379; 2 Russ. on Cr. 61; 1 Hale, P. C. 553. When an article is merely snatched, as by a sudden pull, even though a momentary force be exerted, it is not such violence as to constitute a robbery. 2 East, P. C. 702; 2 Russ. Cr. 68; Dig. 4, 2, 2 and 3.

VIOLENT PROFITS, Scotch law. The gains made by a tenant holding over, are so called. Ersk. Inst. R. 2, tit. 6, s. 54.

VIOLENTLY, pleading. This word was formerly supposed to be necessary in an indictment, in order to charge a robbery from the person, but it has been holden unnecessary. 2 East, P. C. 784; 1 Chit. Cr. Law, *244. The words "feloniously and against the will," usually introduced in such indictments, seem to be sufficient. It is usual also to aver a *putting in fear*, though this does not seem to be requisite. Id.

VIRGA. An obsolete word, which signifies a rod or staff, such as sheriffs, bailiffs, and constables carry, as a badge or ensign of their office.

VIRGINIA. The name of one of the original states of the United States of America. This colony was chartered in 1606, by James the First, and this charter was afterwards altered in 1609 and 1612; and in 1624 the charter was declared to be forfeited under proceedings under a writ of *quo warranto*. After the fall of the charter, Virginia continued to be a royal province until the period of the American Revolution.

2. A constitution, or rather bill of rights, was adopted by a convention of the repre-

sentatives of the good people of Virginia, on the 12th day of June, 1776. An amended constitution or form of government for Virginia was adopted January 14, 1830, which has been superseded by the present constitution, which was adopted August 1, 1851.

3. The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to either house of assembly. Art 2.

4.—§ 1. The legislature is composed of two branches, the house of delegates and the senate, which together are called the general assembly of Virginia.

5.—1. The *house of delegates* will be considered with reference, 1. To the qualifications of the electors. 2. The qualifications of members. 3. The number of members. 4. Time of their election.

6.—1st. Every white male citizen of the commonwealth, of the age of twenty-one years, who has been a resident of the state for two years, and of the county, city, or town where he offers to vote for twelve months next preceding an election, and no other person, shall be qualified to vote for members of the general assembly, and all officers elective by the people: but no person in the military, naval, or marine service of the United States shall be deemed a resident of this state, by reason of being stationed therein. And no person shall have the right to vote, who is of unsound mind, or a pauper, or a non-commissioned officer, soldier, seaman, or marine in the service of the United States, or who has been convicted of bribery in an election, or of any infamous offence.

7.—2. The general assembly at its first session after the adoption of this constitution, and afterwards as occasion may require, shall cause every city or town, the white population of which exceeds five thousand, to be laid off into convenient wards, and a separate place of voting to be established in each, and thereafter no inhabitant of such city or town shall be allowed to vote except in the ward in which he resides.

8.—3. No voter, during the time for holding any election at which he is entitled to vote, shall be compelled to perform military service, except in time of war or public danger; to work upon the public roads, or to attend any court as suitor, juror or wit-

ness; and no voter shall be subject to arrest under any civil process during his attendance at elections, or in going to and returning from them.

9.—4. In all elections votes shall be given openly, or *viva voce*, and not by ballot. But dumb persons, entitled to suffrage, may vote by ballot. Art. 3.

10.—2d. Any person may be elected a delegate who shall have attained the age of twenty-one years, and shall be actually a resident within the city, county, town, or election district, qualified by this constitution to vote for members of the general assembly: but no person holding a lucrative office, no minister of the gospel, or priest of any religious denomination, no salaried officer of any banking corporation or company, and no attorney for the commonwealth shall be capable of being elected a member of either house of assembly. The removal of any person elected to either branch of the general assembly, from the county, city, town, or district for which he was elected, shall vacate his office. Art. 4, s. 5, § 7.

11.—3d. The house of delegates is to consist of one hundred and fifty-two members. Art. 4, § 2.

12.—4th. The members of the general assembly are to be chosen biennially. Art. 4, § 2.

13.—2. The *senate* will be considered in the same order that the house of delegates has been. 1. The qualifications of electors are the same as for electors of delegates. 2. Any person may be elected a senator who has attained the age of twenty-five years, and shall be actually a resident within the district, and qualified to vote for members of the general assembly. The other qualifications are the same as those for delegates. Art. 4, s. 5, § 7. 3. The number of senators is fifty. Art. 4, § 3. 4. Senators are to be elected for the term of four years. Upon the assembling of the senators so elected, they shall be divided into two equal classes, to be numbered by lot. The term of service of the senators of the first class shall expire with that of the delegates first elected under this constitution; and of the senators of the second class, at the expiration of two years thereafter; and this alternation shall be continued, so that one-half of the senators may be chosen every second year. Art. 4, § 3.

14.—1. The chief *executive* power of this commonwealth shall be vested in a governor. He shall hold the office for the term of four

years, to commence on the — day of — next succeeding his election, and be ineligible to the same office for the term next succeeding that for which he was elected, and to any other office during his term of service.

15.—2. The governor shall be elected by the voters, at the times and places of choosing members of the general assembly. Returns of the election shall be transmitted, under seal, by the proper officers to the secretary of the commonwealth, who shall deliver them to the speaker of the house of delegates, on the first day of the next session of the general assembly. The speaker of the house of delegates shall within one week thereafter, in the presence of a majority of the senate and house of delegates, open the said returns, and the votes shall then be counted. The person having the highest number of votes shall be declared elected; but if two or more shall have the highest and an equal number of votes, one of them shall be chosen governor by the joint vote of the two houses of the general assembly. Contested elections for governor shall be decided by a like vote, and the mode of proceeding in such cases shall be prescribed by law.

16.—3. No person shall be eligible to the office of governor unless he has attained the age of thirty years, is a native citizen of the United States, and has been a citizen of Virginia for five years next preceding his election.

17.—4. The governor shall reside at the seat of government; shall receive five thousand dollars for each year of his service, and, while in office, shall receive no other emolument from this or any other government.

18.—5. He shall take care that the laws be faithfully executed; communicate to the general assembly at every session the condition of the commonwealth; recommend to their consideration such measures as he may deem expedient; and convene the general assembly on application of a majority of the members of both houses thereof, or when in his opinion the interest of the commonwealth may require it. He shall be commander-in-chief of the land and naval forces of the state; have power to embody the militia to repel invasion, suppress insurrection and enforce the execution of the laws; conduct, either in person or in such other manner as shall be prescribed by law, all intercourse with other and foreign states; and, during the recess of the general assembly,

fill *pro tempore* all vacancies in those offices for which the constitution and laws make no provision: but his appointments to such vacancies shall be by commissions to expire at the end of thirty days after the commencement of the next session of the general assembly. He shall have power to remit fines and penalties, in such cases and under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the house of delegates, or the law shall otherwise particularly direct, to grant reprieves and pardons after conviction, and to commute capital punishment. But he shall communicate to the general assembly at each session, the particulars of every case of fine or penalty remitted, of reprieve or pardon granted and of punishment commuted, with his reasons for remitting, granting or commuting the same.

19.—6. He may require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices; and may also require the opinion in writing of the attorney-general upon any question of law connected with his official duties.

20.—7. Commissions and grants shall run in the name of the commonwealth of Virginia, and be attested by the governor with the seal of the commonwealth annexed.

21.—8. A lieutenant governor shall be elected at the same time, and for the same term, as the governor: and his qualification and the manner of his election in all respects shall be the same.

22.—9. In case of the removal of the governor from office, or of his death, failure to qualify, resignation, removal from the state, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the lieutenant governor; and the general assembly shall provide by law for the discharge of the executive functions in other necessary cases.

23.—10. The lieutenant governor shall be president of the senate, but shall have no vote; and while acting as such, shall receive a compensation equal to that allowed to the speaker of the house of delegates. Art. 5, §§ 1-10.

24.—§ 3. The *judicial* powers are regulated by the sixth article of the constitution, as follows:

25.—1. There shall be a supreme court

of appeals, district courts and circuit courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law.

26.—2. The state shall be divided into twenty-one judicial circuits, ten districts and five sections.

27.—3. The general assembly may, at the end of eight years after the adoption of this constitution, and thereafter at intervals of eight years, re-arrange the said circuits, districts and sections, and place any number of circuits in a district, and of districts in a section; but each circuit shall be altogether in one district, and each district in one section; and there shall not be less than two districts and four circuits in a section, and the number of sections shall not be increased or diminished.

28.—6. For each circuit, a judge shall be elected by the voters thereof, who shall hold his office for the term of eight years, unless sooner removed in the manner prescribed by this constitution. He shall at the time of his election be at least thirty years of age, and during his continuance in office, shall reside in the circuit of which he is judge.

29.—7. A circuit court shall be held at least twice a year by the judge of each circuit, in every county and corporation thereof, wherein a circuit court is now or may hereafter be established. But the judges in the same district may be required or authorized to hold the courts of their respective circuits alternately, and a judge of one circuit to hold a court in any other circuit.

30.—8. A district court shall be held, at least once a year, in every district, by the judges of the circuits constituting the section and the judges of the supreme court of appeals for the section of which the district forms a part, any three of whom may hold a court; but no judge shall sit or decide upon any appeal taken from his own decision. The judge of the supreme court of appeals of one section, may sit in the district courts of another section, when required or authorized by law to do so.

31.—9. The district courts shall not have original jurisdiction, except in cases of habeas corpus, mandamus and prohibition.

32.—10. For each section, a judge shall be elected by the voters thereof, who shall hold his office for the term of twelve years,

unless sooner removed in the manner prescribed by this constitution. He shall at the time of his election be at least thirty-five years of age, and during his continuance in office, reside in the section for which he is elected.

33.—11. The supreme court of appeals shall consist of the five judges so elected, any three of whom may hold a court. It shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus and prohibition. It shall not have jurisdiction in civil causes where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probat of a will, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing, or the right of a corporation, or of a county to levy tolls or taxes; and except in cases of habeas corpus, mandamus and prohibition, and cases involving freedom, or the constitutionality of a law.

34.—12. Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the supreme court of appeals, and of the circuit courts, or any of them, to try any cases remaining on the dockets of the present court of appeals when the judges thereof cease to hold their offices; or to try any cases which may be on the dockets of the supreme court of appeals established by this constitution, in respect to which a majority of the judges of said court may be so situated as to make it improper for them to sit on the hearing thereof.

35.—13. When a judgment or decree is reversed or affirmed by the supreme court of appeals, the reasons therefor shall be stated in writing, and preserved with the record of the case.

36.—14. Judges shall be commissioned by the governor, and shall receive fixed and adequate salaries, which shall not be diminished during their continuance in office. The salary of a judge of the supreme court of appeals shall not be less than three thousand dollars, and that of a judge of a circuit court not less than two thousand dollars per annum, except that of the judge of the fifth circuit, which shall not be less than fifteen hundred dollars per annum; and each shall receive a reasonable allowance for necessary travel.

37.—15. No judge during his term of

service shall hold any other office, appointment or public trust, and the acceptance thereof shall vacate his judicial office; nor shall he during such term, or within one year thereafter, be eligible to any political office.

38.—16. No election of judge shall be held within thirty days of the time of holding any election of electors of president and vice-president of the United States, of members of congress or of the general assembly.

39.—17. Judges may be removed from office by a concurrent vote of both houses of the general assembly, but a majority of all the members elected to each house must concur in such vote; and the cause of removal shall be entered on the journal of each house. The judge, against whom the general assembly may be about to proceed, shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the general assembly shall act thereupon.

40.—22. At every election of a governor, an attorney-general shall be elected by the voters of the commonwealth, for the term of four years. He shall be commissioned by the governor, shall perform such duties and receive such compensation as may be prescribed by law, and be removable in the manner prescribed for the removal of judges.

41.—23. Judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices after their terms of service have expired, until their successors are qualified.

42.—24. Writs shall run in the name of the commonwealth of Virginia and be attested by the clerks of the several courts. Indictments shall conclude, against the peace and dignity of the commonwealth.

43.—25. There shall be in each county of the commonwealth, a county court, which shall be held monthly, by not less than three, nor more than five justices, except when the law shall require the presence of a greater number.

44.—26. The jurisdiction of the said court shall be the same as that of the existing county courts, except so far as it is modified by this constitution or may be changed by law.

45.—27. Each county shall be laid off into districts, as nearly equal as may be in territory and population. In each district

there shall be elected by the voters thereof, four justices of the peace, who shall be commissioned by the governor, reside in their respective districts, and hold their office for the term of four years. The justices so elected shall choose one of their own body, who shall be the presiding justice of the county court, and whose duty it shall be to attend each term of said court. The other justices shall be classified by law for the performance of their duties in court.

46.—28. The justices shall receive for their services in court, a per diem compensation, to be ascertained by law, and paid out of the county treasury; and shall not receive any fee or emolument for other judicial services.

VIRILIA. The privy members of a man. Bract. lib. 3, p. 144.

VIRTUTE OFFICII. By virtue of his office. A sheriff, a constable, and some other officers may, *virtute officii*, apprehend a man who has been guilty of a crime in their presence.

VIS. A Latin word which signifies force. In law it means any kind of force, violence, or disturbance, relating to a man's person or his property.

VIS IMPRESSA. Immediate force; original force. This phrase is applied to cases of trespass, when a question arises whether an injury has been caused by a direct force, or one which is indirect. When the original force, or *vis impressa*, had ceased to act before the injury commenced, then there is no force, the effect is mediate, and the proper remedy is trespass on the case.

2. When the injury is the immediate consequence of the force or *vis proxima*, trespass *vi et armis* lies. 3 Bouv. Inst. n. 3483; 4 Bouv. Inst. n. 3583.

VIS MAJOR, a superior force. In law it signifies inevitable accident.

2. This term is used in the civil law in nearly the same way that the words *act of God*, (q. v.) are used in the common law. Generally, no one is responsible for an accident which arises from the *vis major*; but a man may be so, where he has stipulated that he would; and when he has been guilty of a fraud or deceit. 2 Kent, Com. 448; Poth. Prêt a Usage, n. 48, n. 60; Story, Bailm. § 25.

VISA, *civ. law*. The formula put upon an act; a register; a commercial book, in order to approve of it and authenticate it.

VISITATION. The act of examining into the affairs of a corporation.

2. The power of visitation is applicable only to ecclesiastical and eleemosynary corporations. 1 Bl. Com. 480; 2 Kyd on Corp. 174. The visitation of civil corporations is by the government itself, through the medium of the courts of justice Vide 2 Kent, Com. 240.

VISITER. An inspector of the government, of corporations or bodies politic. 1 Bl. Com. 482. Vide Dane's Ab. Index, h. t.; 7 Pick. 303; 12 Pick. 244.

VISNE. The neighborhood; a neighboring place; a place near at hand; the venue. (q. v.)

2. Formerly the visne was confined to the immediate neighborhood, where the cause of action arose, and many verdicts were disturbed because the visne was too large, which, becoming a great grievance, several statutes were passed to remedy the evil. The 21 James I., c. 13, gives aid after verdict, where the visne is partly wrong, that is, where it is warded out of too many or too few places in the county named. The 16 and 17 Charles II., c. 8, goes further, and cures defects of the visne wholly, so that the cause is tried by a jury of the proper county. Vide *Venue*.

VIVA VOCE. Living voice; verbally. It is said a witness delivers his evidence viva voce, when he does so in open court; the term is opposed to deposition. It is sometimes opposed to ballot; as, the people vote by ballot, but their representatives, in the legislature, vote viva voce.

VIVARY. A place where *living* things are kept; as a park, on land; or in the water, as a pond.

VIVUM VADIUM, or *living pledge, contracts*. When a man borrows a sum of money, (suppose two hundred dollars,) of another, and grants him an estate, as of twenty dollars per annum, to hold till the rents and profits shall repay the sum so borrowed.

2. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt, and immediately on the discharge of that, results back to the borrower. 2 Bl. Com. 157. See *Antichresis; Mortgage*.

VOCATIO IN JUS, *Roman civ. law*. According to the practice in the *legis actiones* of the Roman law, a person having a demand against another, verbally cited him to go with him to the prætor in *jus eamus*. *In jus te voco*. This was denomina-

ted *vocatio in jus*. If a person thus summoned refused to go, he could be compelled by force to do so, unless he found a *vindex*, that is, a *procurator*, or a person to undertake his cause. When the parties appeared before the prætor, they went through the particular formalities required by the action applicable to the cause. If the cause was not ended the same day, the parties promised to appear again at another day, which was called *vadimonium*. See Math. V. 25.

VOID, contracts, practice. That which has no force or effect.

2. Contracts, bequests or legal proceedings may be void; these will be severally considered.

3.—1. The invalidity of a contract may arise from many causes. 1. When the parties have *no capacity to contract*; as in the case of idiots, lunatics, and in some states, under their local regulations, habitual drunkards. Vide *Parties to contracts*, § 1; 1 Hen. & Munf. 69; 1 South. R. 361; 2 Hayw. R. 394; Newl. on Contr. 19; 1 Fonbl. Eq. 46; 3 Camp. 128; Long on Sales, 14; Highm. on Lunacy, 111, 112; Chit. on Contr. 29, 257.

4.—2. When the contract has for its object the performance of an act *malum in se*; as a covenant to rob or kill a man, or to commit a breach of the peace. Shep. To. 163; Co. Lit. 206, b; 10 East, R. 534.

5.—3. When *the thing to be performed is impossible*; as, if a man were to covenant to go from the United States to Europe in one day. Co. Lit. 206, b. But in these cases, the impossibility must exist at the time of making the contract; for although subsequent events may excuse the performance, the contract is not absolutely void; as, if John contract to marry Maria, and, before the time appointed, the covenantee marry her himself, the contract will not be enforced, but it was not void in its creation. It differs from a contract made by John, who, being a married man, and known to the covenantee, enters into a contract to marry Maria during the continuance of his existing marriage, for in that case the contract is void.

6.—4. Contracts against *public policy*; as an agreement not to marry *any one*, or not to follow *any business*; the one being considered in restraint of marriage, and the other in restraint of trade. 4 Burr. 2225; S. C. Wilm. 364; 2 Vern. 215; Al. 67; 8 Mass. R. 223; 9 Mass. R. 522; 1 Pick. R. 443; 3 Pick. R. 188.

7.—5. When the contract is fraudulent, it is void, for fraud vitiates everything. 1 Fonbl. Equity, 66, note; Newl. on Contr. 852; and article *Fraud*. As to cases when a condition consists of several parts, and some are lawful and others are not, see article *Condition*.

8.—2. A devise or bequest is void: 1. When made by a person not lawfully authorized to make a will; as, a lunatic or idiot, a married woman, and an infant before arriving at the age of fourteen, if a male, and twelve if a female. Harg. Co. Lit. 896, b; Rob. on Wills, 28; Godolph. Orph. Leg. 21. 2. When there is a defect in the form of the will, or when the devise is forbidden by law; as, when a perpetuity is given, or when the devise is unintelligible. 3. When it has been obtained by fraud. 4. When the devisee is dead. 5. And when there has been an express or implied revocation of the will. Vide *Legacy; Will*.

9.—3. A writ or process is void when there was not any authority for issuing it, as where the court had no jurisdiction. In such case, the officers acting under it become trespassers, for they are required, notwithstanding it may sometimes be a difficult question of law, to decide whether the court has or has not jurisdiction. 2 Brownl. 124; 10 Co. 69; March's R. 118; 8 T. R. 424; 3 Cranch, R. 330; 4 Mass. R. 234. Vide articles *Irregularity; Regular and Irregular Process*.

Vide, generally, 8 Com. Dig. 644; Bao. Ab. Conditions, K; Bao. Ab. Infancy, &c. I; Bao. Ab. h. t.; Dane's Ab. Index, h. t.; 3 Chit. Pr. 75; Yelv. 42, a, note 1; 1 Rawle, R. 163; Bouv. Inst. Index, h. t.

VOIDABLE. That which has some force or effect, but which, in consequence of some inherent quality, may be legally annulled or avoided.

2. As a familiar example, may be mentioned the case of a contract made by an infant with an adult, which may be avoided or confirmed by the former on his coming of age. Vide *Parties, contracts*.

3. Such contracts are generally of binding force until avoided by the party having a right to annul them. Bao. Ab. Infancy, I 3; Com. Dig. *Enfant*; Fonbl. Eq. b. 1, c. 2, § 4, note b; 3 Burr. 1794; Nels. Ch. R. 55; 1 Atk. 354; Stra. 937; Perk. § 12.

VOIR. An old French word, which signifies the same as the modern word *vrai*, true. *Voir dire*, to speak truly, to tell the truth.

2. When a witness is supposed to have an interest in the cause, the party against whom he is called has the choice to prove such interest by calling another witness to that fact, or he may require the witness produced to be sworn on his *voir dire* as to whether he has an interest in the cause or not, but the party against whom he is called will not be allowed to have recourse to both methods to prove the witness' interest. If the witness answers he has no interest, he is competent, his oath being conclusive; if he swears he has an interest, he will be rejected.

3. Though this is the rule established beyond the power of the courts to change, it seems not very satisfactory. The witness is sworn on his *voir dire* to ascertain whether he has an interest, which would disqualify him, because he would be tempted to perjure himself, if he testified when interested. But when he is asked whether he has such an interest, if he is dishonest and anxious to be sworn in the case, he will swear falsely he has none, and his answer being conclusive, he will be admitted as competent; if, on the contrary, he swears truly he has an interest, when he knows that will exclude him, he is told that for being thus honest, he must be rejected.

See, generally, 12 Vin. Ab. 48; 22 Vin. Ab. 14; 1 Dall. 875; Dane's Ab. Index, h. t.; and *Interest*.

VOLUNTARY. Willingly; done with one's consent; negligently. Wolff, § 5.

2. To render an act criminal or tortious it must be voluntary. If a man, therefore, kill another without a will on his part, while engaged in the performance of a lawful act, and having taken proper care to prevent it, he is not guilty of any crime. And if he commit an injury to the person or property of another, he is not liable for damages, unless the act has been voluntary or through negligence, as when a collision takes place between two ships without any fault in either. 2 Dobs. R. 83; 3 Hagg. Adm. R. 320, 414.

3. When the crime or injury happens in the performance of an unlawful act, the party will be considered as having acted voluntarily.

4. A negligent escape permitted by an officer having the custody of a prisoner will be presumed as voluntary; under a declaration or count charging the escape to have been voluntary, the party will, therefore, be allowed to give a negligent escape

in evidence. 1 Saund. 35, n. 1. See *Will*.

VOLUNTARY CONVEYANCE, contracts. The transfer of an estate made without any adequate consideration of value.

2. Whenever a voluntary conveyance is made, a presumption of fraud properly arises upon the statute of 27th Eliz. cap. 4, which presumption may be repelled by showing that the transaction on which the conveyance was founded, virtually contained some conventional stipulations, some compromise of interests or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of intent to deceive a purchaser. But unless so repelled, such a conveyance coupled with a subsequent negotiation for sale, is conclusive evidence of statutory fraud. 5 Day, 223, 341; 1 Johns. Cas. 161; 4 John. Ch. R. 450; 3 Conn. 450; 4 Conn. 1; 4 John. R. 536; 15 John. R. 14; 2 Munf. R. 363. A distinction has been made between previous and subsequent creditors; such a conveyance is void as to the former but not as to the latter. 8 Wheat. 229; 3 John. Ch. 481; and see 6 Alab. R. 506; 9 Alab. R. 937; 10 Conn. 69. And a conveyance by a father who, though in debt, is not in embarrassed circumstances, who makes a reasonable provision for a child, leaving property sufficient to pay his debts, is not per se, fraudulent. 4 Wheat. 27; 6 Watts & S. 97; 4 Verm. 389; 6 N. H. Rep. 67; 11 Leigh, 137; 5 Ohio, 121.

3. By the statute of 3 Henry VII. c. 4, all deeds of gifts of goods and chattels in trust for the donor were declared void; and by the statute of 13 Eliz. ch. 5, gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder and defraud creditors, were rendered void as against the person to whom such frauds would be prejudicial.

4. The principles of these statutes, which indeed have been copied from the civil law, Dig. 42, 8, 5, 11; 2 Bell's Com. 182, though they may not have been substantially reenacted, prevail throughout the United States. 3 Johns. Ch. R. 481; 1 Halst. R. 450; 5 Cowen, 87; 8 Wheat. R. 229; 11 Id. 199; 12 Serg. & Rawle, 448; 9 Mass. R. 390; 11 Id. 421; 4 Greenl. R. 52; 2 Pick. R. 411; 8 Com. Dig. App. h. t.; 22 Vin. Ab. 15; 1 Vern. 88, 101; Rob. on Fr. Conv. 65, 478; Dane's Ab. Index, h. t.;

4 Ves. 344; 4 McCord, 294; 1 Rawle. 231; 1 Rep. Const. Ct. 180; 1 N. & McCord, 334; Coxe, 56; Hare & Wall. Sel. Dec. 33-69. Vide *Contracts; Indebtedness; Settlement*.

5. As between the parties such conveyances are, in general, good. 2 Rand. 384; 1 John. Chan. R. 329, 336; 1 Wash. 274. And when it has once been executed and delivered, it cannot be recalled; even where an unmarried man executes a voluntary trust deed for the benefit of future children, nor can he relieve himself from a provision in the conveyance to the trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. 2 My. & Keen, 496. See 2 Moll. 257.

VOLUNTARY DEPOSIT, civil law. One which is made by the mere consent or agreement of the parties. 1 Bouv. Inst. n. 1054.

VOLUNTARY ESCAPE. The giving to a prisoner voluntarily, any liberty not authorized by law. 5 Mass. 310; 2 Chipm. 11; 3 Harr. & John. 559; 2 Harr. & Gill. 106; 2 Bouv. Inst. n. 2332.

VOLUNTARY JURISDICTION. In the ecclesiastical law, jurisdiction is either *contentious jurisdiction*, (q. v.) or *voluntary jurisdiction*. By the latter term is understood that kind of jurisdiction which requires no judicial proceedings, as, the granting letters of administration and receiving the probate of wills.

VOLUNTARY NONSUIT, practice. The abandonment of his cause by a plaintiff, and an agreement that a judgment for costs be entered against him. 3 Bouv. Inst. n. 3306.

VOLUNTARY SALE, contracts. One made freely, without constraint, by the owner of the thing sold. 1 Bouv. Inst. n. 974.

VOLUNTARY WASTE. That which is either active or wilful, in contradistinction to that which arises from mere negligence, which is called *permissive waste*. 2 Bouv. Inst. 2394, et seq. Vide *Waste*.

VOLUNTEERS, contracts. Persons who receive a voluntary conveyance. (q. v.)

2. It is a general rule of the courts of equity that they will not assist a mere volunteer who has a defective conveyance. Fonbl. B. 1, c. 5, s. 2, and see the note there for some exceptions to this rule. Vide, generally, 1 Madd. Ch. 271; 1 Supp. to Ves. jr. 320; 2 Id. 321; Powell on Mortg Index, h. t. 4 Bouv. Inst. n. 3968-73.

VOLUNTEERS, army. Persons who in time of war offer their services to their country, and march in its defence.

2. Their rights and duties are prescribed by the municipal laws of the different states. But when in actual service they are subject to the laws of the United States and the articles of war.

VOTE. Suffrage; the voice of an individual in making a choice by many. The total number of voices given at an election; as, the presidential vote.

2. Votes are either given by ballot, (q. v.) or *viva voce*; they may be delivered personally by the voter himself, or, in some cases, by proxy. (q. v.)

3. A majority (q. v.) of the votes given carries the question submitted, unless in particular cases when the constitution or laws require that there shall be a majority of all the voters, or when a greater number than a simple majority is expressly required; as, for example in the case of the senate, in making treaties by the president and senate, two-thirds of the senators present must concur. Vide Angell on Corpor. Index, h. t.

4. When the votes are equal in number, the proposed measure is lost.

VOTER. One entitled to a vote; an elector.

VOUCHEE. In common recoveries, the person who is called to warrant or defend the title, is called the vouchee. 2 Bouv. Inst. n. 2093.

VOUCHER, accounts. An account book in which are entered the acquittances, or warrants for the accountant's discharge. It also signifies any acquittance or receipt, which is evidence of payment, or of the debtor's being discharged. See 3 Halst. 299.

VOUCHER, common recoveries. The voucher in common recoveries, is the person on whom the tenant to the *præcipe* calls to defend the title to the land, because he is supposed to have warranted the title to him at the time of the original purchase.

2. The person usually employed for this purpose is the cryer of the court, who is therefore called the common voucher. Vide Cruise, Dig. tit. 86, c. 3, s. 1; 22 Vin. Ab. 26; Dane, Index, h. t.; and see *Recovery*.

VOUCHER TO WARRANTY, common recoveries. The calling one who has warranted lands, by the party warranted, to come and defend the suit for him. Co. Litt. 101, b. Vide *Warranty, voucher to*.

VOYAGE, marine law. The passage of a ship upon the seas, from one port to another, or to several ports.

2. Every voyage must have a *terminus à quo* and a *terminus ad quem*. When the insurance is for a limited time, the two extremes of that time are the *termini* of the voyage insured. When a ship is insured both outward and homeward, for one entire *premium*, this with reference to the insurance, is considered but one voyage; and the *terminus à quo* is also the *terminus ad quem*. Marsh. Ins. B. 1, c. 7, s. 1 to 5. As to the commencement and ending of the voyage, see "*Risk*."

3. The voyage, with reference to the legality of it, is sometimes confounded with the traffic in which the ship is engaged, and is frequently said to be illegal, only because the trade is so. But a voyage may be lawful, and yet the transport of certain goods on board the ship may be prohibited; or the voyage may be illegal, though the transport of the goods be lawful. Marsh. Ins. B. 1, c. 6, s. 1. See Lex Merc. Amer. c. 10, s. 14; Park. Ins. ch. 12; Weak. Ins. tit. Voyages; and *Deviation*.

4. In the French law the *voyage de conserve*, is the name given to designate an agreement made between two or more sea captains that they will not separate in their voyage, will lend aid to each other, and will defend themselves against a common enemy, or the enemy of one of them, in case of attack. This agreement is said to be a partnership. 3 Pardes. Dr. Com. n. 656; 4 Pardes. Dr. Com. n. 984; 20 Toull. n. 17.

W.

WADSET, *Scotch law*. A right, by which lands, or other heritable subjects, are impignorated by the proprietor to his creditor in security of his debt; and, like other heritable rights, is perfected by seisin.

2. Wadsets, by the present practice, are commonly made out in the form of mutual contracts, in which one party sells the land, and the other grants the right of reversion. *Ersk. Pr. L. Scot. B. 2, t. 8, s. 1, 2.*

3. Wadsets are proper or improper. Proper, where the use of the land shall go for the use of the money. Improper, where the reverser agrees to make up the deficiency; and where it amounts to more, the surplus profit of the land is applied to the extinction of the principal. *Id. B. 2, t. 8, s. 12, 13.*

WADSETTER, *Scotch law*. A creditor to whom a wadset is made.

TO WAGE, *contracts*. To give a pledge or security for the performance of anything; as to wage or gage deliverance; to wage law, &c. *Co. Litt. 294.* This word is but little used.

WAGER OF BATTEL. A superstitious mode of trial which till lately disgraced the English law.

2. The last case of this kind was commenced in the year 1817, but not proceeded in to judgment; and at the next session of the British parliament an act was passed to abolish appeals of murder, treason, felony or other offences, and wager of battel, or joining issue or trial by battel in writs of right. 59 Geo. III. c. 46. For the history of this species of trial the reader is referred to 4 Bl. Com. 347; 3 Bl. Com. 337; *Encyclopédie*, Gage de Bataille; *Steph. Pl. 122*, and App. note 35.

WAGER OF LAW, *Engl. law*. When an action of *debt* is brought against a man upon a simple contract, and the defendant pleads *nil debit*, and concludes his plea with this formula, "And this he is ready to defend against him the said A B and his suit, as the court of our lord the king here shall consider," &c., he is said to wage his law. He is then required to swear he owes

the plaintiff nothing, and bring eleven compurgators who will swear they believe him. This mode of trial, is trial by wager of law.

2. The wager of law could only be had in actions of debt on simple contract, and actions of detinue; in consequence of this right of the defendant, now actions on simple contracts are brought in *assumpsit*, and instead of bringing detinue, trover has been substituted.

3. If ever wager of law had any existence in the United States, it is now completely abolished. 8 Wheat. 642. *Vide Steph. on Plead. 124, 250, and notes, xxxix.; Co. Entr. 119; Mod. Entr. 179; Lilly's Entr. 467; 3 Chit. Pl. 497; 13 Vin. Ab. 58; Bac. Ab. h. t.; Dane's Ab. Index, h. t.* For the origin of this form of trial, *vide Steph. on Pl. notes xxxix.; Co. Litt. 294, 5; 3 Bl. Com. 341.*

WAGER POLICY, *contracts*. One made when the insured has no insurable interest.

2. It has nothing in common with insurance but the name and form. It is usually in such terms as to preclude the necessity of inquiring into the interest of the insured; as, "interest or no interest," or, "without further proof of interest than the policy."

3. Such contracts being against the policy of the law are void. 1 Marsh. Ins. 121; *Park on Ins. Ind. h. t.; Weak. Ins. h. t.; See 1 Sumn. 451; 2 Mass. 1; 3 Caines, 141.*

WAGERS. A wager is a bet; a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them, on the happening or not happening of an uncertain event.

2. The law does not prohibit all wagers. 1 Browne's Rep. 171; *Poth. du Jeu, n. 4.*

3. To restrain wagers within the bounds of justice the following conditions must be observed: 1. Each of the parties must have the right to dispose of the thing which is the object of the wager. 2. Each must give a perfect and full consent to the contract. 3. There must be equality between the parties. 4. There must be good faith

between them. 5. The wager must not be forbidden by law. Poth. du Jeu, n. 8.

4. In general, it seems, that a wager is legal and may be enforced in a court of law, 3 T. R. 693, if it be not, 1st, Contrary to public policy, or immoral; or if it do not in some other respect tend to the detriment of the public. 2d. If it do not affect the interest, feelings, or character of a third person.

5.—1. Wagers on the event of an election laid before the poll is open; 1 T. R. 56; 4 Johns. 426; 4 Harr. & McH. 284; or after it is closed; 8 Johns. 454, 147; 2 Browne's Rep. 182; are unlawful. And wagers are against public policy if they are in restraint of marriage; 10 East, R. 22; made as to the mode of playing an illegal game; 2 H. Bl. 43; 1 Nott & McCord, 180; 7 Taunt. 246; or on an abstract speculative question of law or judicial practice, not arising out of circumstances in which the parties have a real interest. 12 East, R. 247, and Day's notes, *sed vide* Cowp. 37.

6.—2. Wagers as to the sex of an individual; Cowp. 729; or whether an unmarried woman had borne or would have a child; 4 Campb. 152, are illegal; as unnecessarily leading to painful and indecent considerations. The supreme court of Pennsylvania have laid it down as a rule, that every bet about the age, or height, or weight, or wealth, or circumstances, or situation of any person, is illegal; and this whether the subject of the bet be man, woman, or child, married or single, native or foreigner, in this country or abroad. 1 Rawle, 42. And it seems that a wager between two coach proprietors, whether or not a particular person would go by one of their coaches is illegal, as exposing that person to inconvenience. 1 B. & A. 683.

7. In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded, by either party before the event happens. And if after his authority has been countermanded, and the stake has been demanded, he refuse to deliver it, trover or assumpsit for money had and received is maintainable. 1 B. & A. 683. And where the wager is in its nature illegal, the stake may be recovered, even after the event, on demand made before it has been paid over. 4 Taunt. 474; 5 T. R. 405; *sed vide* 12 Johns. 1. See further on this subject, 7 Johns. 434; 11 Johns. 23; 10 Johns. 406, 468; 12 Johns.

376; 17 Johns. 192; 15 Johns. 5; 13 Johns. 88; Mann. Dig. Gaming; Harr. Dig. Gaming; Stakeholder.

WAGES, contract. A compensation given to a hired person for his or her services. As to servants' wages, see Chitty, Contr. 171; as to sailors' wages, Abbott on Shipp. 473; generally, see 22 Vin. Abr. 406; Bac. Abr. Master, &c., H; Marsh. Ins. 89; 2 Lill. Abr. 677; Peters' Dig. Admiralty, pl. 231, et seq.

WAIFS. Stolen goods waived or scattered by a thief in his flight in order to effect his escape.

2. Such goods by the English common law belong to the king. 1 Bl. Com. 296; 5 Co. 109; Cro. Eliz. 694. This prerogative has never been adopted here against the true owner, and never put in practice against the finder, though against him there would be better reason for adopting it. 2 Kent, Com. 292. *Vide* Com. Dig. h. t.; 1 Bro. Civ. Law, 239, n.

WAIVE. A term applied to a woman as outlaw is applied to a man. A man is an outlaw, a woman is a waive. T. L., Crabb's Tech. Dict. h. t.

To **WAIVE.** To abandon or forsake a right.

2. To waive, signifies also to abandon without right; as, "if the felon waives, that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do, he forfeits them, whether they be his own goods, or goods stolen by him." Bac. Ab. Forfeiture, B.

WAIVER. The relinquishment or refusal to accept of a right.

2. In practice it is required of every one to take advantage of his rights at a proper time, and, neglecting to do so, will be considered as a waiver. If, for example, a defendant who has been misnamed in the writ and declaration, pleads over, he cannot afterwards take advantage of the error by pleading in abatement, for his plea amounts to a waiver.

3. In seeking for a remedy the party injured may, in some instances, waive a part of his right, and sue for another; for example, when the defendant has committed a trespass on the property of the plaintiff, by taking it away, and afterwards he sells it, the injured party may waive the trespass, and bring an action of assumpsit for the recovery of the money thus received by the defendant. 1 Chit. Pl. 90.

4. In contracts, if, after knowledge of a

supposed fraud, surprise or mistake, a party performs the agreement in part, he will be considered as having waived the objection. 1 Bro. Parl. Cas. 289.

5. It is a rule of the civil law, consonant with reason, that any one may renounce or waive that which has been established in his favor: *Regula est juris antiqui omnes licentiam habere his quæ pro se introducta sunt, renunciare.* Code 2, 3, 29. As to what will amount to a waiver of a forfeiture, see 1 Conn. R. 79; 7 Conn. R. 45; 1 John. Cas. 125; 8 Pick. 292; 2 N. H. Rep. 120, 163; 14 Wend. 419; 1 Ham. R. 21. Vide *Verdict*.

WAKENING, Scotch law. The revival of an action.

2. An action is said to sleep, when it lies over, not insisted on for a year, in which case it is suspended. Ersk. Prin. B. 4, t. 1, n. 33. With us a revival is by *scire facias*. (q. v.)

WALL. A building or erection so well known as to need no definition. In general a man may build a wall on any part of his estate, to any height he may deem proper, and in such form as may best accommodate him; but he must take care not to erect a wall contrary to the local regulations, nor in such a manner as to be injurious to his neighbors. See Dig. 50, 16, 157. Vide *Party Wall*.

WANTONNESS, crim. law. A licentious act by one man towards the person of another, without regard to his rights; as, for example, if a man should attempt to pull off another's hat against his will, in order to expose him to ridicule, the offence would be an assault, and if he touched him it would amount to a *battery*. (q. v.)

2. In such case there would be no malice, but the wantonness of the act would render the offending party liable to punishment.

WAPENTAKE. An ancient word used in England as synonymous with hundred. (q. v.) Fortesc. De Laud. ch. 24.

WAR. A contention by force; or the art of paralysing the forces of an enemy.

2. It is either public or private. It is not intended here to speak of the latter.

3. Public war is either civil or national. Civil war is that which is waged between two parties, citizens or members of the same state or nation. National war is a contest between two or more independent nations, carried on by authority of their respective governments.

4. War is not only an act, but a state or condition, for nations are said to be at war not only when their armies are engaged, so as to be in the very act of contention, but also when they have any matter of controversy or dispute subsisting between them which they are determined to decide by the use of force, and have declared publicly, or by their acts, their determination so to decide it.

5. National wars are said to be offensive or defensive. War is offensive on the part of that government which commits the first act of violence; it is defensive on the part of that government which receives such act; but it is very difficult to say what is the first act of violence. If a nation sees itself menaced with an attack, its first act of violence to prevent such attack, will be considered as defensive.

6. To legalize a war it must be declared by that branch of the government entrusted by the constitution with this power. Bro. tit. Denizen, pl. 20. And it seems it need not be declared by both the belligerent powers. Rob. Rep. 232. By the constitution of the United States, art. 1, s. 7, congress are invested with power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; and they have also the power to raise and support armies, and to provide and maintain a navy." See 8 Cranch, R. 110, 154; 1 Mason, R. 79, 81; 4 Binn. R. 487. Vide, generally, Grot. B. 1, c. 1, s. 1; Rutherf. Inst. B. 1, c. 19; Bynkershoeck, Quest. Jur. Pub. lib. 1, c. 1; Lee on Capt. c. 1; Chit. Law of Nat. 28; Marten's Law of Nat. B. 8, c. 2; Phil. Ev. Index, h. t.; Dane's Ab. Index, h. t.; Com. Dig. h. t.; Bac. Ab. Prerogative, D 4; Merl. Répert. mot Guerre; 1 Inst. 249; Vattel, liv. 3, c. 1, § 1; Mann. Com. B. 3, c. 1.

WARD, domestic relations. An infant placed by authority of law under the care of a guardian.

2. While under the care of a guardian a ward can make no contract whatever binding upon him, except for necessities. When the relation of guardian and ward ceases, the latter is entitled to have an account of the administration of his estate from the former. During the existence of this relation, the ward is under the subjection of his guardian, who stands in *loco parentis*.

WARD, a district. Most cities are divided for various purposes into districts, each of which is called a ward.

WARD, police. To watch in the day time, for the purpose of preventing violations of the law.

2. It is the duty of all police officers and constables to keep ward in their respective districts.

WARD IN CHANCERY. An infant who is under the superintendence of the chancellor.

WARDEN. A guardian; a keeper. This is the name given to various officers; as, the warden of the prison; the wardens of the port of Philadelphia; church wardens.

WARDSHIP, Eng. law. Wardship was the right of the lord over the person and estate of the tenant, when the latter was under a certain age. When a tenant by knight's service died, and his heir was under age, the lord was entitled to the custody of the person and the lands of the heir, without any account, until the ward, if a male, should arrive at the age of twenty-one years, and, if a female, at eighteen. Wardship was also incident to a tenure in socage, but in this case, not the lord, but the nearest relation to whom the inheritance could not descend, was entitled to the custody of the person and estate of the heir till he attained the age of fourteen years; at which period the wardship ceased and the guardian was bound to account. Wardship in copyhold estates partook of that in chivalry and that in socage. Like the former, the lord was the guardian; like the latter, he was required to account. 2 Bl. Com. 67, 87, 97; Glanv. lib. 7, c. 9; Grand Cout. c. 33; Reg. Maj. c. 42.

WAREHOUSE. A place adapted to the reception and storage of goods and merchandise. 9 Shepl. 47.

2. The act of congress of February 25, 1799, 1 Story's Laws U. S. 565, authorizes the purchase of suitable warehouses, where goods may be unladen and deposited from any vessel which shall be subject to quarantine or other restraint, pursuant to the health laws of any state, at such convenient place or places as the safety of the revenue and the observance of such health laws may require.

3. And the act of 2d March, 1799, s. 62, 1 Story's Laws U. S. 627, authorizes an importer of goods, instead of securing the duties to be paid to the United States, to deposit so much of such goods as the collector may in his judgment deem sufficient security for the duties and the charges of safe keeping, for which the importer shall give his own bond; which goods shall be

kept by the collector with due care, at the expense and risk of the party on whose account they have been deposited, until the sum specified in such bond becomes due; when, if such sum shall not be paid, so much of such deposited goods shall be sold at public sale, and the proceeds, charges of safe keeping and sale being deducted, shall be applied to the payment of such sum, rendering the overplus, and the residue of the goods so deposited, if there be any, to the depositor or his representatives.

WAREHOUSEMAN. A warehouseman is a person who receives goods and merchandise to be stored in his warehouse for hire.

2. He is bound to use ordinary care in preserving such goods and merchandise, and his neglect to do so will render him liable to the owner. Peake, R. 114; 1 Esp. R. 315; Story, Bailm. § 444; Jones' Bailm. 49, 96, 97; 7 Cowen's R. 497; 12 John. Rep. 232; 2 Wend. R. 593; 9 Wend. R. 268; 1 Stew. Rep. 284. The warehouseman's liability commences as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse. 4 Esp. R. 262.

WARRANTICE, Scotch law. A clause in a charter of heritable rights by which the grantor obliges himself, that the right conveyed shall be effectual to the receiver. It is either personal or real. A warranty. Ersk. Pr. B. 2, t. 3, n. 11.

WARRANT, crim. law, practice. A writ issued by a justice of the peace or other authorized officer, directed to a constable or other proper person, requiring him to arrest a person therein named, charged with committing some offence, and to bring him before that or some other justice of the peace.

2. It should regularly be made under the hand and seal of the justice and dated. No warrant ought to be issued except upon the oath or affirmation of a witness charging the defendant with the offence. 3 Binn. Rep. 88.

3. The reprehensible practice of issuing blank warrants which once prevailed in England, was never adopted here. 2 Russ. on Cr. 512; Ld. Raym. 546; 1 Salk. 175; 1 H. Bl. R. 13; Doct. Pl. 529; Wood's Inst. 84; Com. Dig. Forcible Entry, D 18, 19; Id. Imprisonment, H 6; Id. Pleader, 3 K 26; Id. Pleader, 3 M 23. Vide *Search-warrant*.

4. A *bench warrant* is a process granted

by a court authorizing a proper officer to apprehend and bring before it some one charged with some contempt, crime or misdemeanor. See *Bench warrant*.

5. A *search warrant* is a process issued by a competent court or officer authorizing an officer therein named or described, to examine a house or other place for the purpose of finding goods which it is alleged have been stolen. See *Search warrant*.

WARRANT OF ATTORNEY, practice. An instrument in writing, addressed to one or more attorneys therein named, authorizing them generally to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.

2. This general authority is usually qualified by reciting a bond which commonly accompanies it, together with the condition annexed to it, or by a written defeasance stating the terms upon which it was given, and restraining the creditor from making immediate use of it.

3. In *form*, it is generally by deed; but it seems, it need not necessarily be so. 5 Taunt. 264.

4. This instrument is given to the creditor as a security. Possessing it, he may sign judgment and issue an execution, without its being necessary to wait the termination of an action. Vide 14 East, R. 576; 2 T. R. 100; 1 H. Bl. 75; 1 Str. 20; 2 Bl. Rep. 1133; 2 Wils. 3; 1 Chit. Rep. 707.

5. A warrant of attorney given to confess a judgment is not revocable, and, notwithstanding a revocation, judgment may be entered upon it. 2 Ld. Raym. 766, 850; 1 Salk. 87; 7 Mod. 93; 2 Esp. Rep. 563. The death of the debtor is, however, generally speaking, a revocation. Co. Litt. 52 b; 1 Vent. 310. Vide Hall's Pr. 14, n.

6. The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular. 1 Penna. R. 245; 6 S. & R. 296; 14 S. & R. 170; Addis. R. 267; 2 Browne's R. 321, 3 Wash. C. C. R. 558. Vide, generally, 18 Eng. Com. Law Rep. 94, 96, 179, 209; 1 Salk. 402; 3 Vin. Ab. 291; 1 Sell. Pr. 374; Com. Dig. Abatement, E 1, 2; Id. Attorney, B 7, 8; 2 Archbold's Pr. 12; Bingham on Judg-

ments, 38; Grah. Pr. 618; 1 Crompt. Pr. 316; 1 Troub. & Haly's Pr. 96.

7. A warrant of attorney differs from a *cognovit actionem*. (q. v.) See Metc. & Perk. Dig. Bond, IV.

WARRANTEE. One to whom a warranty is made. Touchst. 181.

WARRANTIA CHARTÆ. An ancient and now obsolete writ, which was issued when a man was enfeoffed of land with warranty, and then he was sued or impleaded in assize or other action, in which he could not vouch or call to warranty.

2. It was brought by the feoffor pending the first suit against him, and had this valuable incident, that when the warrantor was vouched, and judgment passed against the tenant, the latter obtained judgment simultaneously against the warrantor, to recover other lands of equal value. Termes de la Ley, h. t.; F. N. B. 134; Dane's Ab. Index, h. t.; 2 Rand. 141, 148, 156; 4 Leigh's R. 132; 11 S. & R. 115 Vin. Ab. h. t.; Co. Litt. 100; Hob. 22, 217.

WARRANTOR. One who makes a warranty. Touchst. 181.

WARRANTY, contracts. This word has several significations, as it is applied to the conveyance and sale of lands, to the sale of goods, and to the contract of insurance.

2.—1. The ancient law relating to warranties of land was full of subtleties and intricacies; it occupied the attention of the most eminent writers on the English law, and it was declared by Lord Coke, that the learning of warranties was one of the most curious and cunning learnings of the law; but it is now of little use even in England. The warranty was a covenant real, whereby the grantor of an estate of freehold, and his heirs, were bound to warrant the title; and either upon voucher, or judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by paramount title; Co. Litt. 365; Touchst. 181; Bac. Ab. h. t.; the heir of the warrantor was bound only on condition that he had, as assets, other lands of equal value by descent.

3. Warranties were lineal and collateral.

4. Lineal, when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

5. Collateral warranty was when the heir's title was not derived from the warranting ancestor, and yet it barred the heir

from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands, in case of eviction, provided he had assets. 2 Bl. Com. 301, 302.

6. The statute of 4 Anne, c. 16, annulled these collateral warrantees, which had become a great grievance. Warranty in its original form, it is presumed, has never been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which after judgment may be recovered out of the personal or real estate, as in other cases. Vide 4 Kent, Com. 457; 3 Rawle's R. 67, n.; 2 Wheat. R. 45; 9 Serg. & Rawle, 268; 11 Serg. & Rawle, 109; 4 Dall. Rep. 442; 2 Saund. 88, n. 5.

7.—2. Warranties in relation to the sale of personal chattels are of two kinds, express or implied.

8. An express warranty is one by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract, is or is not as there mentioned; as, that a horse is sound; that he is not five years old.

9. An implied warranty is one which, not being expressly made, the law implies by the fact of the sale; for example, the seller is understood to warrant the *title* of goods he sells, when they are in his possession at the time of the sale; Ld. Raym. 593; 1 Salk. 210; but if they are not then in his possession, the rule of *caveat emptor* applies, and the buyer purchases at his risk. Cro. Jac. 197.

10. In general there is no implied warranty of the *quality* of the goods sold. 2 Kent, Com. 374; Co. Litt. 102, a; 2 Black. Comm. 452; Bac. Abr. Action on the case, E; 2 Com. Contr. 263; Dougl. 20; 2 East, 814; Id. 448, n.; Ross on Vend. c. 6; 1 Johns. R. 274; 4 Conn. R. 428; 1 Dall. Rep. 91; 10 Mass. R. 197; 20 Johns. Rep. 196; 3 Yeates, R. 262; 1 Pet. Rep. 317; 12 Serg. & Rawle, 181; 1 Hard. Kent. Rep. 531; 1 Murphy, Rep. 138; 2 Id. 245; 4 Haywood's Tenn. R. 227; 2 Caines' Rep. 48. The rule of the civil law was, that a fair price implied a warranty of title; Dig. 21, 2, 1; this rule has been adopted in Louisiana; Code, art. 2477; and in South Carolina. 1 Bay, R. 324; 2 Bay,

R. 380; 1 Const. R. 182; 2 Const. R. 353. Vide Harr. Dig. Sale, II. 8; 12 East, R. 452.

11.—3. In the contract of insurance, there are certain warranties which are inducements to the insurer to enter into it. A warranty of this kind is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. It may be affirmative; as where the insured undertakes for the truth of some positive allegation: as, that the thing insured is neutral property; or, it may be promissory; as, that the ship shall sail on or before a given day. 6 N. S. 53.

12. Warranties are also express or implied. An express warranty is a particular stipulation introduced into the written contract, by the agreement of the parties; an implied warranty is an agreement which necessarily results from the nature of the contract: as, that the ship shall be seaworthy when she sails on the voyage insured.

13. The warranty being in the nature of a condition precedent, it is to be performed by the insured, before he can demand the performance of the contract on the part of the insurer. Marsh. Inst. B. 1, c. 9. See, generally, Bouv. Inst. Index, h. t.

WARRANTY, VOUCHER TO, practice. A warranty is a contract real, annexed to lands and tenements, whereby a man is bound to defend such lands and tenements from another person; and in case of eviction by title paramount, to give him lands of equal value.

2. Voucher to warranty is the calling of such warrantor into court by the party warranted, (when tenant in a real action brought for recovery of such lands,) to defend the suit for him; Co. Litt. 101, b; Com. Dig. Voucher, A 1; Booth, 43; 2 Saund. 32, n. 1; and the time of such voucher is after the demandant has counted. It lies in most real and mixed actions, but not in personal. Where the voucher has been made and allowed by the court, the vouchee either voluntarily appears, or there issues a judicial writ (called a summons ad warrantizandum,) commanding the sheriff to summon him. Where he, either voluntarily or in obedience to this writ, appears and offers to warrant the land to the tenant, it is called entering into the warranty; after which he is considered as tenant in the action, in the place of the original tenant. The demandant then counts against him *de novo*, the vouchee pleads to the new count,

and the cause proceeds to issue. 2 Inst. 241 a; 2 Saund. 32, n. 1; Booth, 46.

3. Voucher of warranty is, in the present rarity of real actions, unknown in practice. Steph. Plead. 85.

WASTE. A spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail. 2 Bl. Comm. 281.

2. The doctrine of waste is somewhat different in this country from what it is in England. It is adapted to our circumstances. 3 Yeates, R. 261; 4 Kent, Com. 76; Walk. Intr. 278; 7 John. Rep. 227; 2 Hayw. R. 339; 2 Hayw. R. 110; 6 Munf. R. 184; 1 Rand. Rep. 258; 6 Yerg. Rep. 334. Waste is either voluntary or permissive.

3.—§ 1. *Voluntary waste.* A voluntary waste is an act of commission, as tearing down a house. This kind of waste is committed in houses, in timber, and in land. It is committed in houses by removing wainscots, floors, benches, furnaces, window-glass, windows, doors, shelves, and other things once fixed to the freehold, although they may have been erected by the lessee himself, unless they were erected for the purposes of trade. See *Fixtures*; Bac. Ab. Waste, C 6. And this kind of waste may take place not only in pulling down houses, or parts of them, but also in changing their forms; as, if the tenant pull down a house and erect a new one in the place, whether it be larger or smaller than the first; 2 Roll. Ab. 815, l. 33; or convert a parlor into a stable; or a grist-mill into a fulling-mill; 2 Roll. Abr. 814, 815; or turn two rooms into one. 2 Roll. Ab. 815, l. 37. The building of a house where there was none before is said to be a waste; Co. Litt. 53, a; and taking it down after it is built, is a waste. Com. Dig. Waste, D 2. It is a general rule that when a lessee has annexed anything to the freehold during the term, and afterwards takes it away, it is waste. 3 East, 51. This principle is established in the French law. *Lois des Bât.* part. 2, 3, art. 1; 18 Toull. n. 457.

4. But at a very early period several exceptions were attempted to be made to this rule, which were at last effectually engrafted upon it in favor of trade, and of those vessels and utensils, which are immediately subservient to the purposes of trade. *Ibid.*

5. This relaxation of the old rule has

taken place between two descriptions of persons; that is, between the landlord and tenant, and between the tenant for life or tenant in tail, and the remainder-man or reversioner.

6. As between the landlord and tenant it is now the law, that if the lessee annex any chattel to the house for the purpose of his trade, he may disunite it during the continuance of his interest. 1 H. B. 258. But this relation extends only to erections for the purposes of trade.

7. It has been decided that a tenant for years may remove cider-mills, ornamental marble chimney pieces, wainscots fixed only by screws, and such like. 2 Bl. Comm. 281, note by Chitty. A tenant of a farm cannot remove buildings which he has erected for the purposes of husbandry, and the better enjoyment of the profits of the land, though he thereby leaves the premises the same as when he entered. 2 East, 88; 3 East, 51; 6 Johns. Rep. 5; 7 Mass. Rep. 433.

8. Voluntary waste may be committed on timber, and in the country from which we have borrowed our laws, the law is very strict. In Pennsylvania, however, and many of the other states, the law has applied itself to our situation, and those acts which in England would amount to waste, are not so accounted here. Stark. Ev. part 4, p. 1667, n.; 3 Yeates, 251. Where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell a part of the wood and timber, so as to fit the land for cultivation, without being liable to waste, but he cannot cut down the whole so as permanently to injure the inheritance. And to what extent the wood and timber on such land may be cut down without waste, is a question of fact for the jury under the direction of the court. 7 Johns. R. 227. The tenant may cut down trees for the reparation of the houses, fences, hedges, stiles, gates, and the like; Co. Litt. 53, b; and for making and repairing all instruments of husbandry, as ploughs, carts, harrows, rakes, forks, &c. Wood's Inst. 344. The tenant may, when he is unrestrained by the terms of his lease, cut down timber, if there be not enough dead timber. Com. Dig. Waste, D 5; F. N. B. 59 M. Where the tenant, by the conditions of his lease, is entitled to cut down timber, he is restrained nevertheless from cutting down ornamental trees, or those planted for shelter; 6 Ves. 419; or to exclude objects from sight. 16 Ves. 375.

9. Windfalls are the property of the landlord, for whatever is severed by inevitable necessity, as by a tempest, or by a trespasser, and by wrong, belongs to him who has the inheritance. 3 P. Wms. 268; 11 Rep. 81; Bac. Abr. Waste, D 2.

10. Waste is frequently committed on cultivated fields, orchards, gardens, meadows, and the like. It is proper here to remark that there is an implied covenant or agreement on the part of the lessee to use a farm in a husbandman-like manner, and not to exhaust the soil by neglectful or improper tillage. 5 T. R. 373. See 6 Ves. 328. It is therefore waste to convert arable to woodland and the contrary, or meadow to arable; or meadow to orchard. Co. Lit. 58, b. Cutting down fruit trees; 2 Roll. Abr. 817, l. 30; although planted by the tenant himself, is waste; and it was held to be waste for an outgoing tenant of garden ground to plough up strawberry beds which he had bought of a former tenant when he entered. 1 Camp. 227.

11. It is a general rule that, when lands are leased on which there are open mines of metal or coal; or pits of gravel, lime, clay, brick, earth, stone, and the like, the tenant may dig out of such mines, or pits. Com. Dig. Waste, D 4. But he cannot open any new mines or pits without being guilty of waste; Co. Lit. 58 b; and carrying away the soil, is waste. Com. Dig. Waste, D 4.

12.—§ 2. *Permissive waste.* Permissive waste in houses is punishable where the tenant is expressly bound to repair, or where he is so bound on an implied covenant. See 2 Esp. R. 590; 1 Esp. Rep. 277; Bac. Abr. Covenant, F. It is waste if the tenant suffer a house leased to him to remain uncovered so long that the rafters or other timbers of the house become rotten, unless the house was uncovered when the tenant took possession. Com. Dig. Waste, D 2.

13.—§ 3. *Of remedies for waste.* The ancient writ of waste has been superseded. It is usual to bring case in the nature of waste instead of the action of waste, as well for permissive as voluntary waste.

14. Some decisions have made it doubtful whether an action on the case for permissive waste can be maintained against any tenant for years. See 1 New Rep. 290; 4 Taunt. 764; 7 Taunt. 892; S. C. 1 Moore, 100; 1 Saund. 323, a, n. i. Even where the lessee covenants not to do waste, the

lessor has his election to bring either an action on the case, or of covenant, against the lessee for waste done by him during the term. 2 Bl. Rep. 1111; 2 Saund. 252, c. n. In an action on the case in the nature of waste, the plaintiff recovers only damages for the waste.

15. The latter action has this advantage over an action of waste, that it may be brought by him in reversion or remainder for life or years, as well as in fee or in tail; and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste. 2 Saund. 252, n.

See, on the subject in general, Woodf. Landl. & T. 217, ch. 9, s. 1; Bac. Abr. Waste; Vin. Abr. Waste; Com. Dig. Waste; Supp. to Ves. jr. 50, 325, 441; 1 Vern. R. 23, n.; 2 Saund. 252, a, n. 7, 259, n. 11; Arch. Civ. Pl. 495; 2 Sell. Pr. 234; 3 Bl. Com. 180, note by Chitty; Amer. Dig. Waste; Whart. Dig. Waste; Bouv. Inst. Index, h. t.

As to remedies against waste by injunction, see 1 Vern. R. 23, n.; 5 P. Wms. 268, n. F; 1 Eq. Cas. Ab. 400; 6 Ves. 787, 107, 419; 8 Ves. 70; 16 Ves. 375; 2 Swanst. 251; 3 Madd. 498; Jacob's R. 70; Drew. on Inj. part 2, c. 1, p. 134. As between tenants in common, 5 Taunt. 24; 19 Ves. 159; 16 Ves. 132; 3 Bro. C. C. 622; 2 Dick. 667; Bouv. Inst. Index, h. t.; and the article *Injunction*.

As to remedy by writ of estrepement to prevent waste, see *Estrepement*; Woodf. Landl. & T. 447; 2 Yeates, 281; 4 Smith's Laws of Penn. 89; 3 Bl. Com. 226.

As to remedies in cases of fraud in committing waste, see *Hov. Fr. ch. 7*, p. 226 to 238.

WASTE BOOK, *com. law.* A book used among merchants. All the dealings of the merchant are recorded in this book in chronological order as they occur.

WATCH, police. To watch, is, properly speaking, to stand sentry and attend guard during the night time: certain officers called watchmen are appointed in most of the United States, whose duty it is to arrest all persons who are violating the law, or breaking the peace. (q. v.) Vide 1 Bl. Com. 356; 1 Chit. Cr. Law, 14, 20.

WATCH AND WARD. A phrase used in the English law, to denote the superintendence and care of certain officers, whose duties are to protect the public from harm.

WATCHMAN. An officer in many cities and towns, whose duty it is to watch

during the night and take care of the property of the inhabitants.

2. He possesses generally the common law authority of a constable (q. v.) to make arrests, where there is reasonable ground to suspect a felony, though there is no proof of a felony having been committed. 1 Chit. Cr. L. 24; 2 Hale, 96; Hawk. B. 2, c. 13, s. 1, &c.; 1 East, P. C. 303; 2 Inst. 52; Com. Dig. Imprisonment, H 4; Dane's Ab. Index, h. t.; 3 Taunt. R. 14; 1 B. & A. 227; Peake, R. 89; 1 Moody's Cr. Cas. 334; 1 Esp. R. 294; and vide *Peace*.

3. By an act of congress, approved Sept. 30, 1850, the compensation of watchmen in the various departments of government, shall be five hundred dollars per annum.

WATER. That liquid substance of which the sea, the rivers, and creeks are composed.

2. A pool of water, or a stream or water course, is considered as part of the land, hence a pool of twenty acres, would pass by the grant of twenty acres of land, without mentioning the water. 2 Bl. Com. 18; 2 N. H. Rep. 255; 1 Wend. R. 255; 5 Paige, R. 141; 2 N. H. Rep. 371; 2 Brownl. 142; 5 Cowen, R. 216; 5 Conn. R. 497; 1 Wend. R. 237. A mere grant of water passes only a fishery. Co. Lit. 4 b.

3. Like land, water is distinguishable into different parts, as the sea, (q. v.) rivers, (q. v.) docks, (q. v.) canals, (q. v.) ponds, (q. v.) and sewers, (q. v.) and to these may be added a water course. (q. v.) Vide 4 Mason, R. 397; *River; Water course*.

WATER BAILIFF, English law. An officer appointed to search ships in ports. 10 H. VII., 30.

WATER COURSE. This term is applied to the flow or movement of the water in rivers, creeks, and other streams.

2. In a legal sense, property in a water course is comprehended under the general name of *land*; so that a grant of land conveys to the grantee not only fields, meadows, and the like, but also all the rivers and streams, which naturally pass over the surface of the land. 1 Co. Lit. 4; 2 Brownl. 142; 2 N. Hamp. Rep. 255; 5 Wend. Rep. 423.

3. Those who own land bounding upon a water course, are denominated by the civilians *riparian* proprietors, and this convenient term has been adopted by judges and writers on the common law. Ang. on Water Courses, 3; 3 Kent, Com. 354; 4 Mason's R. 397.

4. Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration.

5. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct as it passes along. *Aqua currit et debet currere*, is the language of the law. 3 Rawle, Rep. 84; 9 Co. 57, b.

6. Though he may use the water while it runs over his lands, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of the water, which would otherwise descend to the proprietor below, nor throw the water back upon the proprietor above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. 3 Kent, Com. 353; 1 Wils. R. 178; 6 East, 203; 1 Simon & Stuart, 190; 2 John. Ch. R. 162, 468; 4 Mass. R. 401; 17 John. R. 321; 5 Ohio R. 322; 3 Fairf. R. 407; 8 Greenl. R. 268; 16 Pick. Rep. 247; 1 Coxe's Rep. 460; Dig. 39, 3, 4, and 10; Pothier, *Traité du Contrat de Société*, 2e app. n. 236, 237; Bell's Law of Scotland, 691; Ang. on Water Courses, 12; 2 Conn. R. 584.

7. When there are two opposite riparian proprietors, each owns that portion of the bed of the river which is adjoining his land *usque ad filum aque*; or, in other words, to the thread or central line of the stream; Harg. Tracts, 5; Holt's Rep. 499; and if hydraulic works be erected on both banks, each is entitled to an equal share of the water. 1 Paige's Chanc. Rep. 448.

8. The water can only be used by each as an entire stream, in its natural channel; for of the property in the water there can be no severance. 13 John. R. 212.

9. But it seems that when an island is on the side of a river, so as to give the riparian owner on that side one-fourth of the water, the other is entitled to the whole of the three-fourths of the river. 10 Wend. Rep. 260. See, also, 13 Mass. Rep. 507; 2 Caines' Cas. 87; 9 Pick. R. 528; 3 Kent, Com. 344, 345; 3 Rawle's R. 84; 2 Watts,

R. 327; 8 Greenl. R. 138, 253; 9 Pick. Rep. 59; 10 Pick. R. 348; 10 Wend. R. 167; Com. Dig. Action for Nuisance, A; 4 D. & R. 583; S. C. 2 B. & C. 910; 1 Campb. R. 463; 6 East, R. 208; 1 Wills. Rep. 174; 1 B. & A. 258; 5 Taunt. R. 454; 2 Esp. R. 679; 2 Hill. Abr. c. 14, 16, 17; Ham. N. P. 199; 1 Vin. Ab. 557; 22 Vin. Abr. 525; 2 Chit. Bl. 403, n. 7; 3 Roll. 140, l. 40; Lois des Bât. part 1, c. 3, sec. 1, art. 3; Crabb on R. P. § 398 to 443. Vide *River*.

WATER ORDEAL. An ancient form of trial, now abolished, by which the accused, tied hand and foot, were cast into cold water, and if they did not sink they were deemed innocent; or they were compelled to plunge their limbs into hot water, and if they came out unhurt they were considered innocent. Vide *Ordeal*.

WAVESON. This name is given to such goods as after shipwreck appear upon the waves. Jacob, Law Dict. h. t.

WAY, estates. A passage, street or road. A right of way is a privilege which an individual or a particular description of persons, such as the inhabitants of a particular place, or the owners or occupiers of such place may have, of going over another person's ground.

2. It is an incorporeal hereditament of a real nature, a mere easement, entirely different from public or private roads.

3. A right of way may arise, 1. By prescription and immemorial usage. 2 McCord, 447; 5 Har. & John. 474; Co. Litt. 113, b; Br. Chem. 2; 1 Roll. Ab. 936. 2. By grant. 3 Lev. 305; 1 Ld. Raym. 75; 17 Mass. 416; Crabb on R. P. § 366. 3. By reservation. 4. By custom. 5. By acts of the legislature. 6. From necessity, when a man's ground is enclosed and completely blocked up, so that he cannot, without passing over his neighbor's land, reach the public road. For example, should A grant a piece of land to B, surrounded by land belonging to A; a right of way over A's land passes of necessity to B, otherwise he could not derive any benefit from the acquisition. Vide 3 Rawle, 495; 2 Fairf. R. 156; 2 Mass. 203; 2 McCord, 448; 3 McCord, 139; 2 Pick. 577; 14 Mass. 56; 2 Hill, S. C. R. 641; and *Necessity*. The way is to be taken where it will be least injurious to the owner. 4 Kent, Com. 338.

4. Lord Coke, adopting the civil law, says there are three kinds of ways. 1. A foot-way, called *iter*. 2. A foot-way and

horse-way, called *actus*. 3. A cart-way, which contains the other two, called *via*. Co. Lit. 56, a; Pothier, Pandectæ, lib. 8, t. 3, § 1; Dig. 8, 3; 1 Bro. Civ. Law, 177. Vide Yelv. 142, n; Id. 164; Woodf. Landl. & Ten. 544; 4 Kent, Com. 337; Ayl. Pand. 307; Cruise's Dig. tit. 24; 1 Taunt. R. 279; R. & M. 151; 1 Bail. R. 58; 2 Hill. Abr. c. 6; Crabb on Real Prop. § 360 to 397; Bouv. Inst. Index, h. t.; *Easement*; *Servitude*.

WAY BILL, contracts. A writing in which is set down the names of passengers, who are carried in a public conveyance, or the description of goods sent with a common carrier by land; when the goods are carried by water, the instrument is called a *bill of lading*. (q. v.)

WAY GOING CROP. In Pennsylvania, by the custom of the country, a tenant for a term certain is entitled, after the expiration of his lease, to enter and take away the crop of grain which he had put into the ground the preceding fall. This is called the *way going crop*. 5 Binn. R. 289; 2 S. & R. 14; 1 P. R. 224.

WAYS AND MEANS. In legislative assemblies there is usually appointed a committee whose duties are to inquire into, and propose to the house, the ways and means to be adopted to raise funds for the use of the government. This body is called the committee of ways and means.

WEAR. A great dam made across a river, accommodated for the taking of fish, or to convey a stream to a mill. Jacob's Law Dict. h. t. Vide *Dam*.

WED. A covenant or agreement; whence a wedded husband.

WEEK. Seven days of time.

2. The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days of twenty-four hours each, thereafter.

3. The first day of the week is called *Sunday*; (q. v.) the second, *Monday*; the third, *Tuesday*; the fourth, *Wednesday*; the fifth, *Thursday*; the sixth, *Friday*; and the seventh, *Saturday*. Vide 4 Pet. S. C. Rep. 361.

WEIGHAGE, mer. law. In the English law it is a duty or toll paid for weighing merchandise; it is called *tronage*, (q. v.) for weighing wool at the king's beam, or *pesage*, for weighing other avoirdupois goods. 2 Chit. Com. Law, 16.

WEIGHT. A quality in natural bodies,

by which they tend towards the centre of the earth.

2. Under the article *Measure*, (q. v.) it is said that by the constitution congress possesses the power "to fix the standard of weights and measures," and that this power has not been exercised.

3. The weights now generally used in the United States are the same as those of England; they are of two kinds:

1. AVOIRDUPOIS WEIGHT.

1st. Used in almost all commercial transactions, and in the common dealings of life.

27 $\frac{1}{4}$ grains = 1 dram
16 drams = 1 ounce
16 ounces = 1 pound, (lb.)
28 pounds = 1 quarter, (qr.)
4 quarters = 1 hundred weight, (cwt.)
20 hundred weight = 1 ton.

2d. Used for meat and fish

8 pounds = 1 stone

3d. Used in the wool trade.

	Cwt.	qr.	lb.
7 pounds = 1 clove			
14 pounds = 1 stone =	0	0	14
2 stones = 1 tod =	0	1	0
6 $\frac{1}{4}$ tods = 1 wey =	1	2	14
2 weys = 1 sack =	8	1	0
12 sacks = 1 last =	89	0	0

4th. Used for butter and cheese.

8 pounds = 1 clove
56 pounds = 1 firkin.

2. TROY WEIGHT.

24 grains = 1 pennyweight
20 pennyweights = 1 ounce
12 ounces = 1 pound.

4. These are the denominations of troy weight, when used for weighing gold, silver, and precious stones, except diamonds. Troy weight is also used by apothecaries in compounding medicines; and by them the ounce is divided into eight drams, and the dram into three scruples, so that the latter is equal to twenty grains. For scientific purposes, the grain only is used, and sets of weights are constructed in decimal progression, from 10,000 grains downward to one-hundredth of a grain. The caret, used for

weighing diamonds, is three and one-sixth grains.

5. A short account of the French weights and measures is given under the article *Measure*.

WEIGHT OF EVIDENCE. This phrase is used to signify that the proof on one side of a cause is greater than on the other.

2. When a verdict has been rendered against the weight of the evidence, the court may, on this ground, grant a new trial, but the court will exercise this power not merely with a cautious, but a strict and sure judgment, before they send the case to a second jury.

3. The general rule, under such circumstances, is, that the verdict once found shall stand: the setting aside is the exception, and ought to be an exception of rare and almost singular occurrence. A new trial will be granted on this ground for either party; the evidence, however, is not to be weighed in golden scales. 2 Hodg. R. 125; S. C. 8 Bingh. N. C. 109; Gilp. 356; 4 Yeates, 487; 3 Greenl. 276; 8 Pick. 122; 5 Wend. 595; 7 Wend. 380; 2 Vir. Cas. 235.

WELCH MORTGAGE, *Eng. law, contracts*. A species of security which partakes of the nature of a mortgage, as there is a debt due, and an estate is given as a security for the repayment, but differs from it, in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and there is no remedy to enforce payment, while the mortgagor has a perpetual power of redemption.

2. It is a species of *vivum vadium*. Strictly, however, there is this distinction between a Welch mortgage and a *vivum vadium*. In the latter the rents and profits of the estate are applied to the discharge of the principal, after paying the interest; while in the former the rents and profits are received in satisfaction of his interest only. 1 Pow. Mortg. 373, a.

WELL. A hole dug in the earth in order to obtain water.

2. The owner of the estate has a right to dig in his own ground, at such a distance as is permitted by law, from his neighbor's land; he is not restricted as to the size or depth, and is not liable to any action for rendering the well of his neighbor useless by so doing. Lois des Bât. part. 1, c. 3, sect. 2, art. 2, § 2.

WELL KNOWING. These words are used in a declaration when the plaintiff sues for

an injury which is not immediate and with force, and the act or nonfeasance complained of was not *prima facie* actionable, not only the injury, but the circumstances under which it was committed, ought to be stated, as where the injury was done by an animal. In such case, the plaintiff after stating the injury, continues, the defendant *well knowing* the mischievous propensity of his dog, permitted him to go at large. *Vide Scienter*.

WERE. The name of a fine among the Saxons imposed upon a murderer.

2. The life of every man, not excepting that of the king himself, was estimated at a certain price, which was called the *were*, or *estimatio capitis*. The amount varied according to the dignity of the person murdered. The price of wounds was also varied according to the nature of the wound, or the member injured.

WERGILD, or **WEREGILD**, *old Eng. law*. The price which in a barbarous age, a person guilty of homicide or other enormous offence was required to pay, instead of receiving other punishment. 4 Bl. Com. 188. See, for the etymology of this word, and a tariff which was paid for the murder of the different classes of men, Guizot, *Essais sur l'Histoire de France*, Essai 4ème, c. 2, § 2.

WETHER. A castrated ram, at least one year old; in an indictment it may be called a sheep. 4 Car. & Payne, 216; 19 Eng. Com. Law Rep. 351.

WHALER, mar. law. A vessel employed in the whale fishery.

2. It is usual for the owner of the vessel, the captain and crew, to divide the profits in just proportions, under an agreement similar to the contract *Di Colonna*. (q. v.)

WHARF. A space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessel.

WHARFAGE. The money paid for landing goods upon, or loading them from a wharf. *Dane's Ab. Index*, h. t.

WHARFINGER. One who owns or keeps a wharf, for the purpose of receiving and shipping merchandise to or from it, for hire.

2. Like a warehouseman, (q. v.) a wharfinger is responsible for ordinary neglect, and is therefore required to take ordinary care of goods entrusted to him as such. The responsibility of a wharfinger begins when he acquires, and ends when he ceases

to have the custody of the goods in that capacity.

3. When he begins and ceases to have such custody depends generally upon the usages of trade and of the business. When goods are delivered at a wharf, and the wharfinger has agreed, expressly or by implication, to take the custody of them, his responsibility commences; but a mere delivery at the wharf, without such assent, does not make him liable. 3 Campb. R. 414; 4 Campb. R. 72; 6 Cowen, R. 757. When goods are in the wharfinger's possession to be sent on board of a vessel for a voyage, as soon as he delivers the possession and the care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility. 5 Esp. R. 41; Story, Bailm. § 453; Abbott on Shipp. 226; Molloy, B. 2. c. 2, s. 2; Roccus, Not. 88; Dig. 9, 4, 3.

WHEEL. The punishment of the wheel was formerly to put a criminal on a wheel, and then to break his bones until he expired. This barbarous punishment was never used in the United States, and it has been abolished in almost every civilized country.

WHELPS. The young of certain animals of a base nature, or *fera natura*.

2. It is a rule that when no larceny can be committed of any creatures of a base nature, which are *fera natura*, though tame and reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den. 3 Inst. 109; 1 Russ. on Cr. 153.

3. The owner of the land is, however, considered to have a qualified property in such animals, *ratione impotentia*. 2 Bl. Com. 394.

WHEN. At which time, *in wills*, standing by itself unqualified and unexplained, this is a word of condition denoting the time at which the gift is to commence. 6 Ves. 243; 2 Meriv. 286.

2. The context of a will may show that the word *when* is to be applied to the possession only, not to the vesting of a legacy; but to justify this construction, there must be circumstances, or other expressions in the will, showing such to have been the testator's intent. 7 Ves. 422; 9 Ves. 230; Coop. 145; 11 Ves. 489; 3 Bro. C. C. 471. For the effect of the word *when* in contracts and in wills in the French law, see 6 Toull. n. 520.

WHEN AND WHERE. These words are

used in a plea when full defence is made: the form is, "when and were it shall behove him." This acknowledges the jurisdiction of the court. 1 Chit. Pl. *414.

WHEREAS. This word implies a recital, and in general cannot be used in the direct and positive averment of a fact in a declaration or plea. Those facts which are directly denied by the terms of the general issue, or which may, by the established usage of pleading, be specially traversed, must be averred in positive and direct terms; but facts, however material, which are not directly denied by the terms of the general issue, though liable to be contested under it, and which, according to the usage of pleading, cannot be specially traversed, may be alleged in the declaration by way of recital, under a *whereas*. Gould, Pl. c. 43, § 42; Bac. Ab. Pleas, &c., B. 5, 4; 2 Chit. Pl. 151, 178, 191; Gould, Pl. c. 3, § 47.

WHIPPING, punishment. The infliction of stripes.

2. This mode of punishment, which is still practiced in some of the states, is a relief of barbarism; it has yielded in most of the middle and northern states to the penitentiary system.

3. The punishment of whipping, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 28, 1839, s. 5. Vide 1 Chit. Cr. Law, 796; Dane's Ab. Index, h. t.

WHITE PERSONS. The acts of congress which authorize the naturalization of aliens, confine the description of such aliens to free *white persons*.

2. This of course excludes the African race when pure, but it is not easy to say what shade of color or mixture of blood will make a *white person*.

3. The constitution of Pennsylvania, as amended, confines the right of citizenship to free white persons; and these words, *white persons*, or similar words, are used in most of the constitutions of the southern states, in describing the electors.

WHITE RENT, English law. Rents paid in silver, and called *white rents* or *redditus albi*, to distinguish them from other rents which were not paid in money. 2 Inst. 19. Vide *Alba firma*.

WHOLE BLOOD. Being related by both the father and mother's side; this phrase is used in contradistinction to *half blood*, (q. v.) which is relation only on one side. See *Blood*.

WHOLESALE. To sell by wholesale, is to sell by large parcels, generally in original packages, and not by retail. (q. v.,

WIDOW. An unmarried woman whose husband is dead.

2. In legal writings, widow is an addition given to a woman who is unmarried and whose husband is dead. The addition of spinster is given to a woman who never was married. Lovel. on Wills, 269. See *Addition*. As to the rights of a widow, see *Dower*.

WIDOW'S CHAMBER, Eng. law. In London the apparel of a widow and the furniture of her chamber, left by her deceased husband, is so called, and the widow is entitled to it. 2 Bl. Com. 518.

WIDOWHOOD. The state of a man whose wife is dead, or of a woman whose husband is dead. In general there is no law to regulate the time during which a man must remain a widower, or a woman a widow, before they marry a second time. The term widowhood is mostly applied to the state or condition of a widow.

WIDOWER. A man whose wife is dead. A widower has a right to administer to his wife's separate estate, and as her administrator to collect debts due to her, generally for his own use.

WIFE, domestic relations. A woman who has a husband.

2. A wife, as such, possesses rights and is liable to obligations. These will be considered. 1st. She may make contracts for the purchase of real estate for her own benefit, unless her husband expressly dissents. 6 Binn. R. 427. And she is entitled to a legacy directly given to her for her separate use. 6 Serg. & Rawle, R. 467. In some places, by statutory provision, she may act as a *feme sole* trader, and as such acquire personal property. 2 Serg. & Rawle, R. 289.

3.—2d. She may in Pennsylvania, and in most other states, convey her interest in her own or her husband's lands by deed acknowledged in a form prescribed by law. 8 Dowl. R. 630.

4.—3d. She is under obligation to love, honor and obey her husband, and is bound to follow him wherever he may desire to establish himself; 5 N. S. 60; (it is presumed not out of the boundaries of the United States,) unless the husband, by acts of injustice and such as are contrary to his marital duties, renders her life or happiness insecure.

5.—4th. She is not liable for any obligations she enters into to pay money on any contract she makes, while she lives with her husband; she is presumed in such case to act as the agent of her husband. Chitty, Contr. 43.

6.—5th. The incapacities of *femes covert*, apply to their civil rights, and are intended for their protection and interest. Their political rights stand upon different grounds, they can, therefore, acquire and lose a national character. These rights stand upon the general principles of the law of nations. Harp. Eq. R. 5; 3 Pet. R. 242.

7.—6th. A wife, like all other persons, when she acts with freedom, may be punished for her criminal acts. But the law presumes, when she commits in his presence a crime, not *malum in se*, as murder or treason, that she acts by the command and coercion of her husband, and, upon this ground, she is exempted from punishment. Rosc. on Cr. Ev. 785. But this is only a presumption of law, and if it appears, upon the evidence, that she did not in fact commit the act under compulsion, but was herself a principal actor and inciter in it, she may be punished. 1 Hale, P. C. 516; 1 Russ. on Cr. 16, 20. *Vide Contract; Divorce; Husband; Incapacity; Marriage; Necessaries; Parties to actions; Parties to contracts; Women*; and, generally, Bouv. Inst. Index, h. t.

WIFE'S EQUITY. By this phrase is understood the equitable right of a wife to have settled upon her and her children a suitable provision out of her estate whenever the husband cannot obtain it, without the aid of a court of equity. Shelf. on M. and D., 605.

2. By the marriage the husband acquires an interest in the property of his wife in consideration of the obligation which he contracts by the marriage, of maintaining her and their children. The common law enforces this duty thus voluntarily assumed by him, and he can alien the property to which he is thus entitled *jure mariti*, or in case of his bankruptcy or insolvency it would vest in his assignee for the benefit of his creditors, and the wife would be left, with her children, entirely destitute, notwithstanding her fortune may have been great. To remedy this evil, courts of equity, in certain cases, give a provision to the wife, which is called the wife's equity.

3. The principle upon which courts of equity act is, that he who seeks the aid of

equity must do equity, and that will be withheld until an adequate settlement has been made. 1 P. Wms. 459, 460. See 5 My. & Cr. 105; 11 Sim. 569; 4 Hare, 6.

4. It will be proper to consider, 1. Out of what property the wife has a right to claim her equity to a settlement. 2. Against whom she may make such a claim. 3. Her rights. 4. The rights of her children. 5. When her rights to a settlement will be barred.

5.—1. Where the property is equitable and not recoverable at law, it cannot be obtained without making a settlement upon a wife and children, if one be required by her; 2 P. Wms. 639; and where, though the property be legal in its nature, it becomes, from collateral circumstances, the subject of a suit in equity, the wife's right to a settlement will attach. 5 My. & Cr. 97. See 2 Ves. jun., 607, 680; 4 Bro. C. C. 338; 3 Ves. 166, 421; 9 Ves. 87; 5 Madd. R. 149; 5 Ves. 517; 13 Maine, 124; 10 Ala. R. 401; 9 Watts, 90; 5 John. Ch. R. 464; 3 Cowen, 591; 6 Paige, 366; 2 Bland. 545; 2 Paige, 303.

6.—2. The wife's equity to a settlement is binding not only upon the husband, but upon his assignee under the bankrupt or insolvent laws. 2 Atk. 420; 3 Ves. 607; 4 Bro. C. C. 138; 6 John. Ch. R. 25; 1 Paige, 620; 4 Metc. 486; 4 Gill & John. 283; 5 Monr. 338; 10 Ala. R. 401; 1 Kelly, 637. And even where the husband assigned the wife's equitable right for a valuable consideration, the assignee was considered liable. 4 Ves. 19.

7.—3. As to the amount of the rights of the wife, the general rule is that one half of the wife's property shall be settled upon her. 2 Atk. 423; 3 Ves. 166. But it is in the discretion of the court to give her an adequate settlement for herself and children. 5 John. Ch. R. 464; 6 John. Ch. R. 25; 3 Cowen, 591; 1 Desaus. 263; 2 Bland. 545; 1 Cox, R. 153; 5 B. Monr. 31; 3 Kelly, 193; 1 D. & W. 407; 9 Sim. 597; 1 S. & S. 250.

8.—4. Whenever the wife insists upon her equity, the right will be extended to her children, but the right is strictly personal to the wife, and her children cannot insist upon it after her death. 2 Eden, 337; 1 J. & W. 472; 1 Madd. R. 467; 11 Bligh, N. S. 104; 2 John. Ch. R. 206; 3 Cowen, 591; 10 Ala. R. 401; 1 Sanf. 129.

9.—5. The wife's equity will be barred, first, by an adequate settlement having been

made upon her; 2 Ves. 675; when she lives in adultery apart from her husband; 4 Ves. 146; but a female ward of court, married without its consent, will not be barred, although she should be living in adultery. 1 V. & B. 302.

WILD ANIMALS. Animals in a state of nature; animals *feræ naturæ*. Vide *Animals; Feræ naturæ*.

WILFULLY, intentionally.

2. In charging certain offences it is required that they should be stated to be wilfully done. Arch. Cr. Pl. 51, 58; Leach's Cr. L. 556.

3. In Pennsylvania it has been decided that the word *maliciously* was an equivalent for the word *wilfully*, in an indictment for arson. 5 Whart. R. 427.

WILL, *criminal law*. The power of the mind which directs the actions of a man.

2. In criminal law it is necessary that there should be an act of the will to commit a crime, for unless the act is wilful it is no offence.

3. It is the consent of the will which renders human actions commendable or culpable, and where there is no will there can be no transgression.

4. The defect or want of will may be classed as follows:—1. Natural, as that of infancy. 2. Accidental; namely, 1st. Dementia. 2d. Casualty or chance. 3d. Ignorance. (q. v.) 3. Civil; namely, 1st. Civil subjection. 2d. Compulsion. 3d. Necessity. 4th. Well-grounded fear. Hale's P. C. c. 2; Hawk. P. C. book 1, c. 1.

WILL or TESTAMENT. The legal declaration of a man's intentions of what he wills to be performed after his death. Co. Litt. 111; Swinb. Pt. 1, s. II. 1; Shep. Touch. 398; Bac. Abr. Wills, A.

2. The terms will and testament are synonymous, and they are used indifferently by common lawyers, or one for the other. Swinb. p. 1, s. I. 5; Bac. Ab. Wills. A. Civilians use the term testament only. See *Testament*.

3. There are five essential requisites to make a good will.

4.—1. The testator must be legally capable of making a will. Generally all persons who may make valid contracts can dispose of their property by will. See *Parties to contracts*. This act requires a power of the mind freely to dispose of property. Infants, because of their tender age, and married women, on account of the supposed influ-

ence and control of their husbands, have no capacity to make a will, with these exceptions, that infants at common law may dispose of their personal estate, the males when over fourteen years of age, and the females when over twelve; this rule in relation to infants is not uniform in the United States. Swinb. p. 2, s. 2; Bac. Ab. Wills, B. Persons devoid of understanding, as idiots and lunatics, cannot make a will.

5.—2. The testator at the time of making his will, must have *animus testandi*, or a serious intention to make such will. If a man therefore jestingly or boastingly and not seriously, writes or says that such a person shall have his goods or be his executor, this is no will. Bac. Ab. Wills, C; Com. Dig. Estates by Devise, D 1. See 4 Serg. & Rawle, 545; 2 Yeates, 324; 5 Binn. 490; 1 Des. R. 543.

6.—3. The mind of the testator in making his will must be free, and not moved by fear, fraud or flattery. In such cases the will is void or at least voidable. Bac. Ab. Wills, C; see 3 Serg. & Rawle, 269. Vide *Influence*.

7.—4. There must be a person to take, capable of taking; for to render a devise or bequest valid there must be a donee *in esse*, or in *rerum naturâ*, and one that shall have capacity to take the thing given, when it is to vest, or the gift shall be void. Plowd. 345. See *Legatee*.

8.—5. The will must be put in proper form. Wills are either written or *nuncupative*.

9.—1. A will in writing must be, 1. Written on paper or parchment; it may be in any language, and in any character, provided it can be read or understood. 2. It must be signed by the testator or some person authorized by him; but a sealing has been held to be a sufficient signing. 2 Str. 764. But see 3 Lev. R. 1; 1 Const. R. 343; 18 Ves. R. 183; 2 Ball & B. 104; 5 Mood. R. 484, and article *To sign*. And it ought to be signed by the attesting witnesses. In some states three witnesses are required, who should sign the will as such at the request and in the presence of the testator and of each other. This formality should generally be pursued, as the testator may have lands in such states which would not pass without it. See, as to the attestation of wills, Bac. Ab. Wills, D; Rob. on Wills, c. 1, part 15. 3. It must be published, that is, the testator must do some act from which it can be concluded that he in-

tended the instrument to operate as his will. 6 Cruise, 79; 4 Burn's Eccl. Law, 119. As to the republication of wills, see Bac. Abr. Wills, D 3; and article *Publication*. 4. To make a good will of goods and chattels there must be an executor named in it, otherwise it will be a codicil only, and the party is said to die intestate; in such a case administration must be granted. Bac. Abr. Wills, D 2.

10.—2. A nuncupative will or testament, is a verbal declaration by a testator of his will before a competent number of legal witnesses.

11. Before the statute of frauds they were very common, but by that statute, 29 C. H. c. 3, which has been substantially adopted in a number of the states, these wills were laid under many restrictions. Vide Dane's Ab. chap. 127, a. 2; 8 Harr. & John. 208; 6 Munf. R. 123; 1 Munf. R. 456; 4 Hen. & Munf. 91—100.

12. In New York nuncupative wills have been abolished, except made by a soldier while in actual military service, or by a mariner while at sea. 2 New York Revised Statutes, 60, sec. 22. As to nuncupative wills in Louisiana, see *Testament nuncupative*; and Civil Code of Louisiana, article 1574.

13. It is a rule that the last will revokes all former wills. It follows then that a man cannot by any testamentary act impose upon himself the inability of making another inconsistent with and revoking the first will. Bac. Ab. Wills, E; Swinb. pt. 7, s. 14.

14. A will voluntarily and intentionally made by a competent testator, according to the form required by law, may be avoided, 1st. By revocation, see *Revocation*; Bac. Abr. Wills, G 1; Vin. Abr. Devise, P; 1 Rolle, Ab. 615; Com. Dig. Estates by Dev. F; and, 2d. By fraud.

15. Among the civilians they have two other kinds of wills, namely: the *mystic*, which is a will enveloped in a paper and sealed, and the witnesses attest that fact; the other is the *olographic*; which is wholly written by the testator himself. See *Testament*.

As to wills and testaments, see Swinburne on Wills; Roberts on Wills; Lovelass on Wills; Roper on Legacies; Lowndes on Legacies; Will. on Ex. pt. 1; Vin. Abr. Devise; Rolle's Abr. Devise; Bac. Abr. Wills and Testaments; Com. Dig. Estates by Devise; Nels. Abr. h. t.; Amer. Dig. Wills; Whart. Dig. Wills; Toll. on Execu-

tors; Off. Ex.; Orph. Legacy; Touchst. ch. 23; Civil Code of Louisiana, B. 3, tit. 2; Bouv. Inst. Index, h. t.; and the articles *Devise*; *Legacy*; *Testament*.

WINCHESTER MEASURE. The standard measure originally kept at Winchester, in England.

WINDOW. An opening made in the wall of a house to admit light and air, and to enable those who are in to look out.

2. The owner has a right to make as many windows in his house when not built on the line of his property as he may deem proper, although by so doing he may destroy the privacy of his neighbors. Bac. Ab. Actions in general, B.

8. In cities and towns it is evident that the owner of a house cannot open windows in the partition wall without the consent of the owner of the adjoining property, unless he possesses the right of having *ancient lights*. (q. v.) The opening of such windows and destroying the privacy of the adjoining property, is not, however, actionable; the remedy against such encroachment is by obstructing them, without encroaching upon the rights of the party who opened them, so as to prevent a right from being acquired by twenty years' use. 3 Camp. 82.

WISCONSIN. The name of one of the new states of the United States of America.

2. The constitution of Wisconsin was adopted by a convention, at Madison, on the first day of February, 1848.

3. The right of suffrage is vested by the third article of the constitution, as follows:

Sect. 1. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in this state for one year next preceding any election, shall be deemed a qualified elector at such election.

1st. White citizens of the United States.

2d. White persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization.

3d. Persons of Indian blood who have once been declared by law of congress to be citizens of the United States, any subsequent act of congress to the contrary notwithstanding.

4th. Civilized persons of Indian descent, not members of any tribe; *Provided*, that the legislature may at any time extend by law the right of suffrage to persons not herein enumerated, but no such law shall

be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election.

Sect. 2. No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election; nor shall any person, convicted of treason or felony, be qualified to vote at any election, unless restored to civil rights.

Sect. 3. All votes shall be given by ballot, except for such township officers as may by law be directed or allowed to be otherwise chosen.

Sect. 4. No person shall be deemed to have lost his residence in this state by reason of absence on business of the United States or of this state.

Sect. 5. No soldier, seaman or marine, in the army or navy of the United States, shall be deemed a resident in this state, in consequence of being stationed within the same.

Sect. 6. Laws may be passed excluding from the right of suffrage all persons who have been, or may be convicted of bribery, or larceny, or any infamous crime, and depriving every person who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, of the right to vote at such election.

4. The fourth article vests the *legislative power* in a senate and assembly. These will be separately considered, by taking a view, 1. Of the senate. 2. Of the assembly.

5.—§ 1. The *senate*. It will be proper to examine, first, the qualification of the senators; secondly, the time of their election; third, the duration of their office; fourth, the number of senators.

6.—1. The senators must have resided one year within the state, and be qualified electors in the district which they may be chosen to represent. Sect. 6.

7.—2. Senators are elected on the Tuesday following the first Monday of November by the qualified electors of the several districts. One half every year.

8.—3. They hold their office for two years.

9.—4. The senate shall consist of a number of members not more than one-third, nor less than one-fourth of the number of the members of the assembly. Sect. 2.

10.—§ 2. The *assembly* will be considered in the same order.

11.—1. Members of the assembly must have resided one year in the state, and be

qualified electors for the district for which they may be chosen.

12.—2. Members of the assembly are elected at the same time senators are elected.

13.—3. They are elected annually.

14.—4. The number of members of the assembly shall never be less than fifty-four nor more than one hundred.

15. The two houses are invested severally with the following powers:

Sect. 7. Each house shall be the judge of the elections, returns and qualifications of its own members; and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Sect. 8. Each house may determine the rules of its own proceedings, punish for contempts and disorderly behaviour; and, with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.

Sect. 9. Each house shall choose its own officers, and the senate shall choose a temporary president when the lieutenant governor shall not attend as president, or shall act as governor.

Sect. 10. Each house shall keep a journal of its proceedings, and publish the same, except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than three days.

16. By the fifth article, the *executive power* is vested in a governor.

17.—Sect. 1. The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant governor shall be elected at the same time, and for the same term.

18.—Sect. 2. No person, except a citizen of the United States, and a qualified elector of the state, shall be eligible to the office of governor or lieutenant governor.

19.—Sect. 3. The governor and lieutenant governor shall be elected by the qualified electors of the state, at the times and places of choosing members of the legislature. The persons respectively having the highest number of votes for governor and lieutenant governor shall be elected, but in case two or more shall have an equal

and the highest number of votes for governor or lieutenant governor, the two houses of the legislature, at its next annual session, shall forthwith, by joint ballot, choose one of the persons so having an equal and the highest number of votes, for governor or lieutenant governor. The returns of election for governor or lieutenant governor shall be made in such manner as shall be provided by law.

20.—Sect. 4. The governor shall be commander-in-chief of the military and naval forces of the state. He shall have power to convene the legislature on extraordinary occasions; and in case of invasion, or danger from the prevalence of contagious disease at the seat of government, he may convene them at any other suitable place within the state. He shall communicate to the legislature at every session, the condition of the state; and recommend such matters to them for their consideration as he may deem expedient. He shall transact all necessary business with the officers of the government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed.

21.—Sect. 5. The governor shall receive during his continuance in office an annual compensation of one thousand two hundred and fifty dollars.

22.—Sect. 6. The governor shall have the power to grant reprieves, commutations and pardons after conviction for all offences, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason he shall have the power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve, with his reasons for granting the same.

23.—Sect. 7. In case of the impeachment of the governor, or his removal from office, death, inability from mental or phy-

sical disease, resignation or absence from the state, the powers and the duties of the office shall devolve upon the lieutenant governor for the residue of the term, until the governor, absent or impeached, shall have returned, or the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of the military force thereof, he shall continue commander-in-chief of the military force of the state.

24.—Sect. 8. The lieutenant governor shall be president of the senate, but shall have only a casting vote therein. If during a vacancy in the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or from mental or physical disease, become incapable of performing the duties of his office, or be absent from the state, the secretary of state shall act as governor until the vacancy shall be filled, or the disability shall cease.

25.—Sect. 9. The lieutenant governor shall receive double the per diem allowance of members of the senate, for every day's attendance as president of the senate, and the same mileage as shall be allowed to members of the legislature.

26.—Sect. 10. Every bill which shall have passed the legislature, shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large upon the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the members, voting for or against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law, unless the legislature shall by their adjournment prevent its return, in which case it shall not be a law.

27. The seventh article establishes the *judiciary* as follows:

Sect. 1. The court for the trial of impeachments shall be composed of the

senate. The house of representatives shall have the power of impeaching all civil officers of this state, for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment. On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court. No judicial officer shall exercise his office after he shall have been impeached until his acquittal. Before the trial of an impeachment, the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence; and no person shall be convicted without a concurrence of two-thirds of the members present. Judgment in case of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold any office of honor, profit or trust under the state; but the party impeached shall be liable to indictment, trial and punishment according to law.

28.—Sect. 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts, in the several counties, with limited civil and criminal jurisdiction: Provided, that the jurisdiction which may be vested in municipal courts, shall not exceed, in their respective municipalities, that of circuit courts, in their respective circuits, as prescribed in this constitution: And that the legislature shall provide as well for the election of judges of the municipal courts, as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit court.

29.—Sect. 3. The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto certiorari, and other original and

remedial writs, and to hear and determine the same.

30.—Sect. 4. For the term of five years and thereafter until the legislature shall otherwise provide, the judges of the several courts shall be judges of the supreme court, four of whom shall constitute a quorum, and the concurrence of a majority of the judges present shall be necessary to a decision. The legislature shall have power, if they should think it expedient and necessary, to provide by law for the organization of a separate supreme court, with the jurisdiction and powers prescribed in this constitution, to consist of one chief justice and two associate justices, to be elected by the qualified electors of the state, at such time and in such manner as the legislature may provide. The separate supreme court, when so organized, shall not be changed or discontinued by the legislature; the judges thereof shall be so classified that but one of them shall go out of office at the same time, and the term of office shall be the same as provided for the judges of the circuit court. And whenever the legislature may consider it necessary to establish a separate supreme court, they shall have power to reduce the number of circuit court judges to four, and subdivide the judicial circuits, but no such subdivision or reduction shall take effect till after the expiration of the term of some one of the said judges, or till a vacancy occur by some other means.

31. Circuits are established, and they may be changed by the legislature.

Sect. 7. For each circuit there shall be a judge chosen by the qualified electors therein, who shall hold his office as is provided in this constitution until his successor shall be chosen and qualified, and after he shall have been elected he shall reside in the circuit for which he was elected. One of said judges shall be designated as chief justice, in such manner as the legislature shall provide. And the legislature shall, at its first session, provide by law as well for the election of, as for classifying, the judges of the circuit court to be elected under this constitution, in such manner, that one of the said judges shall go out of office in two years, one in three years, one in four years, one in five years and one in six years, and thereafter the judge elected to fill the office, shall hold the same for six years.

32.—8. The circuit courts shall have original jurisdiction in all matters civil and

criminal within this state, not excepted in this constitution, and not hereafter prohibited by law, and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions.

33.—Sect. 9. When a vacancy shall happen in the office of a judge of the supreme or circuit court, such vacancy shall be filled by an appointment of the governor, which shall continue until a successor is elected and qualified; and when elected, such successor shall hold his office the residue of the unexpired term. There shall be no election for a judge or judges at any general election for state or county officers, nor within thirty days either before or after such election.

34.—Sect. 10. Each of the judges of the supreme and circuit courts shall receive a salary, payable quarterly, of not less than one thousand five hundred dollars annually; they shall receive no fees of office or other compensation than their salaries; they shall hold no office of public trust, except a judicial office, during the term for which they are respectively elected, and all votes for either of them for any office except a judicial office, given by the legislature or the people, shall be void. No person shall be eligible to the office of judge who shall not at the time of his election be a citizen of the United States, and have attained the age of twenty-five years, and be a qualified elector within the jurisdiction for which he may be chosen.

35.—Sect. 11. The supreme court shall hold at least one term annually at the seat of government of the state, at such times as shall be provided by law, and the legislature may provide for holding other terms, and at other places when they may deem it necessary. A circuit court shall be held at least twice a year, in each county of this state, organized for judicial purposes. The judges of the circuit court may hold courts for each other, and shall do so when required by law.

WISTA. Among the Saxons, this was a measure of land; it contained a half hide, or sixty acres.

TO WIT. To know, that is to say, namely. See *Scilicet*.

VOL. II.—S s

WITH STRONG HAND, *pleading*. This is a technical phrase indispensable in describing a forcible entry in an indictment. No other word or circumlocution will answer the same purpose. 8 T. R. 357.

WITHDRAWING A JUROR, *practice*. An agreement made between the parties in a suit to require one of the twelve jurors impaneled to try a cause to leave the jury box; the act of leaving the box by such a juror is also called the withdrawing a juror.

2. This arrangement usually takes place at the recommendation of the judge, when it is obviously improper the case should proceed any further.

3. The effect of withdrawing a juror puts an end to that particular trial, and each party must pay his own costs. 3 T. R. 657; 2 Dowl. R. 721; S. C. 1 Crom M. & R. 64.

4. But the plaintiff may bring a new suit for the same cause of an action. R. & M. 402; S. C. 21 E. C. L. R. 472; 3 Barn. & Adolph. 349; S. C. 23 E. C. L. R. 91. See 3 Chit. Pr. 916.

WITHERNAM, *practice*. The name of a writ which issues on the return of *elongata* to an alias or pluries writ of replevin, by which the sheriff is commanded to take the defendant's own goods which may be found in his bailiwick, and keep them safely, not to deliver them to the plaintiff until such time as the defendant chooses to submit himself, and allow the distress, and the whole of it, to be replevied, and he is thereby further commanded that he do return to the court in what manner he shall have executed the writ. Hamm. N. P. 453; 2 Inst. 140; F. N. B. 68, 69; 19 Vin. Ab. 7; 7 Com. Dig. 674; Grotius, 3, 2, 4, n. 1.

WITHOUT, *pleading*. This word is adopted in formal traverses, and is a negative signifying "and not for;" accordingly the language of the elder entries sometimes is, "*et nemy pur tiel cause*," &c. Hamm. N. P. 120.

WITHOUT DAY. This signifies that the cause or thing to which it relates is indefinitely adjourned; as when a case is adjourned without day, it is not again to be inquired into; when the legislature adjourn without day they are not to meet again. This is usually expressed in Latin, *sine die*.

WITHOUT IMPEACHMENT OF WASTE. When a tenant for life holds the land with-

out impeachment of waste, he is of course punishable for waste whether wilful or otherwise. But still this right must not be wantonly abused so as to destroy the estate, and he will be enjoined from committing malicious waste. Dane's Ab. c. 78, a. 14, § 7; Bac. Ab. Waste, N; 2 Eq. Cas. Ab. tit. Waste, A. pl. 8; 2 Bouv. Inst. n. 2402. See *Impeachment of Waste and Waste*.

WITHOUT RECOURSE. Vide *Sans Recours* and *Indorsement*; Chit. on Bills, 179; 14 S. & R. 325; 3 Cranch, 193; 7 Cranch, 159; 1 Cowen, 538; 12 Mass. 172; 6 Shipl. R. 354.

WITHOUT RESERVE, contracts. These words are frequently used in conditions of sale at public auction, that the property offered, or to be offered for sale, will be sold *without reserve*.

2. When a property is advertised to be sold without reserve, if a puffer be employed to bid, and actually bid at the sale, the courts will not enforce a contract against a purchaser, into which he may have been drawn by the vendor's want of faith. 5 Madd. R. 34. Vide *Puffer*.

WITHOUT THIS, THAT, pleading. These are technical words used in a traverse, (q. v.) for the purpose of denying a material fact in the preceding pleadings, whether declaration, plea, replication, &c. In Latin it is called *absque hoc*. (q. v.) Lawes on Pl. in Civ. Act. 119; Com. Dig. Pleader, G 1; Summary of Pleading, 75; 1 Saund. 103, n.; Ld. Raym. 641; 1 Burr. 320; 1 Chit. Pl. 576, note a.

WITNESS. One who, being sworn or affirmed, according to law, deposes as to his knowledge of facts in issue between the parties in a cause.

2. In another sense by witness is understood one who is called upon to be present at a transaction, as a wedding, or the making of a will. When a person signs his name to an instrument, as a deed, a bond, and the like, to signify that the same was executed in his presence, he is called an attesting witness.

3. The testimony of witnesses can never have the effect of a demonstration, because it is not impossible, indeed it frequently happens, that they are mistaken, or wish themselves to deceive. There can, therefore, result no other certainty from their testimony than what arises from analogy. When in the calm of the passions, we listen only to the voice of reason and the impulse of nature we feel in ourselves a great re-

pugnance to betray the truth, to the prejudice of another, and we have observed that honest, intelligent and disinterested persons never combine to deceive others by a falsehood. We conclude, then, by analogy, with a sort of moral certainty, that a fact attested by several witnesses, worthy of credit, is true. This proof derives its whole force from a double presumption. We presume, in the first place, on the good sense of the witnesses that they have not been mistaken; and, secondly, we presume on their probity that they wish not to deceive. To be certain that they have not been deceived, and that they do not wish to mislead, we must ascertain, as far as possible, the nature and the quality of the facts proved; the quality and the person of the witness; and the testimony itself, by comparing it with the deposition of other witnesses, or with known facts. Vide *Circumstances*.

4. It is proper to consider, 1st. The character of the witness. 2d. The quality of the witness. 3d. The number of witnesses required by law.

5.—I. When we are called upon to rely on the testimony of another in order to form a judgment as to certain facts, we must be certain, 1st. That he knows the facts in question, and that he is not mistaken; and, 2d. That he is disposed to tell the truth, and has no desire to impose on those who are to form a judgment on his testimony. The confidence, therefore, which we give to the witness must be considered, in the first place, by his capacity or his organization, and, in the next, by the interest or motive which he has to tell or not to tell the truth. When the facts to which the witness testifies agree with the circumstances which are known to exist, he becomes much more credible than when there is a contradiction in this respect. It is true that until impeached one witness is as good as another; but when a witness is impeached, although he remains competent, he is not as credible as before. Vide *Circumstances; Competency; Credibility*.

6.—II. As to the quality of the witnesses, it is a general rule that all persons may be witnesses. To this there are various exceptions. A witness may be incompetent, 1. For want of understanding. 2. On account of interest. 3. Because his admission is contrary to public policy. 4. For want of religious principles; and, 5. On account of infamy.

7.—§ 1. Persons who want *understand-*

ing, it is clear, cannot be witnesses, because they are to depose to facts which they know; and if they have no understanding, they cannot know the facts. There are two classes of persons of this kind.

8.—1. *Infants*. A child of any age, capable of distinguishing between good and evil, may be examined as a witness; and, in all cases, the examination must be under oath or affirmation. 1 Phil. Ev. 19; 1 Const. R. 354. This appears to be the rule in England; though formerly it was held by some judges, that it was a presumption of law that the child was incompetent, when he was under seven years of age. Gilb. Ev. 144; 1 East, R. 422; 1 East, P. C. 443; 1 Leach, 199. When the child is under fourteen, he is presumed incapable until capacity is shown; 2 Tenn. Rep. 80; 19 Mass. R. 225; and see 18 John. R. 105; when he is over fourteen, he may be sworn without a previous examination. 2 South. R. 589.

9.—2. *Idiots and lunatics*. An idiot cannot be examined as a witness; but a lunatic, (q. v.) during a lucid interval, (q. v.) may be examined. A person in a state of intoxication cannot be admitted as a witness. 15 Serg. & Rawle, 235. See Ray, Med. Jur. c. 22, § 300 to 311.

10.—§ 2. *Interest* in the event of the suit excludes the witness from examination, unless under certain circumstances. See article *Interest*. The exceptions are, the cases of informers, (q. v.) when the statute makes them witnesses, although they may be entitled to a penalty; 1 Phil. Ev. 96; persons entitled to a reward, (q. v.) are sometimes competent; agents are also admitted, in order to prove a contract made by them on the part of the principal, 1 Phil. Ev. 99; and see 1 John. Cas. 408; 2 John. Cas. 60; 2 John. R. 189; 13 Mass. R. 380; 11 Mass. R. 60; 2 Marsh. In. 706, b; 1 Dall. R. 7; 1 Caines' R. 167. A mere trustee may be examined by either party. 1 Clarke, R. 281. An interested witness' competency may be restored by a release. 1 Phil. Ev. 101. Vide, generally, 1 Day's R. 266, 269; 1 Caines' R. 276; 3 John. R. 518; 4 Mass. R. 488; 3 John. Cas. 82, 269; 1 Hayw. 2; 5 Halst. R. 297; 6 Binn. R. 319; 4 Binn. 83; 1 Dana's R. 181; 1 Taylor's R. 55; Bac. Ab. Evidence, B; Bouv. Inst. Index, h. t.

11.—§ 3. There are some persons who cannot be examined as witnesses, because it is inconsistent with *public policy* that they

should testify against certain persons; these are,

12.—1. *Husband and wife*. The reason for excluding them from giving evidence, either for or against each other, is founded partly on their identity of interest, partly on a principle of public policy which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because it is against the policy of marriage. Co. Litt. 6, b; 2 T. R. 265, 269; 6 Binn. 488. This is the rule when either is a party to a civil suit or action.

13. But where one of them, not being a party, is interested in the result, there is a distinction between the giving evidence *for* and *against* the other. It is an invariable rule that neither of them is a witness for the other who is interested in the result, and that where the husband is disqualified by his interest, the wife is also incompetent. 1 Ld. Raym. 744; 2 Str. 1096; 1 P. Wms. 610.

14. On the other hand, where the interest of the husband, consisting in a civil liability, would not have protected him from examination, it seems that the wife must also answer, although the effect may be to subject her husband to an action. This case differs very materially from those where the husband himself could not have been examined, either because he was a party or because he would criminate himself. The party to whom the testimony of the wife is essential, has a legal interest in her evidence; and as he might insist on examining the husband, it would, it seems, be straining the rule of policy too far to deprive him of the benefit of the wife's testimony. In an action for goods sold and delivered, it has been held that the wife of a third person is competent to prove that the credit was given to her husband. 1 Str. 504; B. N. P. 287. See 1 H. & M. 154; 11 Mass. 286; 1 Har. & J. 478; 1 Tayl. 9; 6 Binn. 488; 1 Yeates, 390, 534.

15. When neither of them is either a party to the suit, nor interested in the general result, the husband or wife is, it seems, competent to prove any fact, provided the evidence does not directly criminate, or tend to criminate, the other. 2 T. R. 263.

16. It has been held in Pennsylvania

that the deposition of a wife on her death-bed, charging her husband with murdering her, was good evidence against him, on his trial for murder. *Addis*. 332. On an indictment for a conspiracy in inveigling a young girl from her mother's house, and she being intoxicated, procuring the marriage ceremony to be recited between her and one of the defendants, the girl is a competent witness to prove the facts. 2 *Yeates*, 114.

17. See, as to the competency of a wife *de facto*, but not *de jure*, *Stark. Ev.* pt. 4, p. 711. And on an indictment for forcible entry, the wife of the prosecutor was examined as a witness to prove the *force*, but only the *force*. 1 *Dall.* 68.

18.—2. *Attorneys*. They cannot be examined as witnesses as to confidential communications which they have received from their clients, made while the relation of attorney and client subsisted. 3 *Johns. Cas.* 198. See 3 *Yeates*, 4. Communications thus protected must have been made to him as instructions necessary for conducting the cause, and not any extraneous or impertinent matter; 3 *Johns. Cas.* 198; they must have been made to him in the character of a counsel and not as a friend merely; 1 *Caines' R.* 157; they must have been made while the relation of counsel and client existed, and not after. 13 *John. Rep.* 492. An attorney may be examined as to the existence of a paper entrusted to him by his client, and as to the fact that it is in his possession, but he cannot be compelled to produce it, or disclose its date or contents. 17 *Johns. R.* 335. See 18 *Johns. R.* 330. He may also be called to prove a collateral fact, not entrusted to him by his client; as to prove his client's handwriting. 19 *Johns. R.* 134; 3 *Yeates*, 4. He is a competent witness for his client, although his judgment fee depends upon his success; 1 *Dall.* 241; or he expects to receive a larger fee from his client if the latter succeeds. 4 *S. & R.* 32. In Louisiana, the reverse has been decided. It is there held that an attorney cannot become a witness for his client in a cause in which he was employed, by renouncing his fee, and having his name struck off from the record, in that case. 3 *N. S.* 88. *Vide Confidential Communications*.

19.—3. *Confessors*. In New York it has been held, that a confessor could not be compelled to disclose secrets which he had received in auricular confession. *City Hall*

Rec. 89 n. *Vide Confessor; Confidential Communications*.

20.—4. *Jurors*. A juror is not competent to prove his own or the conduct of his fellow jurors to impeach a verdict they have rendered. 5 *Conn. R.* 348. See *Coxe*, *R.* 166, and article *Grand Jury*. And a judge in a cause which is on trial before him cannot be a witness, as he cannot decide on his own competency, nor on the weight of his own testimony, compared with that of another. 2 *Mart. R. N. S.* 312; 1 *Greenl. Ev.* § 364.

21.—5. *Slaves*. It is said that a slave could not be a witness at common law, because of the unbounded influence his master had over him. 4 *Dall. R.* 145, note 1; but see 1 *St. Tr.* 113; *Macnally's Ev.* 156. By statutory provisions in the slave states, a slave is generally held incompetent in actions between white persons. See 7 *Monr. R.* 91; 4 *Ham. R.* 353; 5 *Litt. R.* 171; 3 *Harr. & John.* 97; 1 *McCord, R.* 430. In New York a free black man is competent to prove facts happening while he was a slave. 1 *John. R.* 508; see 10 *John R.* 132.

22.—6. *A party to a negotiable instrument*, is not allowed to give evidence to invalidate it. 1 *T. R.* 300. But the rule is confined to negotiable instruments. 1 *Bl. R.* 365. This rule does not appear to be very firmly established in England. In the state courts of some of the United States it has been adopted, and may now be considered to be law. 2 *Dall. R.* 194; *Id.* 196; 2 *Binn. R.* 154; 2 *Dall. R.* 242; 1 *Cain. R.* 258, 267; 2 *Johns. R.* 165; *Id.* 258; 1 *John. R.* 572; 3 *Mass R.* 559; *Id.* 565; *Id.* 27; *Id.* 31; 1 *Day, R.* 17; 6 *Pet.* 51; 8 *Pet.* 12; 5 *Greenl.* 374; 1 *Bailey*, 479; 2 *Dall.* 194. But see 16 *John.* 70; 8 *Wend.* 90; 20 *John.* 285. The witness may however testify to subsequent facts, not tending to show that the instrument was originally invalid. *Peake's N. P. C.* 6. See 2 *Wash.* 63; 1 *Hen. & Munf.* 165, 166, 175; 1 *Cranch, R.* 194.

23.—§ 4. When the witness has no religious principles, to bind his conscience, the law rejects his testimony; but there is not such defect of religious principles, when the witness believes in the existence of a God, who will reward or punish in this world or that which is to come. *Willes' R.* 550. *Vide the article Infidel*, where the subject is more fully examined; and *Atheist; Future state*.

24.—§ 5. *Infamy* (q. v.) is a disqualification while it remains.

25.—III. As to the number of witnesses, it is a general rule that one witness is sufficient to establish a fact, but to this there are exceptions, both in civil and criminal cases.

26.—1. In civil cases. The laws of perhaps all the states of the Union require two witnesses, and some require even more, to prove the execution of a last will and testament devising lands.

27.—2. In criminal cases, there are several instances where two witnesses at least are required. The constitution of the United States, art. 3, s. 3, provides that no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. In cases of perjury there must evidently be two witnesses, or one witness, and such circumstances as have the effect of one witness; for if there be but one witness, then there is oath against oath, and therefore uncertainty.

28. A witness may be compelled to attend court. In the first place a subpoena requiring his attendance must be served upon him personally, and on his neglect to attend, an attachment for contempt will be issued. See, generally, Bouv. Inst. Index, h. t.

WITNESS, AGED. It has been laid down as a rule that to be considered an aged witness, a person must be at least seventy years old. See *Aged Witness*.

WITNESS, GOING. A going witness is one who is about to leave the jurisdiction of the court in which a cause is depending. See *Going Witness*.

WITNESS INSTRUMENTARY, Scotch law. He who has attested a deed or other writing.

2. When witnesses attest a deed without knowing the grantor, and seeing him subscribe, or hearing him own his subscription, and the deed happens to be forged, the witnesses are declared accessory to forgery. Ersk. Pr. L. Scot, 4, 4, 37; 6 Hill, N. Y. Rep. 303.

WOMEN, persons. In its most enlarged sense, this word signifies all the females of the human species; but in a more restricted sense, it means all such females who have arrived at the age of puberty. *Mulieris appellatione etiam virgo viri potens continetur.* Dig. 50, 16, 18.

2. Women are either single or married. 1. Single or unmarried women have all the

civil rights of men; they may therefore enter into contracts or engagements; sue and be sued; be trustees or guardians; they may be witnesses, and may for that purpose attest all papers; but they are, generally, not possessed of any political power; hence they cannot be elected representatives of the people, nor be appointed to the offices of judge, attorney at law, sheriff, constable, or any other office, unless expressly authorized by law; instances occur of their being appointed post-mistresses; nor can they vote at any election. Wooddes. Lect. 31; 4 Inst. 5; but see Callis, Sew. 252; 2 Inst 34; 4 Inst. 311, marg.

3.—2. The existence of a married woman being merged, by a fiction of law, in the being of her husband, she is rendered incapable, during the coverture, of entering into any contract, or of suing or being sued, except she be joined with her husband; and she labors under all the incapacities above mentioned, to which single women are subject. Vide *Abortion; Contract; Divorce; Feminine; Fetus; Gender; Incapacity; Man; Marriage; Masculine; Mother; Necessaries; Parties to Actions; Parties to Contracts; Pregnancy; Wife*.

WOODGELD, old Eng. law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 a. The same as *Pudgeld*. (q. v.)

WOODS. A piece of land on which forest trees in great number naturally grow. According to Lord Coke, a grant to another of *omnes boscos suos*, all his woods, will pass not only all his trees, but the land on which they grow. Co. Litt. 4 b.

WORD, construction. One or more syllables which when united convey an idea; a single part of speech.

2. Words are to be understood in a proper or figurative sense, and they are used both ways in law. They are also used in a technical sense. It is a general rule that contracts and wills shall be construed as the parties understood them; every person, however, is presumed to understand the force of the words he uses, and therefore technical words must be taken according to their legal import, even in wills, unless the testator manifests a clear intention to the contrary. 1 Bro. C. C. 33; 3 Bro. C. C. 234; 5 Ves. 401; 8 Ves. 306.

3. Every one is required to use words in the sense they are generally understood, for, as speech has been given to man to be a sign of his thoughts, for the purpose of

communicating them to others, he is bound in treating with them, to use such words or signs in the sense sanctioned by usage, that is, in the sense in which they themselves understand them, or else he deceives them. Heinneq. Prælect. in Puffendorff, lib. 1, cap. 17, § 2; Heinneq. de Jure Nat. lib. 1, § 197; Wolff, Inst. Jur. Nat. § 798.

4. Formerly, indeed, in cases of slander, the defamatory words received the mildest interpretation of which they were susceptible, and some ludicrous decisions were the consequence. It was gravely decided, that to say of a merchant, "he is a base broken rascal, has broken twice, and I will make him break a third time," that no action could be maintained, because it might be intended that he had a hernia: *ne poet dar porter action, car poet estre intend de burstness de belly*. Latch, 104. But now they are understood in their usual signification. Comb. 37; Ham. N. P. 282. Vide Bouv. Inst. Index, h. t.; *Construction; Interpretation*.

WORK AND LABOR. In actions of assumpsit, it is usual to put in a count, commonly called a common count, for work and labor done, and materials furnished by the plaintiff for the defendant; and when the work was not done under a special contract, the plaintiff will be entitled to recover on the common count for work, labor, and materials. 4 Tyr. R. 43; 2 C. & M. 214. Vide *Assumpsit; Quantum meruit*.

WORKHOUSE. A prison where prisoners are kept in employment; a penitentiary. A house provided where the poor are taken care of, and kept in employment.

WORKING DAYS. In settling lay-days, (q. v.) or days of demurrage, (q. v.) sometimes the contract specifies "working days;" in the computation, Sundays and custom-house holidays are excluded. 1 Bell's Com. 577, 5th ed.

WORKMAN. One who labors, one who is employed to do business for another.

2. The obligations of a workman are to perform the work he has undertaken to do; to do it in proper time; to do it well; to employ the things furnished him according to his contract.

3. His rights, are to be paid what his work is worth, or what it deserves; to have all the facilities which the employer can give him for doing his work. 1 Bouv. Inst. n. 1000 to 1006.

WORSHIP. The honor and homage rendered to the Creator.

2. In the United States, this is free, every one being at liberty to worship God according to the dictates of his conscience. Vide *Christianity; Religious test*.

WORSHIP, Eng. law. A title or addition given to certain persons. 2 Inst. 666; Bac. Ab. Misnomer, A 2.

WORTHIEST OF BLOOD. An expression to designate that, in descent, the sons are to be preferred to daughters, which is the law of England. See some singular reasons given for this, in Plowd. 805.

WOUND, med. jur. This term, in legal medicine, comprehends all lesions of the body, and in this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity, while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations, and the like. Cooper's Surgical Dict. h. t.; Dunglison's Med. Dict. h. t.; vide Dictionnaire des Sciences Médicales, mot Blessures; 3 Foderé, Méd. Lég. § 687-811.

2. Under the statute 9 Geo. IV. c. 21, sect. 12, it has been held in England, that to make a wound, in criminal cases, there must be "an injury to the person by which the skin is broken." 6 C. & P. 684; S. C. 19 Engl. C. L. Rep. 526. Vide Beck's Med. Jur. c. 15; Ryan's Med. Jur. Index, h. t.; Roscoe's Cr. Ev. 652; 19 Engl. Com. L. Rep. 425, 430, 526, 529; Dane's Ab. Index, h. t.; 1 Moody's Cr. Cas. 278; 4 C. & P. 381; S. C. 19 E. C. L. R. 430; 4 C. & P. 446; S. C. 19 E. C. L. R. 466; 1 Moody's Cr. C. 318; 4 C. & P. 558; S. C. 19 E. C. L. R. 526; Carr. Cr. L. 239; Guy, Med. Jur. ch. 9, p. 446; Merl. Répert. mot Blessure.

3. When a person is found dead from wounds, it is proper to inquire whether they are the result of suicide, accident, or homicide. In making the examination, the greatest attention should be bestowed on all the circumstances. On this subject some general directions have been given under the article *Death*. The reader is referred to 2 Beck's Med. Jur. 68 to 93. As to wounds on the living body, see *Id.* 188.

WRECK, mar. law. A wreck (called in law Latin, *wreccum maris*, and in law French, *wrec de mer*,) signifies such goods, as after a shipwreck, are cast upon land by the sea, and left there within some county, so as not to belong to the jurisdiction of the admiralty, but to the common law. 2 Inst. 167;

Bract. l. 3, c. 3; Mirror, c. 1, s. 13, and c. 3.

2. The term wreck of the sea includes, 1. Goods found at low water, between high and low water mark; and 2. Goods between the same limits, partly resting on the ground, but still moved by the water. 3 Hagg. Adm. R. 257.

3. When goods have touched the ground, and have again been floated by the tide, and are within low water mark; whether they are to be considered wreck will depend upon the circumstances whether they were seized by a person wading, or swimming, or in a boat. 3 Hagg. Adm. R. 294. But if a human being, or even an animal, as a dog, cat, hawk, &c. escape alive from the ship, or if there be any marks upon the goods by which they may be known again, they are not, at common law, considered as wrecked. 5 Burr. 2738-9; 2 Chit. Com. Law, c. 6, p. 102; 2 Kent, Com. 292; 22 Vin. Ab. 535; 1 Bro. Civ. Law, 238; Park, Ins. Index, h. t.; Molloy, Jur. Mar. Index, h. t.

4. The act of congress of March 1, 1823, provides, § 21, That, before any goods, wares or merchandise, which may be taken from any wreck, shall be admitted to an entry, the same shall be appraised, in the manner prescribed in the sixteenth section of this act; and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise, shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee, or agent, shall be dissatisfied with such appraisement, he shall be entitled to the privileges provided in the eighteenth section of this act. Vide *Naufrage*.

WRIT, *practice*. A mandatory precept, issued by the authority, and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned.

2. It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under seal and tested by the proper officer, and is directed to the sheriff, or other officer lawfully authorized to execute the same. Writs are divided into, 1. Original. 2. Of mesne process. 3. Of execution. Vide 3 Bl. Com. 273; 1 Tidd, Pr. 93; Gould on Pl. c. 2, s. 1. There are several kinds of writs, some of which are mentioned below.

WRIT DE BONO ET MALO. An ancient

writ which was issued in the case of each prisoner, instead of a general commission of general jail delivery for all the prisoners. This writ has not been used for a very long time, and is obsolete. 4 Bl. Com. 270.

WRIT OF CONSPIRACY. The name of an ancient writ, now superseded by the more convenient remedy of an action on the case, which might have been sued against parties guilty of a conspiracy. F. N. B. 260. See *Conspiracy*.

WRIT OF DECEIT. The name of a writ which lies where one man has done anything in the name of another, by which the latter is damnified and deceived. F. N. B. 217.

2. The modern practice is to sue a writ of trespass on the case to remedy the injury. See *Deceit*.

WRIT DE EJECTIONE FIRMAE. A writ of ejectment. Vide *Ejectment*, and 3 Bl. Com. 199.

WRIT DE HERETICO COMBURENDO, *Engl. law*. The name of a writ formerly issued by the secular courts, when a man was turned over to them by the ecclesiastical tribunals, after having been condemned for heresy.

2. It was founded on the statute 2 Hen. IV. c. 15; it was first used, A. D. 1401, and as late as the year 1611. By virtue of this writ, the unhappy man against whom it was issued, was burned to death. See 12 Co. R. 92.

WRIT DE HOMINE REPLEGIANDO, *practice*. A writ which lies to replevy a man out of prison, or out of the custody of any private person, in the same manner in which cattle taken in distress may be replevied, upon giving security to the sheriff that the man shall be forthcoming to answer to any charge against him.

2. This writ is almost entirely superseded by the more effectual writ of *habeas corpus*. 3 Bl. Com. 129; Com. Dig. Imprisonment, L 4; Lord Raym. 613; F. N. B. 66; 1 Atk. 633; 14 Vin. Ab. 305; Dane's Ab. h. t.; 7 Com. Dig. 271; 5 Binn. R. 304; 1 John. R. 23; 14 John. R. 263; 2 Cain. C. Err. 322.

WRIT DE ODIO ET ATIA, *Engl. law*. This writ is probably obsolete, and superseded by the writ of *habeas corpus*. It was anciently directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause or suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and, if upon the inquisition due cause of suspicion

did not appear, then there issued another writ for the sheriff to admit him to bail. 3 Bl. Com. 128; Com. Dig. Imprisonment, L 3.

WRIT OF COVENANTS, practice. A writ which lies where a party claims damages for breach of covenant, *i. e.* of a promise under seal.

WRIT OF DEBT, practice. A writ which lies where the party claims the recovery of a debt, *i. e.* a liquidated or certain sum of money alleged to be due to him. This is debt *in the debt*, which is the principal and only common form. There is another species mentioned in the books, called the debt *in the detinet*, which lies for the specific recovery of goods, under a contract to deliver them. 1 Chit. Pl. 101.

WRIT OF DETINUE, practice. A writ which lies where a party claims the specific recovery of goods and chattels, or deeds and writings detained from him. This is seldom used: trover is the more frequent remedy, in cases where it may be brought.

WRIT OF DOWER, practice. A writ which lies for a widow claiming the specific recovery of her dower, no part having been yet assigned to her. It is usually called a writ of dower *unde nihil habet*. 3 Chit. Pl. 393; Booth, 166.

2. There is another species, called a writ of *right of dower*, which applies to the particular case where the widow has received a part of her dower from the tenant himself, and of land lying in the same town in which she claims the residue. Booth, 166; Glanv. lib. 6, c. 4, 5. This latter writ is seldom used in practice.

WRIT OF EJECTMENT, practice. The name of a process issued by a party claiming land or other real estate, against one who is alleged to be unlawfully in possession. Vide *Ejectment*.

WRIT OF ENTRY, practice. A writ requiring the sheriff to command the tenant of land that he render to the demandant the premises in question, or to appear in court on such a day to show cause why he hath not done so. Co. Litt. 238. See 2 Pick. 473; 10 Pick. 359; 14 Mass. 20; 15 Mass. 305; 5 N. Hamp. R. 450; 6 N. Hamp. R. 555; 7 Pick. 36.

WRIT OF ERROR, practice. A writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them, in some cases, themselves to examine the record; in others

to send it to another court of appellate jurisdiction, therein named, to be examined in order that some alleged error in the proceedings may be corrected. Steph. Pl. 138; 2 Saund. 100, n. 1; Bac. Ab. Error, *in pr.*

2. The first is called a writ of error *coram nobis* or *vobis*. When an issue in fact has been decided, there is not in general any appeal except by motion for a new trial; and although a matter of fact should exist which was not brought into the issue, as for example, if the defendant neglected to plead a release, which he might have pleaded, this is no error in the proceedings, though a mistake of the defendant. Steph. Pl. 139. But there are some facts which affect the validity and regularity of the proceeding itself, and to remedy these errors the party in interest may sue out the writ of error *coram vobis*. The death of one of the parties at the commencement of the suit; the appearance of an infant in a personal action, by an attorney, and not by guardian; the coverture of either party, at the commencement of the suit, when her husband is not joined with her, are instances of this kind. 1 Saund. 101; 1 Arch. Pr. 212; 2 Tidd's Pr. 1033; Steph. Pl. 140; 1 Browne's Rep. 75.

3. The second species is called, generally, writ of error, and is the more common. Its object is to review and correct an error of the law committed in the proceedings, which is not amendable, or cured at common law, or by some of the statutes of amendment or jeofail. Vide, generally, Tidd's Pr. ch. 43; Graham's Pr. B. 4, c. 1; Bac. Ab. Error; 1 Vern. 169; Yelv. 76; 1 Salk. 322; 2 Saund. 46, n. 6, and 101, n. 1; 3 Bl. Com. 405; Serg. Const. Law, ch. 5.

4. In the French law the *demande en cassation* is somewhat similar to our proceeding in error; according to some of the best writers on French law, it is considered as a new suit, and it is less an action between the original parties, than a question between the judgment and the law. It is not the action which is to be judged, but the judgment; "la demande en cassation est un nouveau procès, bien moins entre les parties qui figuraient dans le premier, qu'entre l'arrêt et la loi." Henrion de Pansey, de l'Autorité judiciaire dans les gouvernemens monarchiques, p. 270, edit. in 8vo.; 6 Toull. n. 193. Ce n'est point le procès qu'il s'agit de juger, mais le jugement. Ib.

5. A writ of error is in the nature of a suit or action when it is to restore the

party who obtains it to the possession of any thing which is withheld from him, not when its operation is entirely defensive. 3 Story. Const. § 1721. And it is considered generally as a new action. 6 Port 9.

WRIT OF EXECUTION, practice. A writ to put in force the sentence that the law has given: it is addressed to the sheriff, (and in the courts of the United States, to the marshal,) commanding him, according to the nature of the case, either to give the plaintiff possession of lands; or to enforce the delivery of a chattel which was the subject of the action; or to levy for the plaintiff, the debt, or damages, and costs recovered; or to levy for the defendant his costs; and that, either upon the body of the opposite party, his lands, or goods, or in some cases, upon his body, land, and goods; the extent and manner of the execution directed, always depending upon the nature of the judgment. 3 Bl. Com. 413.

2. Writs of execution are *supposed* to be actually awarded by the judges in court; but no such award is in general actually made. The attorney, after signing final judgment, sues out of the proper office a writ of execution, in the form to which he conceives he would be entitled upon such judgment as he has entered, if such entry has been actually made; and, if not made, then upon such as he thinks he is entitled to enter; and he does this, of course, upon peril that, if he takes a wrong execution, the proceeding will be illegal and void, and the opposite party entitled to redress. Steph. Pl. 137, 8. See *Ca. Sa.; Execution; Fi. Fa.; Habere fa. possessionem; Vend. Exp.*

WRIT OF EXIGI FACIAS. The name of a process issued in the course of proceedings in outlawry, and which immediately precedes the writ of *capias utlagatum*. See *Exigent*, or *Exigi Facias*.

WRIT OF FORMEDON, practice. This writ lies where a party claims the specific recovery of lands and tenements, as issue in tail; or as remainder-man or reversioner, upon the determination of an estate in tail. Co. Litt. 236 b; Booth, 139, 151, 154.

WRIT OF INQUIRY, practice. When in an action *sounding in damages*, (q. v.) as covenant, trespass, and the like, an interlocutory judgment is rendered, which is, that the plaintiff ought to recover his damages, without specifying the amount, it not yet being

ascertained, the court does not in general undertake the office of assessing the damages, but issues a *writ of inquiry*, which is a writ directed to the sheriff of the county where the facts are alleged by the pleadings to have occurred, commanding him to inquire into the amount of damages sustained "by the oath or affirmation of twelve good or lawful men of his county;" and to return such inquisition, when made, to the court.

2. The finding of the sheriff and jury under such a proceeding is called an *inquisition*. (q. v.)

3. The court will, on application, order that a writ of inquiry shall be executed before a judge, where it appears that important questions of law will arise. 2 John. R. 107.

4. When executed before the sheriff, he acts ministerially, and not judicially, and, therefore, it may be executed before a deputy of the sheriff. 2 John R. 63. Vide Steph. Pl. 126; Grah. Pr. 639; 2 Archb. Pr. 19; Tidd's Pr. 513; Yelv. 152, n.; 18 Eng. Com. Law Rep. 181, n., 189, n.; 1 Marsh. R. 129; 1 Sell. Pr. 346; Watson on Sher. 221; 2 Saund. 107, n. 2.

WRITS, JUDICIAL, practice. In England those writs which issue from the common law courts, during the progress of a suit, are described as *judicial writs*, by way of distinction from the *original* one obtained from chancery. 3 Bl. Com. 282.

WRIT OF MAINPRIZE, English law. A writ directed to the sheriff, (either generally, when any man is imprisoned for a bailable offence, and bail has been refused; or specially, when the offence or cause of commitment is not properly bailable below,) commanding him to take sureties for the prisoner's appearance, commonly called *mainpernors*, and to set him at large. 3 Bl. Com. 128. Vide *Mainprize*.

WRIT OF MESNE, Breve de medio, old English law. A writ which was so called, by reason of the words used in the writ, namely, *Unde idem A qui medius est inter C et prefatum B*; that is, A, who is mesne between C, the lord paramount, and B, the tenant paravail. Co. Litt. 100, a.

WRIT, ORIGINAL, practice, English law. An original writ is a mandatory letter, issuing out of the court of chancery, under the great seal, and, in the king's name, directed to the sheriff of the county where the injury is alleged to have been committed, containing a summary statement of the cause

of complaint, and requiring him, in most cases, to command the defendant to satisfy the claim; and, on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. In some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance. Steph. Pl. 5.

WRIT OF REPLEVIN, *practice*. The name of a process issued for the recovery of goods and chattels. Vide *Replevin*.

WRIT OF PRÆCIPUE. This writ is also called a writ of covenant, and is sued out by the party to whom lands are to be conveyed by fine; the foundation of which is a supposed agreement or covenant that the one shall convey the land to the other. 2 Bl. Com. 349, 350.

WRIT OF PREVENTION. This name is given to certain writs which may be issued in anticipation of suits which may arise. Co. Litt. 100. See *Quia Timet*.

WRIT OF RATIONABILI PARTE BONORUM. A writ which was sued out by a widow, when the executors of her deceased husband refused to let her have a third part of her late husband's goods after the debts were paid. F. N. B. 284.

WRIT OF RESTITUTION. A writ which is issued on the reversal of a judgment, commanding the sheriff to restore to the defendant below, the thing levied upon, if it has not been sold, and if it has been sold, the proceeds. Bac. Ab. Execution, Q. Vide *Restitution*.

WRIT PRO RETORNO HABENDO, *remedies, practice*. The name of a writ which recites, that the defendant was summoned to appear to answer the plaintiff, in a plea whereof he took the cattle of the said plaintiff, specifying them, and that the said plaintiff afterwards made default, wherefore it was then considered that the said plaintiff and his pledges of prosecuting should be in meroy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff, that he should cause to be returned the cattle aforesaid, to the said defendant without delay, &c. 2 Sell. Pr. 168. Vide *Judgment in replevin*.

WRIT OF PROCESS, *Engl. law, practice*. If the defendant does not appear, in obedience to the original writ, there issue, when the time for appearance is past, other writs, returnable on some general return day in the term, called *writs of process*, enforcing

the appearance of the defendant, either by attachment, or distress of his property, or arrest of his person, according to the nature of the case.

2. These differ from the original writ in the following particulars; they issue not out of chancery, but out of the court of common law, into which the original writ is returnable; and, accordingly, are not under the great seal, but the private seal of the court; and they bear *teste* in the name of the chief justice of that court, and not in the name of the king himself. It may also be observed, that in common with all other writs issuing from the court of common law, during the progress of the suit, they are described as *judicial* writs, by way of distinction from the *original* one obtained from the chancery. 4 Bl. Com. 282. See further, as to the nature of these writs, 1 Tidd's Pr. 106-193, 4th edit.; 1 Sellon's Pr. 64-102.

WRIT OF PROCLAMATION, *Engl. practice*. A writ which issues at the same time with the *exigi facias*, by virtue of stat. 31 Eliz. c. 3, s. 1, by which the sheriff is commanded to make proclamations in the statute prescribed.

2. When it is not directed to the same sheriff as the writ of *exigi facias* is, it is called a foreign writ of proclamation. Lee's Dict. of Pr.; 4 Reev. Hist. 261.

WRIT OF QUARE IMPEDIT, *English law*. The remedy by which, where the right of a party to a benefice is obstructed, he recovers the presentation; and is the form of action now constantly adopted to try a disputed title to an advowson. Booth, 223; 1 Arch. Civ. Pl. 434.

WRIT OF RECAPTION, *practice*. This writ lies where, pending an action of replevin, the same distrainer takes, for the same supposed cause, the cattle or goods of the same distrainee. See F. N. B. 169.

2. This writ is nearly obsolete, as trespass, which is found to be a preferable remedy, lies for the second taking; and, as the defendant cannot justify, the plaintiff must necessarily recover damages proportioned to the injury.

WRIT OF RIGHT, *practice*. The remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee simple; founding his title on the right of property, or mere right, arising either from his own seisin, or the seisin of his ancestor or predecessor. F. N. B. 1 B; 3 Bl. Com. 391.

2. At common law, a writ of right lies only against the tenant of the freehold demanded. 8 Cranch, 239.

3. This writ brings into controversy only the rights of the parties in the suit, and a defence that a third person has better title will not avail. *Id.*; 7 Wheat. 27; 3 Pet. 133. See 2 Wheat. 806; 4 Bing. N. S. 711; 3 Bing. N. S. 434; 4 Scott, R. 209; 6 Scott, R. 435; *Id.* 788; 1 Bing. N. S. 597; 5 Bing. N. S. 161; 6 Ad. & Ell. 103; 1 H. Bl. 1; 5 Taunt. R. 326; 1 Marsh. R. 68; 2 Bos. & P. 570; 1 N. R. 64; 4 Taunt. R. 572; 3 Bing. R. 167; 2 W. Bl. Rep. 1261; 1 B. & B. 17; 2 Car. & P. 187; *Id.* 271; Holt, R. 657; 8 Cranch, 229; 3 Fairf. 312; 7 Wend. 250; 3 Bibb, 57; 3 Rand. 563; 2 J. J. Marsh. 104; 2 A. K. Marsh. 396; 1 Dana, 410; 2 Leigh, R. 1; 4 Mass. 64; 17 Mass. 74.

WRIT OF TRESPASS, *practice*. This writ lies where a party claims damages for a trespass committed against his person, or tangible and corporeal property. See *Trespass*.

WRIT OF TRESPASS ON THE CASE, *practice*. A writ which lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply. See 8 Woodd. 167; Steph. Pl. 15.

2. This action originates in the power given by the statute of Westm. 2, to the clerks of chancery to frame new writs in *consimili casu* with writs already known. Under this power they constructed many writs for different injuries, which were considered as in *consimili casu*, with, that is, to bear a certain analogy to a trespass. The new writs invented for the cases supposed to bear such analogy, have received, accordingly, the appellation of writs of trespass on the case, as being founded on the particular circumstances of the case thus requiring a remedy, and, to distinguish them from the old writ of trespass; 3 Reeves, 89, 243, 391; and the injuries themselves, which are the subjects of such writs, are not called trespasses, but have the general name of *torts*, *wrongs*, or *grievances*.

3. The writs of trespass on the case, though invented thus, *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting collectively a new individual form of action; and this new genus took its place, by the name of *Trespass on the case*,

among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, it comprises, of course, many different species. There are two, however, of more frequent use than any other species of trespass on the case, or, perhaps, than any other form of action whatever. These are *assumpsit* and *trover*. Steph. Pl. 15, 16.

WRIT OF TOLT, *Eng. law*. The name of a writ to remove proceedings on a writ of right patent from the court baron into the county court. 3 Bl. Commentaries, App. No. 1, § 2.

WRIT OF WASTE. The name of a writ to be issued against a tenant who has committed waste of the premises. There are several forms of this writ, that against a tenant in dower differs from the others. F. N. B. 125.

WRITING. The act of forming by the hand letters or characters of a particular kind on paper or other suitable substance, and artfully putting them together so as to convey ideas. It differs from printing, which is the formation of words on paper or other proper substance by means of a stamp. Sometimes by writing is understood printing, and sometimes printing and writing mixed.

2. Many contracts are required to be in writing; all deeds for real estate must be in writing, for it cannot be conveyed by a contract not in writing, yet it is the constant practice to make deeds partly in printing, and partly in writing. Wills, except nuncupative wills, must be in writing, and signed by the testator; and nuncupative wills must be reduced to writing by the witnesses within a limited time after the testator's death.

3. Records, bonds, bills of exchange and many other engagements, must, from their nature, be made in writing.

See *Frauds, statute of*; *Language*.

WRITING OBLIGATORY. A bond; an agreement reduced to writing, by which the party becomes bound to perform something, or suffer it to be done.

WRONG. An injury; (q. v.) a tort; (q. v.) a violation of right. In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights, unconnected with contract; and these wrongs are committed with or without force. But in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his undertaking or promise, is a

wrong or injury to him to whom it was made. 3 Bl. Com. 158.

2. Wrongs are divided into public and private. 1. A *public* wrong is an act which is injurious to the public generally, commonly known by the name of crime, misdemeanor, or offence, and it is punishable in various ways, such as indictments, summary proceedings, and upon conviction by death, imprisonment, fine, &c. 2. *Private* wrongs, which are injuries to individuals, unaffecting the public: these are redressed by actions for damages, &c. See *Remedies*.

WRONG-DOER. One who commits an injury, a *tort-feasor*. (q. v.) Vide *Dane's Abridgment*, Index, h. t.

WRONGFULLY INTENDING. These words are used in a declaration when in an action for an injury, the motive of the defendant in committing it can be proved, for then his malicious intent ought to be averred. This is sufficiently done if it be substantially alleged, in general terms, as wrongfully intending. 3 Bouv. Inst. n. 2871.

Y.

YARD. A measure of length, containing three feet, or thirty-six inches.

YARD, estates. A piece of land enclosed for the use and accommodation of the inhabitants of a house. In England it is nearly synonymous with backside. (q. v.) 1 Chitty, Pr. 176; 1 T. R. 701.

YARDLAND, old Eng. law. A quantity of land containing twenty acres. Co. Litt. 69 a.

YEAR. The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed.

2. The civil year differs from the astronomical, the latter being composed of 365 days, 5 hours, 48 seconds and a fraction, while the former consists, sometimes of three hundred and sixty-five days, and at others, in leap years, of three hundred and sixty-six days.

3. The year is divided into half-year, which consists, according to Co. Litt. 135 b, of 182 days; and quarter of a year, which consists of 91 days; Ibid. and 2 Roll. Ab. 521, l. 40. It is further divided into twelve months.

4. The civil year commences immediately after twelve o'clock at night of the thirty-first day of December, that is the first moment of the first day of January, and ends at midnight of the thirty-first day of December, twelve months thereafter. Vide Com. Dig. Ann.; 2 Bl. Com. by Chitty, 140, n.; Chitt. Pr. Index tit. Time. Before the

alteration of the calendar (q. v.) from old to new style in England, (see *Bissextile*), and the colonies of that country in America, the year in chronological reckoning was supposed to commence with the first day of January, although the legal year did not commence until March 25th, the intermediate time being doubly indicated: thus February 15, 1724, and so on. This mode of reckoning was altered by the statute 24 Geo. II. cap. 23, which gave rise to an act of assembly of Pennsylvania, passed March 11, 1752, 1 Sm. Laws, 217, conforming thereto, and also to the repeal of the act of 1710.

5. In New York it is enacted that whenever the term "year" or "years" is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; half a year of a hundred and eighty-two days; and a quarter of a year of ninety-two days; and the day of a leap year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day. Rev. Stat. part 1, c. 19, t. 1, § 3.

YEAR AND DAY. This period of time is particularly recognized in the law. For example, when a judgment is reversed, a party, notwithstanding the lapse of time mentioned in the statute of limitations pending that action, may commence a fresh action

within a year and a day of such reversal; 3 Chitty, Pract. 107; again, after a year and a day have elapsed from the day of signing a judgment, no execution can be issued until the judgment shall have been revived by *scire facias*. Id.; Bac. Ab. Execution, H; Tidd, Pr. 1103.

2. In Scotland, it has been decided that in computing the term, the year and day is to be reckoned, not by the number of days which go to make up a year, but by the return of the day of the next year that bears the same denomination. 1 Bell's Com. 721, 5th edit.; 2 Stair, 842. See Bac. Ab. Descent, I 3; Ersk. Princ. B. 1, t. 6, n. 22.

YEAR BOOKS. These were books of reports of cases in a regular series from the reign of the English King Ed. II. inclusive, to the time of Henry VIII., which were taken by the prothonotaries or chief scribes of the courts, at the expense of the crown, and published annually, whence their name Year Books. They consist of eleven parts, namely: Part 1. Maynard's Reports, temp. Edw. II.; also divers Memoranda of the Exchequer, temp. Edward I. Part 2. Reports in the first ten years of Edw. III. Part 3. Reports from 17 to 39 Edward III. Part 4. Reports from 40 to 50 Edward III. Part 5. Liber Assisarum; or Pleas of the Crown, temp. Edw. III. Part 6. Reports temp. Hen. IV. and Hen. V. Parts 7 and 8. Annals; or Reports of Hen. VI. during his reign, in 2 vols. Part 9. Annals of Edward IV. Part 10. Long Quinto; or Reports in 5 Edward IV. Part 11. Cases in the reigns of Edward V., Richard III., Henry VII., and Henry VIII.

YEARS, ESTATE FOR. Vide *Estate for Years*.

YEAS AND NAYS. The list of members of a legislative body voting in the affirmative and negative of a proposition is so called.

2. The constitution of the United States, art. 1, s. 5, directs that "the yeas and nays of the members of either house, on any

question, shall, at the desire of one-fifth of those present, be entered on the journal." Vide 2 Story, Cons. 301.

3. The power of calling the yeas and nays is given by all the constitutions of the several states, and it is not in general restricted to the request of one-fifth of the members present, but may be demanded by a less number; and, in some, one member alone has the right to require the call of the yeas and nays.

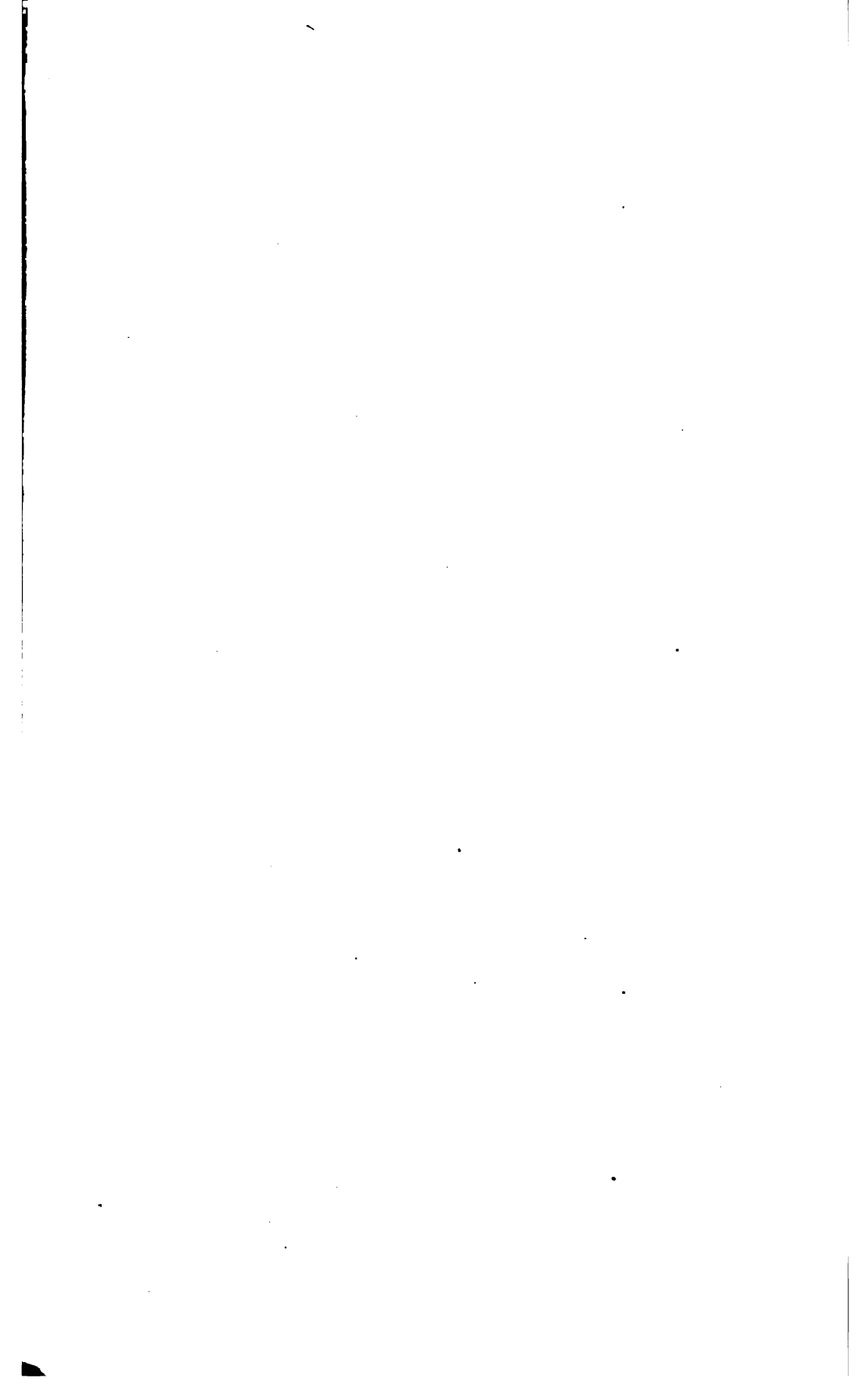
YEOMAN. In the United States this word does not appear to have any very exact meaning. It is usually put as an addition to the names of parties in declarations and indictments. In England it signifies a free man who has land of the value of forty shillings a year. 2 Inst. 668; 2 Dall. 92.

YIELDING AND PAYING, contracts. These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent; Platt on Coven. 50; 3 Penna. Rep. 464; 1 Sid. 447, pl. 9; 2 Lev. 206; 3 T. R. 402; 1 Barn. & Cres. 416; S. C. 2 Dow. & Ry. 670; but whether it be an express covenant or not, seems not to be settled. Sty. 387, 406, 451; Sid. 240, 266; 2 Lev. 206; S. C., T. Jones, 102; 3 T. R. 402.

2. In Pennsylvania, it has been decided to be a covenant running with the land. 3 Penna. Reports, 464. Vide 1 Saund. 233, n. 1; 9 Verm. R. 191.

YORK, STATUTE OF. The name of an English statute, passed 12 Edw. II., Anno Domini 1318, and so called because it was enacted at York. It contains many wise provisions and explanations of former statutes. Barr. on the Stat. 174. There were other statutes made at York in the reign of Edw. III., but they do not bear this name.

YOUNG ANIMALS. It is a rule that the young of domestic or tame animals belong to the owner of the dam or mother, according to the maxim *Partus sequitur ventrem*. Dig. 6, 1, 5, 2; Inst. 2, 1, 9.



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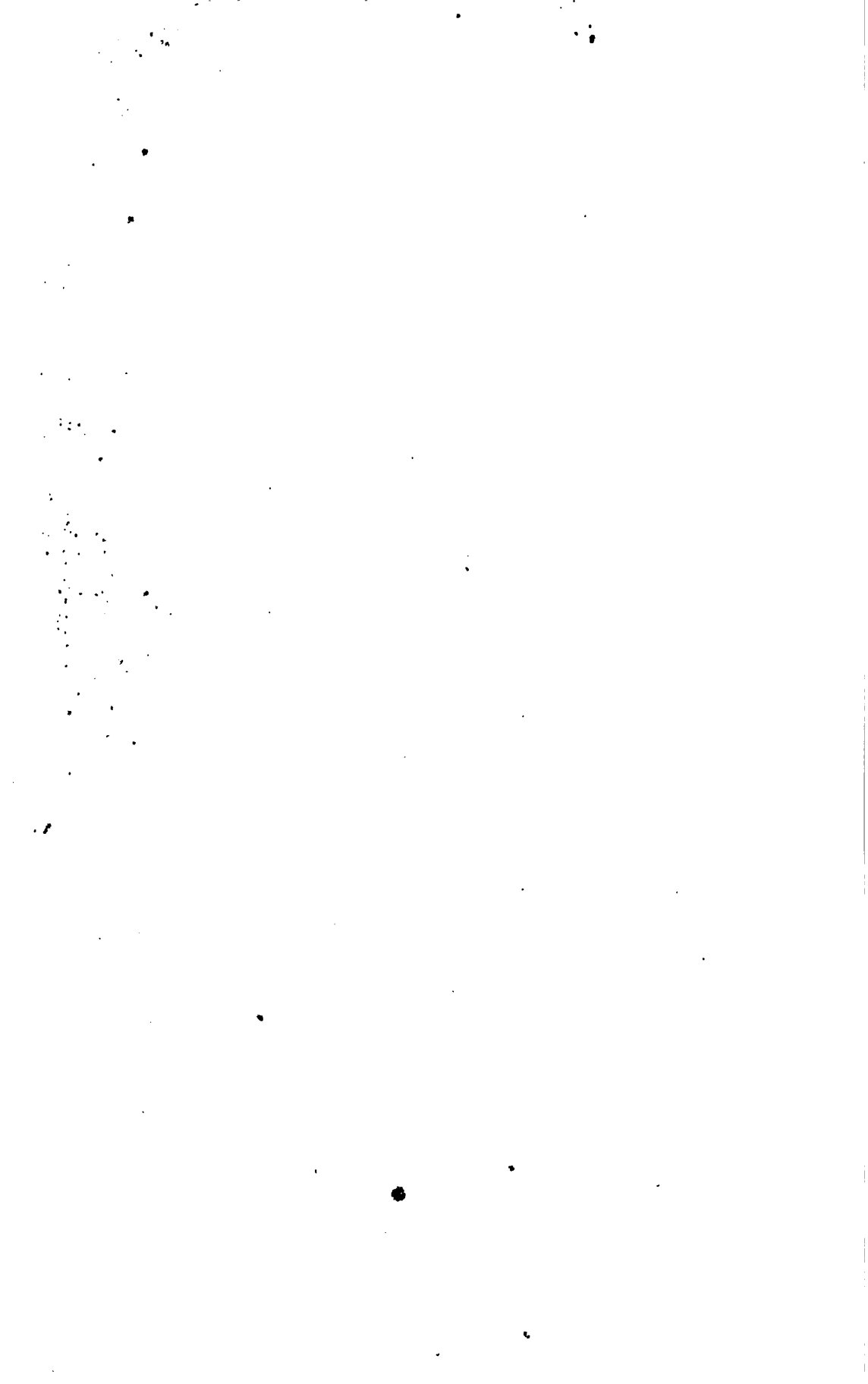
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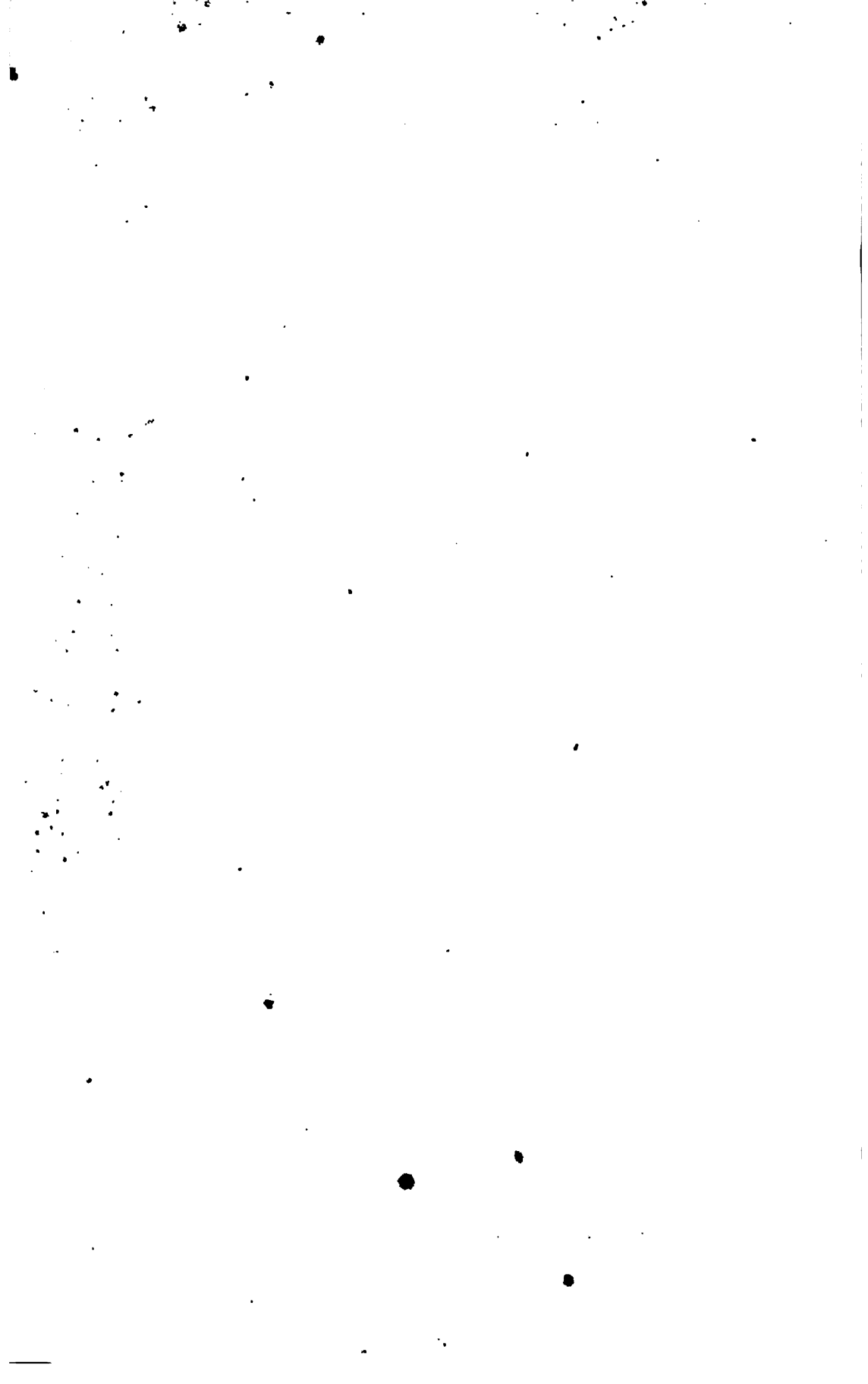
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